Consultation Response

Historic Environment Advice Note 4: Enabling development and heritage assets

Historic England consultation

Date: 12 May 2017

1. This is a Historic England (HE)[1] consultation[2] on a new shorter version of its previous (2008) advice on enabling development.

A. Introduction and summary

2. Enabling development essentially is development (often housing development) where it would normally be seen as unacceptable, but which is permitted in order to achieve a specific public benefit (like funding the rescue of heritage at risk). Enabling development has saved much heritage at risk, though there have also been cases in the past in which it was damaging (see paragraph 15 below).

3. The CLA has been very critical of previous HE advice on enabling development. Although most of its content was excellent, its 'one-size-fits-all' approach to applications and its assumption that all applications and all applicants must be presumed to be malign put such a long list of bureaucratic hurdles in the way of benign owners or developers that very few were ever likely to embark on it.

4. This response (see section C below) is again very critical. The advice's relative brevity is appreciated, and again much of the content is excellent. However, **it would deter benign enabling development at least as much as the 2008 advice**. **At the same time, the loss of some of the detail of the 2008 version might make it more possible for malign applications to succeed**. **A different approach is therefore needed, in which applications are no longer seen as all the same and all bad, and in which local planning authorities (LPAs) encourage benign applications, based on NPPF paragraph 140. There is nothing new or discriminatory in that approach: LPAs make such judgements all the time**. **This advice needs to help them to do that**.

5. We also have comments on detail (see section D below).

[1] previously English Heritage.
[2] The consultation can be found on the HE website, on the Closed consultations page (or from the foot of the Guidance open for consultation page). The previous advice was at https://content.historicengland.org.uk/images-books/publications/enabling-development-and-the-conservation-of-significant-places/enablingwebv220080915124334.pdf/

B. The CLA, heritage, and enabling development

6. The CLA (Country Land & Business Association) has more than 30,000 members – not-for-profit, government, commercial, or private – who collectively manage or own at least a quarter of all heritage in England. The CLA is thus by far the largest stakeholder group of managers and owners of heritage. CLA policy strongly supports proportionate and effective heritage protection.

7. CLA members own much heritage at risk. They do not like watching heritage decay, and generally are keen to put it to appropriate uses which will fund its repair and long-term maintenance, but most of this heritage at risk (i) has a 'conservation deficit', meaning that repair is not financially viable, and/or (ii) planning permission cannot be obtained for sustainable use or re-use. A very small proportion of this heritage has been given a realistic future by enabling development (an example is Combermere Abbey in Cheshire, where a major and award-winning restoration was completed in 2015, but the process was extremely difficult and took almost a decade).

8. There are many other heritage at risk cases where careful enabling development might be the solution. But in practice – given the highly discouraging tone of the HE advice, the high risk of rejection, and the very large costs involved – extremely few CLA members risk going down this route.

C. Enabling development in the NPPF-based planning system

9. **The core planning policy on enabling development in paragraph 140 of the National Planning Policy Framework (NPPF), in, is balanced**. There is no 'presumption against enabling development'. As in the rest of the NPPF, it simply asks LPAs to weigh its benefits against the disbenefits.

10. This (and previous) HE advice takes a very different approach. In the NPPF-based system it is not able to use the words "strong presumption against", but that message is very clear. About 1 per cent of the advice encourages enabling development, and the other 99 per cent is relentlessly discouraging. The 2008 advice set out a series of hurdles at the start, and proposals which passed these then had to surmount further formal hurdles, and another 90 pages added numerous further tests and qualifications. The new draft has much reduced the number of pages, and reduced the complexity somewhat, but the core underlying message – that enabling development is highly undesirable and should be prevented in almost all circumstances – remains clear.

