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Exploring the Roles of Alternatives in Heritage Planning Decisions

by Tom Cosgrove KC and Jack Barber

Introduction

1. In the context of planning decisions, alternative sites or schemes are frequently dismissed as irrelevant. However, in certain cases, particularly where conflicts with policy or other planning harm are identified, alternatives may become a significant factor in the decision-making process. This article examines how decision-makers should approach alternatives in the face of heritage harm, while exploring the broader implications for developers, local authorities, and decision-makers.

Conserving the historic environment: Legal and policy framework

2. Before delving into the role of alternatives, it's important to understand the legal and policy framework guiding planning decisions that involve heritage issues. Lieven J recently remarked that heritage cases have often come to involve a "complex legal reasoning process", having regard to the statutory duties, policy requirements and growing case law relating to the historic environment.[1]

3. Section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 provides that, in considering whether to grant planning permission or permission in principle for development which affects a listed building or its setting, the decision-maker 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] This is a "demanding duty", requiring rigorous attention from decision-makers concerned with development management.[3] Section 72 of the same Act sets out an equivalent duty in relation to conservation areas. These duties serve to impose a strong statutory presumption against harm to heritage assets.

4. Having "special regard" to the desirability of preserving the setting of a listed building under section 66 (or section 72) involves more than merely giving weight to those matters in the planning balance. Where a proposed development harms the setting or significance of a listed building, the decision-maker must give "considerable importance and weight" to the desirability of preserving the asset. This applies regardless of whether the harm is substantial or less than substantial.[4] It is not open to a decision-maker merely to give the harm such weight it thinks fit, in the exercise of his planning judgment or to treat less than substantial harm to the setting of a listed building as a less than substantial objection to the grant of planning permission.[5] The requirement to give considerable importance and weight" to any harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving its setting is the same in every such case.[6]

5. The National Planning Policy Framework (NPPF) is a material consideration in planning decision-making, and Chapter 16, which concerns the conservation and enhancement of the historic environment, plays a crucial role in guiding decision-making. National policy emphasises the need to minimise harm to heritage assets: para. 201. In decision-making terms, when considering potential impacts of a proposed development on the significance of a heritage asset, "great weight" should be given to an asset's conservation; the more important the asset, the greater the weight should be: para. 205. "Any harm" to, or loss of, the significance of a designated heritage asset should require "clear and convincing justification": para. 206.

6. National policy accordingly imposes stringent restrictions on development causing heritage harm. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent unless it can be demonstrated that the harm or loss is necessary to achieve "substantial public benefits that outweigh the harm or loss", or one of four exceptions

1. *Marks and Spencer Plc v SSLUHC* [2024] EWHC 452 (Admin), per Lieven J at [133].
2. The Levelling-Up and Regeneration Act 2023, proposes to amend s.66 to read "preserving or enhancing", although the provisions are not in force yet.
3. *East Quayside 12 LLP v Newcastle upon Tyne City Council* [2023] EWCA Civ 359, [51].
4. See *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303; *East Northamptonshire District Council v Secretary of State for Communities and Local Government [2015] 1 WLR at [22] to [28]; and R (Palmer) v Hertfordshire County Council* [2017] 1 WLR 411 at [5].
5. *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2015] 1 WLR 45 per Sullivan LJ at [16]-[29].
6. *City and Country Bramshill v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761 at [60], [61] and [71], and *East Quayside 12 LLP* [2023] EWCA Civ 359 at [38].

apply: para. 207. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use: para. 208.

7. The advice contained in the NPPF is set out in a fasciculus of paragraphs which lay down an approach which corresponds with the duty in section 66(1) of the P(LBCA)A 1990. Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty.[7] The reference in paragraph 208 of the NPPF to weighing harm against the public benefits of the proposal must nonetheless give effect to the presumption against granting permission for development which harms the setting of a listed building. The balance is "tilted" in favour of the preservation of setting; but how much weight to give to the harm to the setting of a listed building and to that tilt is a matter for the decision maker.[8]

8. Notably, the new draft NPPF as provided for consultation does not propose any substantive changes to national policy on the historic environment. In our view, the lack of change only serves to underline the seriousness with which developers should reflect on how to formulate and present a scheme which provides a considered and sensitive response to the historic environment; and suggests that heritage issues are likely to continue to provide potentially significant obstacles once an application reaches the decision-maker.

