Mallard Pass
Solar Farm

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Planning Statement Addendum

Deadline 2 - June 2023

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APPENDICES

1.0 PLANNING STATEMENT ADDENDUM

Introduction

1.1 This document constitutes an addendum to the Planning Statement submitted with the Application [APP-203] to account for revisions to the draft National Policy Statements ('NPSs') for Energy which were published after submission of the Application.

1.2 This addendum provides an overview of the updated policy and the compliance of the Proposed Development with that policy. The addendum focuses on the revised policy wording of relevance to the Proposed Development only, as much of the revised NPSs are consistent with the draft versions from 2021, which are referred to within the Planning Statement [APP-203].

1.3 The Statement of Need [APP-202], including the policy update appended to the Procedural Deadline A cover letter [PDA-001] sets out the updated policy position within the UK relating to the delivery of large scale solar development. In a planning specific context, the updated suite of Draft NPSs further strengthens the need for timely renewable energy delivery or sources. Para 3.10.2 of draft EN-3 stresses the importance of solar in delivering the government's goals for greater energy independence. It references the British Energy Security Strategy, which states that the government expects a five-fold increase in solar deployment by 2025 (up to 70GW).

NPSs Updates: Background

1.4 In March 2023, the Department for Energy Security and Net Zero published updated drafts of the suite of National Policy Statements for Energy. The consultation on these revised drafts was recently extended to end on June 2023, and Government has indicated that it wishes to move to present them for designation to the Houses of Parliament as soon as possible after the close of consultation.

1.5 The national policy statements relevant to the consideration of Proposed Development are as follows:

- Draft Overarching Energy National Policy Statement for Energy (EN-1)
- Draft National Policy Statement for Renewable Energy Infrastructure (EN-3)
- Draft National Policy Statement for electricity networks infrastructure (EN-5)

1.6 For the purposes of this Planning Statement Addendum, it is noted that none of the proposed changes to draft EN-5 impact upon the way in which the Secretary of State, particularly given the small amount of off-site cabling that is required for the Proposed Development. As such, the changes to EN-5 are not considered further in this document.

1.7 In terms of transitional arrangements for a suite of draft NPSs, the consultation document published alongside the revised draft NPSs, Consultation: Planning for New Energy Infrastructure advises:

1.8 The Secretary of State has decided that for any application accepted for examination before designation of the updated energy NPSs, the original suite of energy NPS should have effect. The amended energy NPSs will therefore only have effect in relation to those applications for development consent accepted for examination after the designation of the updated energy NPSs. However, any emerging draft energy NPSs (or those designated but not having effect) are potentially capable of being important and relevant considerations in the decision-making process. The extent to which they are relevant is a matter for the relevant Secretary of State to consider within the framework of the Planning Act and with regard to the specific circumstances of each development consent order application.

1.9 For the avoidance of doubt, the Applicant's view is that the updated draft NPSs are important and relevant and should be given significant weight in the decision-making process, particularly with regard to NSIP-scale solar, given that there are no current solar-specific policies in adopted NPS EN1 and EN3 and given the consistency of the updated drafts with the direction of travel of Government policy.

Agricultural Land Classification and Soil Use

1.10 In relation to factors influencing site selection, draft EN-3 offers updated advice around ALC and land type. Paragraph 3.10.14 advises that where agricultural land use has been shown to be necessary, poorer quality should be preferred to higher quality. Paragraph 3.10.15 suggests that the development of ground mounted solar arrays is not prohibited on BMV land, and Paragraph 3.10.17 notes that consideration may be given as to whether the proposed development allows for continued agricultural use and can be co-located with other functions (e.g. onshore wind).

1.11 The draft EN-3 updates inaccuracies in references to ALC and soil management processes and advises in paragraph 3.10.19 that Applicants are also encouraged to develop soil resources and management plans to help reduce adverse impacts on soil, in line with the ambition set out in the Environmental Improvement Plan to bring 60% of soil into sustainable management by 2023.

1.12 In Paragraph 3.10.118, draft EN-3 refers to the Defra Construction code of practice for the sustainable use of soils on construction sites. It describes mitigation measures relating to ALC and land type, focusing on minimising damage to soil, including the aim to preserve soil health and structure in order to minimise carbon loss and maintain water infiltration and soil biodiversity. At

paragraph 3.10.136, draft EN-3, requires the Secretary of State to take into account the economic benefits of BMV land and ensure adequate mitigation is secured to minimise impacts on soils or soil resources.

1.13 The Proposed Development has clearly outlined its site selection assessment and process in Appendix 1 to the Planning Statement [APP-203] and in its design development process of that site in the DAS [APP-204], including how it has sought to minimise BMV requirements in the context of the other factors that have driven site selection and design; and how there are no real alternatives which would have less effect to BMV land than what is proposed. The updated wording reiterates that lower quality land should be preferred but accepts that the use of BMV land may be necessary. As explained in both the site selection report and Section 7.4 of the Planning Statement, in order to deliver the capacity available within the grid connection, BMV land is required to be temporarily used. This is a consequence of the general land resource within and around the site and Ryhall substation. Drawing on the provisional ALC mapping as well as the detailed site investigation work, the Site represents a characteristic snapshot of the land quality locally and the land required to be used to host the solar arrays temporarily represents a higher use of non-BMV land (just under 60%) than is representative of the area. As Chapter 12 of the ES [APP-042] sets out, the proportion of BMV land within Lincolnshire is just over 70%. Rutland is closer to the national average of 42% at 45.2%, with an estimated 400,000 hectares of BMV land across the two counties (combined). The use of 216 hectares of this land for the Proposed Development represents just 0.054% of this total resource being temporarily diverted to deliver low carbon renewable energy in accordance with the UK's Net Zero aims.

1.14 The outline Soil Management Plan (oSMP), updated at Procedural Deadline A [PDA-007], sets out how the Applicant intends to minimise and mitigate potential soil damage. The oSMP has been developed with reference to the Defra Construction Code of Practice for the Sustainable Use of Soils on Construction Sites.

1.15 As such, the Proposed Development is considered to be in accordance to the policy updates noted above. It is of particular note that draft EN-3 explicitly advises that the use of BMV land for solar proposals is not prohibited and that at utility scale, it is likely that developments may need to use some agricultural land, but should seek to minimise it, which the Applicant has done.

Cultural Heritage

1.16 In paragraph 3.10.128 , draft EN-3 advises that the ability of applicants to microsite specific elements of the development during the construction phase should be an important consideration by the SoS when assessing the risk of damage to archaeology and that the SoS should consider granting consents which allow for such micrositing within tolerances so precise locations can be amended during construction should unforeseen circumstances such as previously unknown archaeology arise.

1.17 Draft EN-1 also applies the approach that a documentary record of the past is not the same as retaining a heritage asset, and the ability to record an asset should not be a factor in deciding whether such loss should be permitted (para. 5.9.16). The Applicant notes that this wording is consistent with the approach of the existing NPS and NPPF (paragraph 205) but does not take into account the latest legal position on this matter. Case law on that NPPF paragraph, specifically paragraph 81 of R (Hayes) v York City Council [2017] EWHC 1374 (Admin) (a copy of the judgement of which is appended to this Addendum), has noted that this wording should not be taken to read that the recording of an asset should not be taken into account at all by the decision-maker, but should be read as indicating that asset recording should not be seen as a decisive factor in deciding whether such loss should be permitted.