11. Four key points need to be made about enabling development:

12. Firstly, **prevention is vital**. **HE still produces no advice on heritage at risk[3], and the need for that is urgent**. The intelligent first sentence of GPA2[4] paragraph 46 ("Working with the owner is the route to solving heritage at risk issues…") needs to be supported by effective advice, based on giving heritage at risk a viable use to ensure its long-term maintenance and survival. The traditional approach of telling LPAs to go straight to aggressive legal action does not work, because LPAs see that as disproportionate, ineffective, and difficult, and seldom take it forward (or focus it on the wrong targets, or fail). Good heritage at risk advice would encourage LPAs to take a flexible approach to sympathetic proposals for re-use, well before there are holes in the roof, and to communicate this message firmly to owners. While this document is not the place for detailed heritage at risk advice, **it should (briefly) encourage prevention by encouraging LPAs to accept and promote sympathetic proposals for re-use and/or nearby development well**

[3] HE's *Stopping the rot* is of course enforcement advice, not heritage at risk advice.
[4] HE's *Good Practice Advice in Planning 2*.

before conservation deficits accelerate and major enabling development becomes the main or only solution.

13. Secondly, **the advice needs to say explicitly that enabling development can work and be beneficial**. Paragraph 1.1.1 of the 2008 advice said that it "…is an established and useful planning tool by which a community may be able to secure the long-term future of a place of heritage significance, and sometimes other public benefits…", but this point seems to have been lost from the new draft.

14. Thirdly, **HE advice needs to stress the value of the heritage benefits of enabling development in order to encourage LPAs to take a more balanced view in accordance with the NPPF**. LPAs do not need to be encouraged to question the disbenefits of the proposed enabling development (which is often housing in what LPAs call "open countryside"): they have been putting strong presumptions against such development into their local plans for 40 years, and remain – the NPPF notwithstanding – extremely good at maintaining and communicating these presumptions.

15. Fourth, and importantly, as noted above, **enabling development can be dangerous**: in the 1980s and 1990s there were many cases in which the planning disbenefits were incurred but the heritage benefits were not secured, generally because a malign developer never intended to carry out the heritage work and inexperienced LPAs and inadequate planning conditions/agreements allowed the malign developer to profit from the enabling development and then disappear without repairing the heritage asset[5]. Over the 17 years in which it has been in force **HE's advice has largely eliminated this problem; but it has also largely eliminated enabling development, and thus largely eliminated the benefits enabling development could have brought**. This is obviously difficult to quantify, but in that 17 years dozens, perhaps hundreds, more buildings at risk could have been rescued by careful and sympathetic enabling development projects.

What this advice should say

16. **HE should therefore now take a more logical and considered approach**. Previous advice has presumed that all owners and applications are malign, that enabling development is thus always dangerous, and therefore that sufficient hurdles must be put in its way to prevent it happening in practice. The result of this, not surprisingly, is that benign, scrupulous owners are so discouraged by HE's relentlessly negative and hurdle-filled advice that few ever embark on enabling development. CLA members do ask us about enabling development, but our advice usually has to be that no owner should even contemplate enabling development unless it is certain to have the enthusiastic support of both the LPA and HE, and that even then because of the long timescales and high costs, and the risk of changes of personnel, and of local opposition, it is a very high-risk course of action, only for the very brave and determined. The few that do embark on it find that overcoming the hurdles costs a lot of money – money which cannot be spent on the heritage asset – and takes years, during which it continues to deteriorate, and the conservation deficit, and the amount of enabling development needed to cover it, continue to increase. Buildings at risk which could have been rescued by enabling development therefore continue to crumble, and 'historic entities' (see 32 below) which could have been put on a sound footing continue to be broken up. There is also a presentational problem: fairly or not, HE's approach gives the impression that HE is putting obstacles in the way of change and letting important historic buildings fall down in the process.

[5] See for example *Rescued or ruined: dealing with enabling development*, C Askwith, 1999.

17. This loss of the opportunity for benign owners to carry out careful enabling development projects which could have rescued important heritage assets is bad enough. Worse, the 'one-size-fits-all' approach, though tough enough to stop benign enabling development, is not necessarily tough enough to put off malign speculators and developers. Although in recent years there is little evidence of enabling development actually being carried out by malign developers, the HE approach distorts the market, leading to buildings at risk deteriorating as they are sold and resold to a series of speculators hoping to benefit from enabling development, and pricing buildings out of the reach of genuine rescuing purchasers who would need a more modest level of enabling development, or none.

18. **HE should therefore abandon this 'one-size-fits-all', 'all-situations-are-the-same' approach**. Firstly, **the advice needs to be be robust enough to deal effectively with unscrupulous property speculators and developers**, and it should do that more effectively than the draft does (see 26-27 below).