9. Planning Practice Guidance (PPG) complements the NPPF, and includes an answer to the question of how proposals can avoid or minimise harm to the significance of a heritage asset:

"Understanding the significance of a heritage asset and its setting from an early stage in the design process can help to inform the development of proposals which avoid or minimise harm. Analysis of relevant information can generate a clear understanding of the affected asset, the heritage interests represented in it, and their relative importance."

"Early appraisals, a conservation plan or targeted specialist investigation can help to identify constraints and opportunities arising from the asset at an early stage. Such appraisals or investigations can identify alternative development options, for example more sensitive designs or different orientations, that will both conserve the heritage assets and deliver public benefits in a more sustainable and appropriate way."[9]

10. Relatedly, Historic England's 'Good Practice Advice in Planning: 3' (GPA3) outlines steps for assessing harm to heritage assets. Step 4 involves exploring ways to maximise enhancement and avoid or minimising harm. Paragraph 39 of GPA 3 gives the following advice on step 4:

"Options for reducing the harm arising from development may include the repositioning of a development or its elements, changes to its design, the creation of effective long-term visual or acoustic screening, or management measures secured by planning conditions or legal agreements. For some developments affecting setting, the design of a development may not be capable of sufficient adjustment to avoid or significantly reduce the harm, for example where impacts are caused by fundamental issues such as the proximity, location, scale, prominence or noisiness of a development. In other cases, good design may reduce or remove the harm, or provide enhancement. Here the design quality may be an important consideration in determining the balance of harm and benefit."

11. In summary, the following aspects of the legal and policy framework for conserving and enhancing the historic environment are relevant for present purposes:

(i) Statutory duties concerned with decision-making in relation to proposals affecting heritage assets impose strong presumptions against harm to designated heritage assets and require rigorous attention from decision-makers.

(ii) Special regard involves giving considerable importance and weight to the desirability of preserving heritage assets, even where the level of harm identified is less than substantial.

(iii) National policy emphasises the avoidance and minimisation of harm, and any harm requires clear and convincing justification. Based on the draft NPPF, this is not changing any time soon, and the absence of any changes to heritage policy highlights the importance of sensitive, considered responses to heritage assets in development proposals.

(iv) The NPPF is supported by PPG which underlines the importance of early-stage understanding of a heritage asset to inform design that avoids or minimises harm, including consideration of alternative development options. Historic England's guidance (GPA3) also suggests that in assessing how to avoid or minimise harm, options for reducing harm may include the repositioning of development or its elements, or changes to its design.

Alternatives as material considerations

12. The question of whether and how alternatives[10] could or should be considered by a decision-maker primarily involves the question of whether the alternative is relevant or material for the purposes of decision-making.

13. The range of potentially relevant planning issues, or "material considerations", is very wide.[11] Absent irrationality or illegality, the weight to be given to a material consideration – provided the

7. See *Jones v Mordue* [2016] 1 WLR 2682 per Sales LJ (as he then was) at [28].
8. *R (Leckhampton Green Land Action Group Ltd) v Tewkesbury BC* [2017] EWHC 198 (Admin), at [49]. See *R (Tesco Stores Ltd) v Reigate and Banstead Borough Council* [2024] EWHC 2327 (Admin) at [51].
9. PPG, Paragraph: 008 Reference ID: 18a-008-20190723, Revision date: 23 07 2019.
10. In the form of alternative sites or alternative schemes.
11. *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281.

consideration is in fact material – is a matter for the decision-maker.[12]

14. In recent guidance on the approach to challenges based on an alleged failure to take into account a material consideration, the Supreme Court has identified three categories of consideration.[13] First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard *must* be had. Secondly, those clearly identified by the statute as considerations to which regard *must not* be had. Thirdly, those considerations to which the decision-maker *may* have regard if in his or her judgment and discretion he or she thinks it right to do so.

15. In this third category of consideration, there are two types of case. First, where a decision-maker does not advert at all to a particular consideration, which is only unlawful if the consideration is obviously material according to the *Wednesbury* irrationality test. Secondly, where a decision-maker turns their mind to a particular consideration but decides to give it no weight; here too, the question is whether the decision-maker acted rationally in so doing.