1.18 A key change to draft EN-3 is in paragraph 3.10.106, where text is updated from the previous paragraph 2.53.4, advising that the extent of investigative work should be proportionate to the sensitivity and extent of proposed ground disturbance in the associated study area. This update of proportionality to "the extent of proposed ground disturbance" reflects the limited impact that solar arrays have on buried archaeology. Chapter 8 of the ES [APP-038] has, amongst other important inputs, been informed by a Programme of Archaeological Trial Trenching, a supplementary report to which (Supplementary Trial Trenching Report) was submitted at Procedural Deadline A [PDA-014]. This sets out the Applicant's approach to trial trenching in light of those limited impacts and the results of the geophysical surveys.

1.19 This issue is dealt with in 7.3.21 of the Planning Statement [APP-203], which summarises that the detailed design process will protect important (specifically sensitive) buried archaeological remains from any disturbance. This will be achieved by the embedded measures set out within the outline Construction Environmental Management Plan (oCEMP) [APP-207], such as the localised use of 'no-dig' construction solutions such as 'concrete or ballast shoes' to avoid piling. The Applicant has also committed to excavating, preserving where possible, or recording assets before they are affected.

Furthermore, the Applicant will be working with the host local authorities to develop an Outline Written Scheme of Investigation, which is in any event required by the draft DCO [PDA-003].

1.20 The Secretary of State will therefore be able to take these measures into account, and that the ability for assets to be recorded following excavation is just one of many benefits deriving from the Scheme, as set out in the Statement of Need and Planning Statement.

Biodiversity

1.21 Both draft EN-1 and (para. 5.4.2) and draft EN-3 (3.10.119) have been updated to align with the ambition set out in the 25 Year Environment Plan and the relevant measures and targets, including statutory targets (Environment Net Gain and Biodiversity Net Gain), within the Environment Act. Paragraph 3.10.120 of draft EN-3 suggests extending existing habitats and potentially creating new important habitats.

1.22 Paragraph 5.4.35 of draft EN-1 expands on previous text around appropriate avoidance, mitigation, compensation and enhancement measures and advises that location and quality will be of key importance where habitat creation is required. It continues to advise that habitat creation should be focussed on areas where the most ecological and ecosystem benefits can be realised.

1.23 Paragraph 5.4.41 advises that the SoS may take account of net benefit to biodiversity and geological conservation where it can be demonstrated but that if significant harm to biodiversity cannot be avoided, the SoS will give significant weight to residual harm and consent may be refused (para. 5.4.41).

1.24 Chapter 7 of the ES [APP-037] concludes that subject to mitigation, there is anticipated to be no potential for significant adverse effects on any designated ecological sites, habitats or species. Further, and as set out in para. 8.1.12 of the Planning Statement, with reference to the submitted BNG metric [APP-064] the Proposed Development has been shown to deliver 72% Biodiversity Net Gain for habitats and 40/83% for hedgerows in accordance with the Defra Biodiversity Metric 3.1, contributing to the ambition set out in the government's 25-Year Environment Plan and demonstrating accordance with the updated text in draft EN-1 and draft EN-3.

1.25 Paragraph 3.10.121 of draft EN-3 encourages applicants to develop an ecological monitoring programme. This is a new requirement, however, the Applicant has provided for appropriate monitoring within the outline Landscape and Ecology Management Plan [APP-210], with further updates at Deadline 2], compliance with which is secured via the draft DCO.

1.26 The Proposed Development is therefore considered to comply with the updated draft text and contributes positively towards the targets set out in the Environment Act and the Government's 25 Year Environment Plan.

Landscape and Visual

1.27 There are limited updates within draft EN-3 on landscape and visual matters that are relevant to the Proposed Development. There is further emphasis placed on the consideration and impact of nationally designated landscapes, however, there are no such designations relating to the Proposed Development. There is now also a reference to the use of native woodland as a means of screening, however, it is not prescriptive to the extent that there is a change in assessment or outcome in the planning merits relating to the topic. In any event, it is noted that the Applicant has proposed native planting as part of its mitigation proposals set out within the outline Landscape and Ecology Management Plan [APP-210], with further updates at Deadline 2], compliance with which is secured via the draft DCO [APP-017].

Glint and Glare

1.28 Draft EN-3 now expands on how potential impacts of glint and glare may be mitigated and includes additional information on the requirement for glint and glare assessments. Para. 3.10.94 notes that applicants should map receptors to qualitatively identify potential issues and determine whether an assessment is necessary. Paragraph 3.10.95 notes that applicants are expected to consider the geometric possibility of glint and glare affecting nearby receptors and provide an assessment of impact and impairment based on angle and duration of incidence and intensity.

1.29 The Glint and Glare Assessment in Appendix 15.3 to the ES [APP-104] has mapped potential sensitive receptors and undertaken geometric reflection calculations (which are set out in detail in Appendix H to the assessment).

1.30 Paragraphs 3.10.125 - 3.10.127 of draft EN3 set out additional potential mitigation measures which applicants may consider, including anti-glare/reflective coating, screening and adjustment of azimuth alignment or changing the elevation tilt angle (within the economically viable range).

1.31 The Applicant's approach to mitigation for Glint and Glare is outlined in the Glint and Glare Study (APP-104) and the outline Landscape and Ecology Management Plan (oLEMP) [APP-210]. For any potential impacts on residential properties (two residential properties at Wood Cottage), enhanced screening is proposed and secured via the oLEMP. Clarification on Glint and Glare modelling is provided in response to Q.1.0.15 of the Examining Authority's First Written Questions.

1.32 Para. 3.10.150 of draft EN-3 notes that while there is some evidence that pilots or air traffic controllers can experience glint and glare in certain conditions, there is no evidence that glint and glare from solar farms result in significant impairment on aircraft safety.

1.33 The wording with draft EN-3 has altered marginally to acknowledge that the SoS is likely to give limited weight to claims of aviation interference because of glint and glare from solar farms unless a significant impairment can be demonstrated.

1.34 The Glint and Glare assessment [APP-104] assesses the impact of the Proposed Development on pilots and concludes (in Section 9.2) that:

- It can be safely presumed that any predicted solar reflections towards pilots approaching runway thresholds 04, 06, and 15 would have intensities no greater than 'low potential for temporary after image', which is acceptable in accordance with the associated guidance and industry best practice; and
- The proposed development will be outside a pilot's primary field of view (50 degrees on either side of the approach bearing) along the 2-mile approach path towards runway thresholds 22, 24, and 33, which is acceptable in accordance with the associated guidance and industry best practice;

1.35 As evidenced by the application documentation, the Proposed Development is considered to be in accordance with updated draft EN-3 on this matter.

Public Rights of Way

1.36 Paragraph 3.10.25 of draft EN-3 notes that proposals may affect the provision of public right of way networks. Paragraph 3.10.26 notes that as far as practicable, applicants should keep public rights of way that cross a site open during construction. Paragraph 3.10.28 encourages applicants to minimise the visual outlook from existing PRoWs, considering the impacts this may have on other visual amenities. 3.10.29 advises applicants to consider and maximise opportunities to enhance PRoWs, and paragraph 3.10.30 requires applicants to detail how PRoWs would be managed in an outline Public Rights of Way Management Plan.

1.37 The Outline Construction Environmental Management Plan [APP-207] states that access to all existing PRoW will be retained during the construction phase with a limited number of temporary PRoW diversions for a small amount of time to allow the construction of access tracks where they cross the PRoW.

1.38 As outlined in the Green Infrastructure Strategy (as part of the oLEMP [APP-210]) and Design and Access Statement [APP-204], there will be a minimum 15m offset from the PV site on either side of any PRoW which passes through the Solar PV Site to limit any perceived channelling of visual effects along routes. The Amenity and Recreation Assessment [APP-058] also sets out how the Proposed Development generally has sought to take account of impacts to PRoW users in design development and in developing mitigation proposals.