When are alternative sites and schemes relevant?

16. There has been a "long-standing debate among planning lawyers… as to the relevance of alternative sites to the consideration of individual planning applications".[14]

17. Simon Brown J's judgment in *Trusthouse Forte Hotels Ltd v Secretary of the State for the Environment* (1987) 53 P. & C.R. 293 sought to summarise the effect of the earlier case law:

"There has been a growing body of case law upon the question when it is necessary or at least permissible to have regard to the possibility of meeting a recognised need elsewhere than upon the appeal site … These authorities in my judgment establish the following principles:

(1) Land (irrespective of whether it is owned by the applicant for planning permission) may be developed in any way which is acceptable for planning purposes. The fact that other land exists (whether or not in the applicant's ownership) upon which the development would be yet more acceptable for planning purposes would not justify the refusal of planning permission upon the application site.

(2) Where, however, there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it.

(3) Instances of this type of case are developments, whether of national or regional importance, such as airports … coal mining, petro-chemical plants, nuclear power stations and gypsy encampments … Oliver LJ's judgment in *Greater London Council v Secretary of State for the Environment* [52 P&CR 158] suggests a helpful though expressly not exhaustive approach to the problem of determining whether consideration of the alternative sites is material …

'comparability is appropriate generally to cases having the following characteristics: first of all, the presence of a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there can only be one permission granted for such development or at least only a very limited number of permissions.'

(4) In contrast to the situations envisaged above are cases where development permission is being sought for dwelling houses, offices … and superstores …

(5) There may be cases where, even although they contain the characteristics referred to above, nevertheless it could properly be regarded as unnecessary to go into questions of comparability. This would be so particularly if the environmental impact was relatively slight and the planning objections were not especially strong …."

18. Simon Brown J's remarks were considered a "useful starting point" by Carnwarth LJ, sitting in the Administrative Court, in *Derbyshire Dales DC v SSCLG* [2010] 1 P & CR 19, at [16]. In *Derbyshire Dales*, Carnwath LJ observed:

(i) Alternatives may or may not be relevant depending on the nature and circumstance of the project, including its public importance and the degree of planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgement for the decision-maker, involving no issue of law: [15].

(ii) To say that consideration of a possible alternative site is necessarily relevant (so that the decision-maker errs in law if he or she fails to have regard to it) is a different thing to saying that consideration of a possible alternative site is a potentially relevant legal issue (so that the decision-maker does not err in law if he or she has regard to it). Legal analysis of the two propositions is materially different: [17] and [35].

12. *Tesco Stores Ltd v Secretary of State* [1995] 1WLR 759, 780.
13. See *R. (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3, [2020] P.T.S.R 221 per Lord Carnwath at [29] – [31] and *R. (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] P.T.S.R 190 per Lord Hodge and Lord Sales at [116] - [121].
14. *Derbyshire Dales DC v SSCLG* [2010] 1 P & CR 19, at [14].

(iii) To hold that a decision-maker has erred in law by failing to have regard to alternative sites, it is necessary to find some legal principle which compelled (and not merely empowered) him or her to do so. What is necessary is a statutory or policy requirement imposing some positive obligation to consider alternatives. If there is no such requirement whether or not to consider alternatives will remain a matter of planning judgement on the facts of the case: [36] and [37].

19. Very shortly after Carnwath LJ's decision in *Derbyshire Dales*, the Court of Appeal had the opportunity to consider the materiality of alternative development options within the same site. In *R (Langley School for Girls) v Bromley LBC* [2010] 1 P & CR 10, the local planning authority had considered a proposal for substantial new buildings on a large site which was partly occupied by existing buildings and partly open land, within land designated as Metropolitan Open Land in the Bromley Unitary Development Plan. It was being contended that it would severely injure the openness and visual amenity of the MOL because the new buildings were to be sited on the open part of the application site (Point A), and that the injury to the MOL would be greatly reduced if the layout was revised so that the new buildings were sited largely on the built up, rather than the open part of the application site (Point B). The Appellant challenged the grant of planning permission on the ground that the Respondent local planning authority had failed to consider the possibility of an alternative scheme on the proposed development site.

20. In *Trusthouse Forte Hotels*, Simon Brown J stated, at 299, that "Where [...] there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere". In *Langley Park School for Girls*, at [46], Sullivan LJ said:

"The *Trusthouse Forte* case was an ''alternative site'' case, but the principle must apply with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself."

21. At [51], Sullivan LJ said:

"An unlikely possibility that a more acceptable alternative scheme might be devised could not, on any rational basis, be a reason for refusing permission for a scheme to which there was no planning objection."

22. Sullivan LJ went on to set out the following position:

"52. It does not follow that in every case the ''mere'' possibility that an alternative scheme might do less harm must be given no weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no ''one size fits all' 'rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm."

"53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application."

23. Sullivan LJ concluded that the decision to grant planning permission was seriously flawed: "Insofar as the Report dealt with Point (a) it was wholly inadequate; and insofar as it directed the members as to whether Point (b) was potentially relevant it was misleading." The appeal was allowed and the decision to grant planning permission was quashed.

24. In *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2022] P.T.S.R. 74, at [268]-[274], Holgate J reiterated the principles surveyed above as to whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account.

25. *Save Stonehenge* concerned a challenge to the Secretary of State's decision to grant development consent for a road tunnel.[15] The Claimant's case was that the Secretary of State had failed to assess alternative schemes that could reduce harm to heritage assets, specifically, alternative tunnel designs. The court held

15. In *Save Stonehenge*, it had been accepted in that case that alternatives should be considered in accordance with [NPSNN], but the Examination Panel and the Secretary of State had misdirected themselves in concluding that the carrying out of the options appraisal for a different purpose made it unnecessary for them to consider the merits of alternatives for themselves: [285].

that alternatives were an "obviously material consideration", in part due to the exceptional nature of the World Heritage Site's significance. The proposal gave rise to clear planning objections, including permanent and irreversible harm: see [280]-[281]. The Secretary of State had proceeded on the basis that the heritage benefits of the scheme did not outweigh the harm that would be caused to heritage assets, and would not produce an overall net benefit for the World Heritage Site. At [282], Holgate J provided the following analysis:

"The acceptability of the scheme depended upon the SST deciding that the heritage harm (and in the overall balancing exercise all disbenefits) were outweighed by the need for the new road and all its other benefits. This case fell fairly and squarely within the exceptional category of cases identified in, for example, *Trusthouse Forte*, where an assessment of relevant alternatives to the western cutting was *required*." (emphasis added).

26. The Court of Appeal has recently given further consideration to the ways in which alternatives can – and cannot – be relevant in cases involving a particular type of planning harm, namely harm to the historic environment. *East Quayside 12 LLP v Newcastle-upon-Tyne City Council* [2023] EWCA Civ 359 concerned an appeal from an order of Holgate J which quashed planning permission granted to the Appellant by an inspector for a mixed scheme involving apartments, residential amenity and commercial space. The proposed development was situated at a site close to St Ann's Church, a Grade-I listed building. The Inspector concluded that the identified heritage harm of the development fell at the lower end of less than substantial, "…given the key constrains of the plot and the nature of the harm identified, this is towards the lower end of any such scale within that classification."

27. The Court of Appeal held that if the existence or absence of another scheme on the site that could produce less harm was considered by the Inspector for the purposes of assessing the level of heritage harm of the proposed development, that would be an error of law, and in that case, there was substantial doubt as to whether the Inspector had so erred in law.

28. Sir Keith Lindblom SPT provided the following analysis (emphasis added):

"39. Secondly, it has been accepted on both sides in this appeal, as evidently it was in the court below, that *in assessing harm to the significance of a heritage asset, including harm to the setting of a listed building, the decision-maker must focus on the harm that the proposed development itself would cause, not the harm that some other development on the site, or a differently designed development, might cause.* Logically, as the judge recognised (in paragraph 65 of his judgment), *the existence or absence of another scheme or design which would or might produce less harm is not relevant to the level of harm that the proposed development itself would cause.* That harm would be the same either way. This, of course, is *not to say that the absence of an alternative design that would cause less harm than the development proposed is irrelevant to the decision on the application for planning permission, and an immaterial consideration. As the judge said, it can be relevant, and may be important, in the balance finally stuck between harm and benefit.*"

29. Thus, the Court of Appeal has emphasised that when assessing harm to a heritage asset, the decision-maker must focus on the harm caused by the proposed development, not on the harm that a different scheme might cause. However, the existence of an alternative design that would cause less harm can be relevant when balancing harm and benefits (presumably, for the purposes of the heritage balance envisaged by ¶208 of the NPPF, and in the wider planning balance).