1.39 The Proposed Development would also include three new permissive paths, approximately 8.1km, connecting the wider network of PRoW and rural lanes. These permissive routes are set out in the GI Strategy [APP-210] which is incorporated into the oLEMP and therefore secured by DCO Requirement. .

1.40 The requirement for an outline Public Right of Way Management is a new requirement, however, as outlined above, the Applicant's approach to the management is contained within the oCEMP [APP-207] and will be set out in the detailed CEMPs pursuant to it, and it is considered that no separate additional document is required.

Project Lifetime and Decommissioning

1.41 Draft EN-3 in paragraph 3.10.137 states that the SoS should ensure that the applicant has put forward outline plans for decommissioning the generating station and restoring the land to a suitable use.

1.42 Paragraph 3.10.140 of draft EN-3 acknowledges that applicants may seek consent for a proposal not subject to a time limit. Paragraph 3.10.142 continues to advise that the SoS should consider the period the applicant is seeking to operate the generating station as well as the extent to which the site will return to its original state when assessing impacts such as landscape and visual effects as well as potential effects on settings of heritage assets and nationally designated landscapes.

1.43 The outline Decommissioning Environmental Management Plan [APP-209] in paragraph 2.1.2 states that all solar infrastructure including PV modules, Onsite Substation, Mounting Structures, cabling on or near the surface, Inverters, Transformers, Switchgear, fencing and ancillary infrastructure would be removed and recycled or disposed of in accordance with good practice following the waste hierarchy, with materials being reused or recycled wherever possible. Compliance with the oDEMP is secured by Requirement 18 as per the current draft DCO [APP-017], demonstrating compliance with the updated policy wording.

1.44 In terms of the project lifetime, the Proposed Development is not seeking a time-limited consent.

1.45 Although no timescale has been given for the decommissioning stage and the effects during operation are accordingly considered to be permanent in nature, as is recognised at paragraph 3.10.59 of the draft revised NPS EN-3 the solar PV installation could be dismantled relatively easily and economically at the end of its operational lifespan. Its impacts are therefore reversible.

1.46 It is the case that technology has an operational lifespan, and it is noted that the definition of maintain in the draft DCO [PDA-003] means that the Applicant cannot wholesale replace the Proposed Development. As such, it will come to an end, but, given the possibilities of technological enhancement, a time limit has not been imposed. Therefore, while a time limited consent is not sought, it is anticipated that the development will be decommissioned at some point in the future.

1.47 Whilst the EIA has assessed the operational impacts of the Proposed Development as permanent, it is the case that any impacts that are caused by the proposed development related to the use of the land are considered to be reversible, pursuant to the management plans secured by the draft DCO [APP-017].

Grid Connection

1.48 Paragraph 3.10.36 advises that larger developments may seek connection to the transmission network if there is available network capacity and/or supportive infrastructure .

1.49 The Proposed Development has been offered a grid connection to an existing National Grid substation. The Proposed Development seeks to maximise the delivery capacity provided within the connection offer (240MW AC). Further details are set out in the Grid Connection Statement [APP-205].

Planning Balance

1.50 The updated draft suite of Energy NPS have a common theme: the importance of timely delivery of new low carbon and renewable energy infrastructure. The wording has been updated to convey the importance of this need, with, for example, the opening paragraph of draft EN-3 stating, “There is an urgent need for new electricity infrastructure to meet our energy objectives”. Both draft EN-1 (para. 2.1.1) and draft EN-3 (para. 2.1.4) refer to matters of energy security and the need to deliver low-cost energy and address the UK’s underlying vulnerability to international oil and gas prices and reduce our dependence on imported oil and gas. Draft EN-1 (paragraph 2.5.6), in reference to the British Energy Security strategy, specifically refers to the acceleration in the deployment of renewables, nuclear, hydrogen, CCUS and related network infrastructure to ensure a domestic supply of clean, affordable and secure power. The important role that solar has to play in our future energy mix is recognised (for example, with reference to the 70GW by 2035). The

Statement of Need [APP-202] and addendum in Appendix 1 to the [PDA-001] set out the criticality of the need and how strategic governmental policy supports the urgent delivery of renewable energy generation. The further weight given in the draft suite of Energy NPS adds further significance to the substantial weight that is to be afforded to the delivery of projects such as the Proposed Development.

APPENDIX 1: THE QUEEN ON THE APPLICATION OF JOHN CHARLES HAYES MBE V CITY OF YORK COUNCIL V ENGLISH HERITAGE TRUST LIMITED

The Queen on the application of John Charles Hayes MBE v City of York Council v English Heritage Trust Limited

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
9 June 2017

Case No: CO/6259/2016

High Court of Justice Queen's Bench Division Administrative Court

[2017] EWHC 1374 (Admin), 2017 WL 02391651

Before : Mr Justice Kerr

Date: 09/06/2017

Hearing date: 3rd May 2017

Planning Court

Representation

Anthony Crean QC and Killian Garvey (instructed by Amanda Beresford , Shulmans LLP) for the Claimant.
David Elvin QC (instructed by Alison Hartley , City of York Council) for the Defendant.
Emma Dring (instructed by Michael Guy , English Heritage) for the Interested Party.

Approved Judgment

Mr Justice Kerr :

Introduction: Proposed Works at Clifford's Tower, York

1. This case is about a proposal to construct new features at the historic site of Clifford's Tower in York. As far as counsel and the court are aware, it is the first case raising directly the meaning and effect of paragraph 141 of the National Planning Policy Framework (NPPF). That paragraph states that where heritage assets are lost or partly lost, local planning authorities and developers should make archaeological records publicly available, but "the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted."

2. The project is controversial and has sharply divided local opinion. The challenge is to the decision to grant full planning permission enabling it to proceed. It involves, in summary, the construction of a visitor centre at the base of the motte at Clifford's Tower and the installation of a new staircase and tower floor, with walkways, balustrading, a roof deck with a café and other restoration works. A car park next to the site is to be removed. The project includes archaeological works and disturbance to buried artefacts.

3. The claimant, Mr Hayes, is a local resident and elected member of the defendant, the city council. Mr Crean QC described Mr Hayes as a tribune of the people in the finest traditions of local democracy. The city council and the interested party, English Heritage, through Mr Elvin QC and Ms Dring respectively, defend the legality of the planning permission. English Heritage, the promoter of the development, is a charitable company responsible to Historic England (the Historic Buildings and Monuments Commission for England) for the management of historic sites in England.

4. As in any case of this kind, the court is in no way concerned with the merits of the decision challenged. I have to decide only whether the grant of planning permission was lawfully made. Mr Hayes contends that the decision was unlawful on two counts: failure properly to identify and assess the significance of Clifford's Tower and its setting and to take that assessment into account; and taking account of a legally irrelevant factor, the ability to record evidence of the past. The city council and English Heritage say the city council did not behave unlawfully in either respect.

Relevant Statutory Provisions

5. Section 33(1) of the National Heritage Act 1983 confers responsibility on Historic England to secure the preservation of ancient monuments and historic buildings in England; to promote, preserve and enhance the character and appearance of conservation areas; and to promote the public's enjoyment of and advance their knowledge of such monuments and buildings and their preservation.

6. York Castle, including Clifford's Tower, is a "scheduled monument" under section 1 of the Ancient Monuments and Archaeological Areas Act 1979 , which means that under section 2 of the same Act, consent from the Secretary of State is needed in addition to planning permission, before works of the type decided upon in this case can proceed. The Secretary of State must consult appropriately in accordance with that Act before deciding whether to consent and can set conditions to which consent is subject.

7. The Planning (Listed Buildings and Conservation Areas) Act 1990 includes provisions requiring special consideration of proposals for development, in the case of listed buildings of special historic or architectural interest, appearing on lists kept by the Secretary of State under section 1 of the Act; and in the case of conservation areas, designated by the local planning authority as areas of "special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance" (section 69(1)(a)).

8. By section 66(1) and (2) of the same Act, as amended:

> (1) In considering whether to grant planning permission …. for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
>
> (2) Without prejudice to section 72 , in the exercise of the powers of appropriation, disposal and development (including redevelopment) conferred by [provisions in the Town and Country Planning Act 1990] …, a local authority shall have regard to the desirability of preserving features of special architectural or historic interest, and in particular, listed buildings.

9. And by section 72(1) of the same Act, as amended:

> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of [certain other statutory provisions] … special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

Relevant Statements of Planning Policy

10. Government policy in planning matters, as is well known, is now set out in the National Planning Policy Framework (NPPF) published in March 2012. It brought together within a single document and simplified the content of many lengthy documents setting out government planning policies. Local planning authorities must take account of policy statements in the NPPF as a material consideration when making planning decisions.

11. It is well established that the interpretation of the policies stated in the NPPF is a matter for the court, while the application of those policies in a particular case is a matter of planning judgment for the local planning authority. It is common ground that the forerunners of the NPPF may, where appropriate, be a legitimate aid to its interpretation: *Timmins v. Gedling BC [2015] PTSR 837* , per Richards LJ at paragraphs 24, 28-29, 33.

12. Some of the forerunners of paragraph 141 of the NPPF, within section 12, to which I am coming shortly, are of potential relevance to this application and were helpfully produced to the court at the hearing, at my request. The superseded policy documents are those listed at Annex 3 of the NPPF. These include, as I discovered, *Planning Policy Statement 5: Planning for the Historic Environment* , published on 23 March 2010 (PPS 5). PPS 5, in turn, replaced an older guidance document, *Planning Policy Guidance 16: Archaeology and Planning* , published in 1990 (PPS 16).

13. PPS 16 formerly provided, at paragraphs 24, 25 and 28:

> **(d) Arrangements for Preservation By Record Including Funding**
>
> 24. The Secretary of State recognises that the extent to which remains can or should be preserved will depend upon a number of factors, including the intrinsic importance of the remains. Where it is not feasible to preserve remains, an acceptable alternative may be to arrange prior excavation, during which the archaeological evidence is recorded.
>
> 25. Planning authorities should not include in their development plans policies requiring developers to finance archaeological works in return for the grant of planning permission. By the same token developers should not expect to obtain planning permission for archaeologically damaging development merely because they arrange for the recording of sites whose physical preservation in situ is both desirable (because of their level of importance) and feasible. Where planning authorities decide that the physical preservation in situ of archaeological remains is not justified in the circumstances of the case and that development resulting in the destruction of the archaeological remains should proceed, it would be entirely reasonable for the planning authority to satisfy itself

> before granting planning permission, that the developer has made appropriate and satisfactory provision for the excavation and recording of the remains. Such excavation and recording should be carried out before development commences, working to a project brief prepared by the planning authority and taking advice from archaeological consultants.
>
> …..
>
> 28. There will no doubt be occasions, particularly where remains of lesser importance are involved, when planning authorities may decide that the significance of the archaeological remains is not sufficient when weighed against all other material considerations, including the need for development, to justify their physical preservation in situ, and that the proposed development should proceed. As paragraph 25 explains, planning authorities will, in such cases, need to satisfy themselves that the developer has made appropriate and satisfactory arrangements for the excavation and recording of the archaeological remains and the publication of the results. If this has not already been secured through some form of voluntary agreement, planning authorities can consider granting planning permission subject to conditions which provide for the excavation and recording of the remains before development takes place …. . Local planning authorities may, as a matter of last resort, need to consider refusing planning permission where developers do not seek to accommodate important remains.

14. After PPS 16 was revoked and replaced by PPS 5 in March 2010, Policy HE12 within the latter document dealt with "[p]olicy principles guiding the recording of information related to heritage assets". "HE" denoted "Historic Environment". Beneath the heading, policy HE 12 stated as follows:

> HE12.1 A documentary record of our past is not as valuable as retaining the heritage asset, and therefore the ability to record evidence of our past should not be a factor in deciding whether a proposal that would result in a heritage asset's destruction should be given consent.
>
> HE12.2 The process of investigating the significance of the historic environment, as part of plan-making or development management, should add to the evidence base for future planning and further the understanding of our past. Local planning authorities should make this information publicly available, including through the relevant historic environment record.
>
> HE12.3 Where the loss of the whole or a material part of a heritage asset's significance is justified, local planning authorities should require the developer to record and advance understanding of the significance of the heritage asset before it is lost, using planning conditions or obligations as appropriate. The extent of the requirement should be proportionate to the nature and level of the asset's significance. Developers should publish this evidence and deposit copies of the reports with the relevant historic environment record. Local planning authorities should require any archive generated to be deposited with a local museum or other public depository willing to receive it… Local planning authorities should impose planning conditions or obligations to ensure such work is carried out in a timely manner and that the completion of the exercise is properly secured.

15. PPS 5 was supplemented by a document called the *Historic Environment Planning Practice Guide* , published at about the same time, March 2010 (PPS 5 PPG). Within PPS 5 PPG, there appeared the following guidance on policy HE 12, at paragraphs 126 and 127:

> 126. The historic environment is one of the primary sources of evidence of our history. There is a great deal of valuable knowledge still to be gained from it. Safeguarding this new knowledge and making it widely accessible is an important exercise of general public benefit.
>
> 127. Many heritage assets, including buildings and below-ground remains have the potential to yield new evidence about past human activity through expert investigation. Although we may learn a lot from an investigation undertaken today, the knowledge is not a substitute for the heritage asset itself. Records cannot deliver the sensory experience and understanding of context provided by the original heritage asset. Records reflect the outlook, technical capabilities and circumstances that prevailed at the time they were made. Techniques and understanding evolve and future investigations may ask different questions, or employ alternative approaches, to reveal deeper insights. For this reason, the best sources of information and understanding of our past are always the heritage assets themselves. The ability to investigate and record a heritage asset is therefore not a factor in deciding whether consent for its destruction should be given (policy HE 12.1). However, there will be some assets that are under threat from natural processes such as organic material deposits at risk from dessication where an early investigation may be desirable.

16. Such was, for present purposes, the relevant historical context for what became Section 12 of the NPPF, entitled *Conserving and enhancing the historic environment* . Paragraph 128 requires local planning authorities to require applicants for planning permission to describe the significance of any affected heritage assets, including any contribution made by their setting, with a level of detail proportionate to the assets' importance. Where an affected heritage asset is of archaeological interest, the developer should be required "to submit an appropriate desk-based assessment and, where necessary, a field evaluation."

17. By paragraph 129, local planning authorities should:

> identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affected the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal.

18. Paragraph 131 of the NPPF requires local planning authorities, in determining planning applications, to take account of the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation, and the positive contribution their conservation can make to sustainable communities including their economic vitality, and the desirability of new development making a positive contribution to local character and distinctiveness.