Where do we stand?

30. As surveyed above, the issue of the relevance of alternatives will be case specific. If there are no clear planning objections, alternative proposals will normally be irrelevant. However, if there are clear planning objections (such as material harm to designated assets in a context where that could be avoided or reduced), it may be potentially relevant or even necessary to consider whether that could be overcome by an alternative proposal.

31. If alternative proposals are not to be dismissed out of hand, one might expect that those proposals would need to be more than just speculative, but that is not to say that alternative options or proposals need to be detailed or highly developed so as to be considered as material and relevant for decision-making purposes. As *Langley Park School for Girls* made clear (at [52]-[53]), how far evidence in support of an alternative option or proposal, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission, are matters of planning judgment for the decision-maker.

32. If an alternative scheme is being presented, even a high-level alternative can be a weighty consideration if it can be said that the approach as presented would result in a material reduction in a various range of planning harms (such as heritage, design, and landscape objections), and can prompt a decision-maker to ask: "what might be achievable here in any event".[16]

33. Whilst the courts have not treated the issue of alternatives as a separate and distinct hurdle to overcome, the existence of and failure to pursue and alternative is capable of being a factor which weighs heavily – perhaps even decisively – in considering relevant planning balances required for decision making.

34. There are potential pitfalls: the absence or presence of an alternative scheme or alternative site(s) does not (and cannot) directly affect the assessment of harm of the proposed

16. APP/Y3615/W/23/3330618 Land south and east of Guildford Cathedral, appeal decision letter, ¶124.

development in a given case.

35. However, *East Quayside* also made clear that there is a potentially significant role for alternatives in a heritage case. In particular, the existence of an alternative design that minimises harm can be an important factor in planning decisions, particularly when assessing whether identified heritage harm has been clearly and convincingly justified, and in considering the balance between harm and public benefit: *East Quayside*, [39].

36. For example, in the absence of a suitable justification for the level of development proposed financially or otherwise, it might be said that a decision-maker cannot rationally conclude that similar benefits could not be achieved in a less harmful way, and that absence of justification might serve to qualify the weight attributable to the benefits of the proposal such that a decision-maker can reach the view that there is not the necessary clear and convincing justification for a proposed scheme.[17]

Practical takeaways for developers, local authorities and decision-makers

37. In practical terms, developers should consider providing clear evidence of how alternatives have been explored to minimise harm, particularly in cases involving heritage assets. This may involve redesigning proposals or repositioning elements to reduce impact; or being prepared to provide robust, clear and convincing justifications as to why those different routes are not possible in a given case.

38. For local authorities, understanding the materiality of alternatives is key to ensuring that planning decisions are legally robust. While alternatives may not always need to be considered, decision-makers must carefully assess whether the harm caused by a proposed development can be minimised through alternative options. In appropriate cases, in developing a considered and thoughtful "alternatives" case on appeal, an objector (whether a local planning authority or "rule 6 party" can provide a decision-maker with a potentially compelling material consideration weighing against the grant of planning permission.

39. Finally, for decision-makers, striking the right balance between harm and public benefits is essential, particularly in the context of heritage planning. The courts have made it clear that even less than substantial harm to a heritage asset can carry significant weight in the decision-making process.

Where alternatives exist that could reduce harm, they should be carefully weighed against the benefits of the proposal, as a matter of planning judgement.

Conclusion

40. The relevance of alternatives in heritage planning decisions depends on the specific circumstances of the case, including the identified level of harm caused by the proposed development. While alternatives may not always be engaged, in the right case, proper consideration of alternatives can play a critical role in avoiding or minimising harm. Developers and decision-makers alike must carefully consider the potential for alternatives to reduce heritage harm, particularly where significant planning objections are raised. Ultimately, the careful consideration of alternatives can help preserve the historic environment while allowing for sustainable development.

17. APP/Y3615/W/23/3330618 Land south and east of Guildford Cathedral, appeal decision letter, ¶128.

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