19. Paragraph 132 cautions against the loss of or substantial harm to heritage assets, which should be "wholly exceptional". Paragraph 133 describes circumstances in which, in a wholly exceptional case, this might be justified. Where the harm would

be "less than substantial harm to the significance of a designated heritage asset", paragraph 134 requires the local planning authority to weigh that harm against "the public benefits of the proposal, including securing its optimum viable use."

20. Paragraph 137 of the NPPF requires local planning authorities to "look for opportunities for new development within Conservation Areas and World Heritage Sites and within the setting of heritage assets to enhance or better reveal their significance". Thus, "[p]roposals that preserve those elements of the setting that make a positive contribution to or better reveal the significance of the asset should be treated favourably."

21. Paragraph 141, relied upon by Mr Hayes, states:

> Local planning authorities should make information about the significance of the historic environment gathered as part of plan-making or development management publicly accessible. They should also require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, and to make this evidence (and any archive generated) publicly accessible [*a footnote here gives guidance on how this should be done*]. However, the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted.

The Historic Site and Modern Development Proposals

22. Against that legal and policy framework I come next to the facts, starting in 1068. Two years after Norman invaders subdued the southern part of England, striving to subjugate the north they built two castles on either side of the River Ouse. One was what became Clifford's Tower, on the east side. It became a seat of royal power and government in the region. It is the probable scene of the tragic Jewish Massacre of 1190, now marked by a venerated commemoration stone, when the Jews of York committed suicide *en masse* during an uprising against them.

23. Clifford's Tower is the castle keep rebuilt in stone, dating from the mid-13th century. It fell into disrepair in the 15th and 16th centuries, was refortified as a royalist garrison in 1642-3, during the Civil War and was largely abandoned after being badly damaged by an explosion in 1684. It remained an open topped ruin after that, down to the present day. It is now a much visited heritage asset of major historic and archaeological importance, under the management of English Heritage, on behalf of Historic England.

24. The facts of the case in modern times start with the draft development plan for York. As at 2005, it included a policy on archaeology called HE 10, stating that developments within the designated "Central Area of Archaeological Importance" would normally be permitted if the developer could demonstrate that the development would destroy less than five per cent of archaeological deposits. The NPPF was published in March 2012. There was a policy on archaeology (called D7) within the 2014 draft Local Plan, but none of the parties placed any reliance on it and it was considered to carry little weight in view of the advent of the NPPF.

25. From 2015, heritage assets such as Clifford's Tower became the responsibility of a new body which continued to use the name of its predecessor, English Heritage. Historic sites are expected to become self-funding by 2022 or 2023, when

grants from central government are expected to cease. It is therefore of importance that proposals for the preservation and enhancement of much visited historic sites such as Clifford's Tower are financially viable as well as acceptable in other ways.

26. York is a city of major historic and cultural importance. The city includes a "Central Historic Core Conservation Area", divided into "character areas". The character area numbered 13 comprises York Castle, including Clifford's Tower. The Castle site, between the River Ouse and the River Foss, is a scheduled ancient monument. The buildings at the site are grade 1 listed buildings. The site is described in the officer's report in this case, to which I shall come shortly, as "one of the most archaeologically, historically and architecturally important sites in the country" (paragraph 4.35).

27. The project proposals leading to the grant of planning permission which is challenged in this case, were articulated in detail in a number of project documents published in June 2016. There is a *Heritage Impact Assessment* produced by architects for English Heritage; a *Planning Statement* produced by English Heritage; an *Archaeology Statement* , produced by FAS Heritage on behalf of English Heritage; and a *Design and Access Statement* , produced by other architects for English Heritage. There is also a *York Central Historic Core; Conservation Area Appraisal* (the date is not clear) commissioned by the city council and English Heritage.

28. The city council too was closely involved in the project. Its Conservation Architect, Ms Janine Riley, and the City Archaeologist, Mr John Oxley, took part in an appraisal in 2016 of various options for a proposed new visitor centre at the Clifford's Tower site. These were discussed in the Design and Access Statement of June 2016. They concluded that the preferred site for the visitor centre should be at the south side of the monument at the base of the motte, beneath the fore-building.

29. The proposals were then prepared for consideration of the full planning permission application in October 2016 by the city council's planning committee. On 25 October, seven members of the committee, and one objector, went on a visit to the site and received a detailed presentation. The proposals were consulted upon and the widely differing responses ranged from strong objection to strong support. The responses were summarised in the report of the Development Management Officer, Ms Rachel Tyas (the officer's report).

30. The officer's report was available for consideration at the meeting of the planning committee to be held on 27 October 2016. It recommended approval of the application, subject to conditions set out in the report. After describing the site and the proposal, relevant policies and statutory duties were mentioned. The consultation responses were summarised. There was a section on "Environmental Management (Archaeology)" (paragraphs 3.5-3.9). No particular criticisms are levelled at these parts of the officer's report, though it is noted that NPPF paragraph 141 was not mentioned.

31. Historic England's rationale for supporting the project was set out (paragraphs 3.19-3.25). In the long fourth section, headed "Appraisal", occupying paragraphs 4.1-4.67, the officer's report dealt at length with the justification for the proposals. It is these paragraphs in the third and fourth sections which were mainly the subject of comment and submissions from the parties. The conclusion (paragraphs 5.1-5.2) was that the proposed works "have the potential to greatly enhance the visitor experience … by enabling better physical and intellectual access to the monument …."

32. There would be "minor harm to the designated heritage assets", but though considerable importance and weight was attached to the desirability of avoiding such harm, "the local planning authority has concluded that it is outweighed by the application's public benefits …". The application "accords with national planning policy set out in the [NPPF] and with the emerging policies in the Draft York Local Plan (2014 Publication Draft)."

33. The recommended conditions included condition 5, requiring a programme of "archaeological mitigation, including excavation, public access and community engagement, post excavation assessment & analysis, publication and archive deposition". Condition 5(C) required that a copy of a report or publication of the project be deposited with the City of York Historic Environment Record within 12 months of completion of the works. Condition 5 was said to be "imposed in accordance with Section 12 of the NPPF", and clearly reflected the language of paragraph 141.

34. At the meeting of the planning committee on 27 October 2016, the proposals were approved, despite the opposition of, among others, Mr Hayes who spoke at the meeting in his capacity as a local resident. The planning permission was issued on 31 October. It included condition 6, which corresponded to condition 5 as recommended in the officer's report and was in the same terms.

35. Then on 2 November, Historic England wrote to English Heritage, at the direction of the Secretary of State, to confirm that English Heritage's application for "Scheduled Monument Consent" for the works comprising the project, under the Ancient Monuments and Archaeological Areas Act 1979 , was granted subject to conditions including safeguards to ensure that the archaeological works were carried out properly and to the satisfaction of the Secretary of State.

Applicable Principles

36. The parties agreed that the applicable principles are found in oft-cited authorities such as *R. (Midcounties Co-operative Ltd) v. Forest of Dean DC [2015] JPL 288* , per Hickinbottom J (as he then was), at paragraph 15; Bloor Homes East Midlands Ltd v. Secretary of State for Communities and Local Government [2014] EWHC 754 , per Lindblom J (as he then was) at paragraph 19; *Secretary of State for Communities and Local Government v. Hopkins Homes Ltd [2016] 2 P&CR 1* , per Lindblom LJ at paragraph 24.

37. These citations are very well known and I do not think it would enhance the law to repeat the uncontroversial propositions for which they are authority. I bear those propositions firmly in mind when addressing the grounds of challenge below, and considering the officer's report and its relation to the content of NPPF section 12 and, within it, paragraph 141. In addition, after the hearing before me, the judgments of the Supreme Court in *Suffolk Coastal DC v. Hopkins Homes Ltd; Richborough Estates Partnership LLP and another v Cheshire East BC [2017] UKSC 37* , became available.

38. I have considered, in particular, the judgment of Lord Carnwath JSC at paragraphs 19-26 on the status, standing and interpretation of the NPPF. I bear in mind his endorsement of the approach to interpretation of the NPPF adopted by the House in *Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759* , and the importance of the distinction between interpreting policy documents such as the NPPF, a matter for the court, and the weight to be attached to them, a matter of planning judgment for the decision maker subject to review on classic public law grounds.

Grounds of Challenge; the Second Ground

39. I come next to the two grounds of challenge, dealing with the second ground first, as I consider (in agreement with Ms Dring) that it raises questions that are logically and chronologically prior to those raised by the first ground. The second ground, I remind myself, is that the city council failed properly to identify and assess the significance of Clifford's Tower and its setting and failed properly to take that assessment into account, before deciding to grant planning permission for the project.

40. The claimant's focus, in advancing this ground, is on paragraph 129 of the NPPF. Mr Crean QC, for Mr Hayes, emphasised that it includes three verbs setting tasks for the local planning authority: to *assess* the significance of an affected heritage asset; to *take account of* available evidence and necessary expertise; and to *take into account* its assessment when considering the impact of the proposal on the asset, to avoid or minimise conflict between conservation of the asset and any aspect of the proposal.

41. It is Mr Crean's contention that the officer's report and other documents that were before the planning committee fail to perform these tasks, or fail to provide an adequate account of their performance so that the reasoning is inadequate. His main point is that other heritage assets apart from Clifford's Tower itself are affected by the proposal and that the officer's report and accompanying documents overlook this point and do not adequately assess the impact of the project on other nearby historic buildings.

42. The parties are agreed that the effect of NPPF paragraph 128, combined with paragraph 129, is that the more complex the project, the greater the level of detail required in the developer's description of the heritage assets affected. Ms Riley, the city council's Conservation Architect, relies on the detail contained within the Archaeology Statement, the Planning Statement, the Heritage Impact Assessment and the Design and Access Statement. Mr Crean says these documents do not perform the tasks set by paragraph 129.

43. Mr Crean took me to passages in the officer's report in support of his submissions. He noted that at paragraph 4.19, the report mentions that York Castle, the motte and Clifford's Tower form part of "an ensemble of buildings, spaces and sub surface deposits which represent one of the most important heritage sites in the country"; while paragraph 4.20 refers to Clifford's Tower "and its neighbours", without defining the "ensemble" of buildings or the "neighbours."

44. He submitted that it was necessary, at the very least, for the documents to identify each building or site affected and he suggested there should have been an assessment of the impact of the project on each site or building comprised among those identified. The Heritage Impact Assessment document, and the other documents, stopped short of this and did not adequately perform the task of assessing the impact of the proposal on sites or buildings other than Clifford's Tower itself.

45. I have come to the conclusion that these submissions are not well founded. As Mr Elvin QC pointed out, I must bear in mind that the officer's report and accompanying assessment documents were addressed to an informed audience familiar with the layout of the site and buildings. Many if not all the committee members are likely to be resident in or near the city of York and several had visited the site only two days before the planning committee met to consider the proposals.

46. I accept Mr Elvin's submission that the officer's report began (see paragraph 1.3) by correctly identifying the wider site as that of "Scheduled Ancient Monument no NHLE1011799", of which Clifford's Tower forms part. That site was rightly described in the same paragraph as:

> located within the Central Historic Core conservation area (character area 13), close to the confluence of the Rivers Ouse and Foss, where together with the formal grouping of the three 18th Century prison and court buildings [i]t also lies within the City Centre Area of Archaeological Importance …. .

47. In my judgment, that is an adequate description of the affected heritage assets, the effect on which needed to be assessed. Frequent references to the "Eye of York" - the oval shaped grass space between the Castle and the former prison which is now the Castle Museum - and surrounding area could have left members of the committee in no doubt about the extent of the heritage setting under consideration.

48. The York Central Historic Core; Conservation Area Appraisal, which defined "conservation area 13", includes, as Mr Elvin demonstrated, a description of the other buildings, and spaces between them, forming the "ensemble" referred to in the officer's report. Those buildings are, specifically, the former Debtor's Prison (now the Crown Court) and the former Female Prison (now the Castle Museum).

49. Mr Elvin also relied on the Heritage Impact Assessment document dated June 2016, which includes in tabulated form an impact assessment of each feature of the project by reference not just to Clifford's Tower itself, but to the surrounding space and buildings. The assessment of impact on the features of Clifford's Tower itself, understandably, predominates in the assessment exercise, but the surrounding heritage assets are not overlooked.

50. Thus, the entries in table 12 directly address the impact of the proposed new visitor centre, as a "[c]atalyst for change and improvement of the 'Eye of York' with positive impacts on other attractions in the immediate locality" (12.1). The siting of the visitor centre is considered to address directly "the context and boundary of the 'Eye of York' and neo-classical Court Houses contributing to the urban townscape …" (12.2).

51. The architectural appearance of the visitor centre, much criticised by objectors, is said to "respond to the plan of the motte" and to have a roof terrace with steps which "relate to the adjacent Crown Court House terrace steps" (12.3). The commemoration stone for the Jewish Massacre of c.1190 is to be "permanently resited" – it is not yet clear exactly where – with replanted daffodils; such that the proposals are "likely to continue and enhance the commemorative value of Clifford's Tower" (12.6).

52. Table 13 is concerned with aspects of the *Skyline Impact and Views From and to the Tower* . The removal of the car park, considered unsightly, is recognised as a benefit to the surrounding area. The visitor centre is praised for being in harmony with the surrounding area and buildings. Whether or not one agrees with that assessment, it was clearly part of the exercise carried out for the purposes of paragraph 129 of the NPPF.

53. It is thus clear that the proposals were assessed properly, and in the context of the surrounding area and buildings, and not in splendid isolation as Mr Crean contended. I do not accept the contention that the tasks set by paragraph 129 of the NPPF were not undertaken properly. The assessment is adequate, and the planning committee must, as Mr Crean accepts, be assumed to have taken it into account. The reasoning in the report is also adequate. For those reasons the second ground of challenge is not made out.

Grounds of Challenge; the First Ground

54. I turn next to consider the first ground which, I remind myself, is that the city council unlawfully took into account a legally irrelevant factor stated to be such in the concluding sentence of paragraph 141 of the NPPF; namely, the ability to

record evidence of the past. Mr Crean QC submits that the decision to grant planning permission for the project to proceed is flawed on that account and should be quashed.

55. Mr Crean contended that the concluding sentence of NPPF paragraph 141 bears the meaning that (to quote from his grounds): "where the loss (partial or whole) to a heritage asset provides an opportunity to generate knowledge about the asset or otherwise, this cannot be a material consideration in favour of the grant of consent"; and that on a fair reading of the officer's report, it wrongly took account of that consideration by applauding the public benefit of the opportunity to enhance knowledge of Clifford's Tower.

56. He pointed to various passages in the officer's report in support of his argument, and to the recommended condition 5 (condition 6 of the actual permission, as it became), mirroring those passages. The starting point was the assessment was that the development would cause "less than substantial harm" to the site, consisting of detrimental impacts on archaeological features and deposits on the site (paragraph 3.5 of the officer's report).

57. The officer's report went on to refer in several places to "mitigation measures", "archaeological mitigation" and "archaeological mitigation measures". These measures would deliver "significant public benefit" (see paragraphs 3.5-3.8). The "opportunity to interrogate the site of a motte as important and significant as that at York Castle is rare" and would enable "[q]uestions relating to the pre-castle landscape, the date and constructional [sic] sequence of the motte" to be "addressed" (paragraph 3.6).

58. At paragraph 3.8, the officer's report described what the "mitigation measures" should include:

> archaeological recording of material forming the lower segment of the motte to be removed; archaeological recording of the 19th century retaining wall to be revealed; archaeological excavation of all features and deposits down to formation levels for sub-surface accommodation, foundations, attenuation facilities and service connections; a programme of public access and community engagement with these archaeological works; publication of the results and deposition of the archaeological archive with an appropriate registered museum.

59. Mr Crean relied on other passages in the officer's report, to similar effect (at paragraphs 3.23, 4.11 and 4.52). He submitted that the balancing exercise required by NPPF paragraph 134 to be carried out, in a case of "less than substantial harm", was skewed and distorted by weighing in the balance an illegitimate "benefit" to the public which, as ordained in the last sentence of paragraph 141, fell to be disregarded.

60. The final sentence of paragraph 141, as Mr Crean emphasises, uses the word "record" as a verb, not as a noun. The recording and publicising of evidence resulting from the development should be mandatory in accordance with paragraph 141 in a case where the (total or partial) loss of the heritage asset is otherwise justified on its merits, but the final sentence ordains that the ability to record such evidence cannot itself supply the justification.

61. The city council's riposte was that (to quote from Mr Elvin's grounds of opposition): "the recording of evidence is not itself a justification for permitting a loss to a heritage asset but it is nonetheless something which ought to be undertaken so

that if the loss does occur, the evidence obtained during development is properly obtained and recorded and made publicly accessible". Mr Elvin argued for a "distinction … between the justification for the loss and the mitigation required if there to be a loss."

62. Mr Elvin further contended that the officer's report, properly read, correctly "treated mitigation and recording as a consequence of granting permission and not a factor that itself supported the grant of permission"; the obtaining of evidence and recording was not, he submitted, listed "as one of the public benefits in overriding the less than substantial harm when setting out the basis of the recommendation …". Mr Hayes' case, he submitted, "confuses mitigation and justification."

63. In the course of debate in court, Mr Elvin added that the public benefit of understanding the archaeology of the site, for example by viewing some of the exposed artefacts from the new internal walkways, is not the same thing as the recording, documenting and making publicly accessible the evidential fruits of the exercise. He submitted that the forerunners of what became paragraph 141 did not rule out treating as a public benefit the enhanced public understanding of the asset's significance, as a material consideration.

64. Ms Dring, for English Heritage, supported the existence of a distinction between justification for a development and mitigation measures consequent upon it. The last sentence of paragraph 141 only prevented the recording of evidence from supplying the justification; it did not prevent those mitigation measures from being taken; indeed, they are required. She commended that approach as consistent with the duties under sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 .

65. Ms Dring noted that while the officer's report did not directly refer to paragraph 141 of the NPPF, it referred (at paragraph 4.34) to NPPF paragraph 137, requiring opportunities to be sought for new development within conservation areas and world heritage sites, and within the setting of heritage assets, to enhance or better reveal their significance, and to treat favourably proposals which preserve elements of the setting that make a positive contribution to or better reveal the significance of the asset.

66. I have carefully considered the parties' contentions in the light of the statutory regime, the nature of this site, the proposed development, the officer's report and the planning policy statements subsequently subsumed in abbreviated form into paragraph 141 of the NPPF. At the heart of the issue is the meaning and effect of the last sentence of paragraph 141, and whether the officer's report remained faithful to it.

67. The codification exercise which created the NPPF delivered commendable brevity, at the price (well worth paying) of replacing detailed exposition with general policy statements that can be Delphic, as in this instance. Paragraph 141 must be read in its proper context. It forms part of section 12 of the NPPF which is concerned with "[c]onserving and enhancing the historic environment" and is the last paragraph within that section.

68. Section 12 as a whole condenses and codifies numerous pages of superseded policy documents. It requires, first, proper attention to the local planning process and assessment of the significance of heritage assets and the impact of proposed development on them (paragraphs 126-129). It calibrates the level of harm to heritage (or equivalent) assets as "substantial" or "less than substantial", and programmes the required balancing exercise accordingly (paragraphs 132-4 and 138-140).

69. The section gives emphasis to sustaining and enhancing the significance of heritage assets and getting the most out of them (paragraphs 131 and 137). Paragraph 141 then deals, lastly, with the provision of information to the public in connection with developments affecting heritage assets. The sense of paragraph 141 is that you cannot destroy a heritage asset just to mine information from it. The information is no substitute for the asset itself.

70. That is not to say that the information derived from a justified loss or partial loss of a heritage asset should not be carefully gathered and made publicly available. The purpose of paragraph 141 is to ensure that is done. In this case, it was the foundation of condition 6, subject to which planning permission was granted. But the last sentence, beginning with the admonition "[h]owever", then ensures that the creation of the record is not itself the justification for the harm to the asset.

71. So far, the analysis is not particularly difficult or controversial. The difficulty arises from the wording in the last sentence: "the ability to record evidence shall not be a factor in deciding …". Those words do express, as a matter of language, what appears in conventional public law parlance to be the exclusion of a material consideration. Read literally, those words say not only that the ability to record evidence cannot be the sole justification for the harm; it cannot even contribute to the justification for the harm.

72. Yet, the mining of publicly available information from a heritage asset contributes to sustaining and enhancing its significance, deriving a positive contribution from it and better revealing its significance. These are the goals to which local planning authorities are required by NPPF paragraphs 131 and 137 to aspire. It would undermine their ability to secure those achievements if they had to blind themselves to the part played, in securing them, by provision of information and public education.

73. The former PPS 16 (paragraphs 24 and 25) emphasised that recording of evidence may be an "acceptable alternative" to preservation of the asset where that is not feasible; but that developers, "by the same token … should not expect to obtain planning permission for archaeologically damaging development *merely* because they arrange for the recording of sites whose physical preservation in situ is both desirable … and feasible" (my italics). The language there used did not rule out provision of information as a factor that may contribute to the justification for the harm done.

74. But in the subsequent incarnation, policy HE 12.1 forming part of PPS 5, the language shifted in the direction of what is now NPPF paragraph 141: "[a] documentary record of our past is not as valuable as retaining the heritage asset, and *therefore* the ability to record evidence of our past should not be *a factor* in deciding whether a proposal that would result in a heritage asset's destruction should be given consent" (my italics).

75. It could be said that this is a *non sequitur* and the word "therefore" was inapt. Policy HE 12.2 in the next paragraph, acknowledged that investigating the significance of the historic environment "should add to the evidence base for future planning and further the understanding of our past". This idea was explained in more detail in PPS 5 PPG, paragraph 126: safeguarding "new knowledge [of the historic environment] and making it widely accessible is an important exercise of general public benefit."

76. In paragraph 127 of PPS 5 PPG, it was explained further that "the knowledge is not a substitute for the heritage asset itself" and that this is because "[r]ecords cannot deliver the sensory experience and understanding of context provided by the original heritage asset … the best sources of information and understanding of our past are always the heritage assets

themselves. The ability to investigate and record a heritage asset is *therefore* not *a factor* in deciding whether consent for its destruction should be given (policy HE 12.1)" (my italics).

77. Again the *non sequitur* , derived from HE 12.1, is apparent. Why should the preservation of information about an asset not be weighed in the balance along with other factors in favour of a development that harms a heritage asset? The harm is attenuated by the preservation of information and making it publicly available, which enhances and better reveals the significance of the harmed asset and hence its positive contribution to the locality and to our heritage.

78. The proposed development in this very case is a paradigm example: the site at present is imposing but sometimes considered bleak and forlorn. The planning documents include statements to the effect that people tend to visit once, be suitably impressed and not come back again. The visitor's centre, walkways and café are intended to remedy this by making the site more attractive and enhancing understanding of it, as well as raising money needed for the upkeep of the site. The new features will provide a platform for the supply of recorded evidence and information to the visiting public.

79. During the course of argument, the example of a Saxon helmet in a glass case was mentioned. Suppose that such a helmet is unearthed during the excavation works and placed in a glass case visible from the walkway, with an accompanying explanatory caption revealing its significance to a public that had never been able to see it before. The artefact is, surely, part of the heritage asset itself and not merely a record of it. It delivers the sensory experience which the explanatory caption (a record of it) alone cannot.

80. That example shows that recording and publicising information about a heritage asset may be very difficult to disentangle from the process of enhancing the public's experience of the asset itself, a process that may (some might say paradoxically) do harm to the asset. I do not think it is realistic to suppose that the last sentence of NPPF paragraph 141 requires a local planning authority to perform the mental gymnastics required to separate out the two concepts.

81. This difficulty can only be overcome, in my judgment, once it is recognised that a non sequitur crept in when PPS 5 replaced PPS 16, and then found its way into the language of NPPF paragraph 141. In my judgment, the last sentence of that paragraph only makes good sense if interpreted so that the words "should not be a factor" are taken to bear the meaning "should not be a *decisive* factor", in deciding whether the harm to the asset should be permitted.

82. I appreciate that, even allowing for the fact that the NPPF is a policy document and not a statutory provision, this interpretation stands uneasily with the actual words of the last sentence of the paragraph. But unless the paragraph is interpreted in that way, it would be very difficult to apply in a coherent manner. In the example given above, the local planning authority could take into account the public's ability to view the Saxon helmet, but not the explanatory words inscribed beneath the glass case displaying it.

83. In the present case, the officer's report clearly invited the planning committee to take into account, in favour of granting planning permission, that there would be (paragraph 4.53) "archaeological recording of material forming the lower segment of the motte to be removed [and] … of the 19th century retaining wall to be revealed…". These were to be "mitigation measures", as stated in the same paragraph.

84. In the previous paragraph (4.52), the report stated that through implementation of those same "mitigation measures", the development "offers an opportunity to both enhance understanding of the monument and to engage with a wide range of

audiences *thus delivering significant public benefit* [my italics]". It is therefore inescapable that the committee was invited to take into account the recording of evidence of our past as part of the public benefit to be weighed (under NPPF paragraph 134) against the "less than substantial harm" to the significance of the heritage asset.

85. The distinction between public benefits weighed in the scales in the balancing exercise and mitigation measures which attenuate the detriment caused by an already justified development, must therefore be rejected on the facts of this case, even if (which I doubt) it has any intrinsic validity. I do not see how the treatment of a public benefit as such can be wished away by renaming it as the mitigation of a detriment. The extent to which the detriment is mitigated is a determinant of the quantum of the public benefit.

86. It follows that, on the literal reading advocated by Mr Crean, the officer's report would have taken account of a legally irrelevant consideration and the decision consequently flawed. But rejecting, as I do, the literal interpretation in favour of a sensible and liberal construction of the paragraph in its proper historical context, the officer's report and the committee's decision were not taken inconsistently with the concluding words of NPPF paragraph 141. The recording of evidence of the past was not the sole justification for the development. It was treated as part of the public benefit flowing from the project, but that was not unlawful.

The Issue of Remedy

87. I conclude that the first ground of challenge is not made out either and the claim must fail. There is therefore no need to consider the question of remedy. But the issue would arise if, contrary to my decision, the decision to grant planning permission was unlawfully made. In case this matter goes any further, I will consider the argument of the city council and English Heritage that relief should in any event be refused, on the basis that any flaw in the officer's report plainly made no difference to the outcome.

88. The argument is put, first, on the basis of section 31(2A) of the Senior Courts Act, i.e. it is said to be "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". By section 31(8), the conduct complained of is: "the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief". In this case, that would be the officer's invocation of the public benefit occasioned by the ability to record evidence of our past.

89. Secondly, it is said that the court should be "satisfied that the decision-making authority would have reached the same conclusion without regard to that reason", i.e. the reason that is bad in law (*Simplex GE (Holdings) Ltd. v. Secretary of State for the Environment (1989) 57 P&CR 306* , per Staughton LJ at 329). Applying that test, the committee would, it is argued, have reached the same decision founded on the remaining public benefits it saw in the project, even without reliance on the factor that was legally irrelevant.

90. Mr Elvin submitted that the key to the committee's decision was the public benefit flowing from the construction of the visitor's centre and other improvements to the site, and that any illegality was collateral and not significant. Ms Dring supported that submission and both she and Mr Elvin added that this was a case where the supporters of the project included the body with statutory responsibility for the preservation of ancient monuments and historic buildings (under section 33(1) of the National Heritage Act 1983).

91. For English Heritage, Ms Dring reminded me that this was a case in which the perceived harm to the heritage asset was always going to less than substantial, and that the balancing exercise required under NPPF paragraph 134 would have plainly

led to the same result if the allegedly immaterial factor had been excluded from consideration. The decision was not a finely balanced one and was not "a close run thing."

92. Furthermore, Ms Dring pointed out that Historic England, the government's statutory adviser on heritage assets, supported the proposal; and the city council would be bound to attach "considerable weight" to its view and would need "cogent and compelling reasons" for departing from it (*Shadwell Estates Ltd v. Breckland DC [2013] EWHC 12 (Admin)* , per Beatson J (as he then was) at paragraph 72).

93. Finally, Ms Dring reminded me that the Secretary of State had been required to bestow statutory consent on the project pursuant to the Ancient Monuments and Archaeological Areas Act 1979 , in addition to the grant of planning permission, before the project could proceed; and the Secretary of State had done so after the grant of the permission. This made it the more unlikely that the supposed legal error in the officer's report would have led to the planning permission being refused.

94. Mr Crean submitted that the court was in no position to judge what the committee's decision would have been in the absence of the conduct complained of, namely the taking account of recording of evidence of the past as a factor materially influencing the decision. The court had rightly declined to speculate on this issue at the permission stage, when granting permission on the papers. The position was no different now, Mr Crean argued.

95. I agree with the city council and English Heritage that it is appropriate to revisit this question at the substantive stage of the judicial review application. I have now heard considerably more detailed argument than I had received on the papers when I granted permission to proceed with the claim. If I were wrong to dismiss the claim founded on the first and second grounds of challenge, I would nonetheless refuse relief, applying section 31(2A) of the 1981 Act and the reasoning in the *Simplex* case.

96. I accept the points made by Mr Elvin and Ms Dring. The decision was not finely balanced; the perceived public benefits were considered substantial, even though the proposals generated substantial opposition. The supporters of the proposal included the statutory body with responsibility for preservation, Historic England, and its managing agent, English Heritage. The project enjoyed the support of the city council, in the person of its most senior officers with professional responsibility for heritage matters.

97. In all the circumstances I would have been satisfied that the threshold tests set by section 31(2A) and the *Simplex* judgment are met in this case, and I would have refused relief even if I had been persuaded that the decision challenged was flawed in either of the two ways suggested by Mr Hayes, though Mr Crean. In the event, the separate issue of remedy does not arise, and the claim must be dismissed for the reasons given above.