19. Secondly, however, **the advice must encourage, not derail, benign applications**. A long-term owner genuinely intending to make a heritage asset financially sustainable for the long term, or a developer with a good documented track record in enabling development, need encouragement every bit as much as much as the speculator needs every obstacle to be placed in its way. This is perfectly possible: discriminating between good and bad applications is at the root of the planning system, LPAs are used to doing this, and do it (usually reasonably competently) every day. In the case of enabling development, there are often obvious clues (a heritage-sympathetic application from a family which has owned the heritage asset for 100 years and intends to continue to do that is likely to be more acceptable than an application completely focused on the new development from a speculator who bought the property six months before and has no track record in heritage – or any – development). **The advice needs to give LPAs/HE an extensive toolkit of obstacles, but it should make it clear that these obstacles are there to be applied assertively where necessary, and lightly where not**.

20. **The courts have supported this sensible approach: in *R (Davey) v Aylesbury Vale DC and Mentmore Towers Ltd* (2005), the court held that it was apparent that the applicant had got the scale of development right, and that it was therefore not necessary to go through every single hoop set out in HE's enabling development advice**.

D. Specific comments on the new draft HE advice note

Paragraph 2: What is enabling development?

21. Paragraph 2 is fine as an introduction, but (see 13 and 15 above) a further introductory paragraph is needed to illustrate both how enabling development can work well, and what can go wrong. This could be achieved simply by saying this, but it might best be illustrated by two case studies.

22. One of these needs to have been successful, to inspire owners to embark on enabling development, and to inspire LPAs to see how it can work well. The other should have been unsuccessful: LPAs are unlikely to get enabling development right without more specific awareness of the problems, and owners/developers need to know something of the history so that they understand why LPAs and Historic England can be wary of enabling development.

Paragraphs 4-6: When might enabling development be a realistic option?

23. Paragraph 4, while it must convey the key issues, should be less relentlessly negative. In particular, constantly repeating the term "last resort" here and elsewhere implies that consent for enabling development should almost never be granted.

24. Paragraph 5 – see 32 below.

Paragraphs 8-9: What is the object of enabling development?

25. Paragraphs 8 and 9 cover the vital point that rescuing heritage at risk is not only about initial repair: the only way in which its long-term conservation can be secured is by giving it long-term sustainability, especially financial sustainability.

Paragraph 15: How are the benefits of enabling development secured?

26. This is a vital part of this document: all enabling development needs effective conditions, but **this section specifically needs to give LPAs the tools they need to tie down malign speculators/developers they suspect might not actually carry out the heritage work**. This is vital because the effective use of these tools (i) will probably persuade malign developers to pull out (or at least maximise the chance that they will actually carry out the work); and (ii) more fundamentally, changes the whole marketplace, discouraging malign speculators from 'taking a punt' buying heritage at risk, and preventing them from pricing out genuine repairing purchasers.

27. The 'one-size-fits-all' approach in the draft does not appear to be tough enough to achieve this. Firstly, therefore, the advice needs to give more detail on tying up enabling development consents to maximise the likelihood that the heritage objectives will be achieved (this may imply the need for a separate document based on elements of HE's 2008 advice). It also needs to say more about why this is necessary; one or two case studies showing what happened when LPAs got things wrong in the 1980s/90s might get this point across effectively to LPAs unfamiliar with these problems. This section needs to cross-refer to paragraphs 63-65.

28. Secondly, and **equally importantly**, **the advice needs to avoid discouraging benign applications by making it clear that these tools should be used proportionately (see 19-20 above), quoting the *R (Davey) v Aylesbury Vale DC and Mentmore Towers Ltd* case.**

Paragraph 18

29. Paragraph 18 bullet 2 should be preceded by "Where appropriate," (see 32 below).

Paragraph 19

30. In paragraph 19, the first step surely should be to analyse and understand the significance of the building and the setting, so either that step needs to be added as a new step before step (1), or step (1) needs to be changed to something like "Carry out a significance, setting, and condition assessment of the asset…". Heading 1 on page 6 should then read "Assessment of significance and condition".

Paragraph 23: Alternative solutions

31. Paragraph 23 would better read "…establish if enabling development complies with NPPF paragraph 140 (rather than "is the last resort"), and the final line "…original use is often, but not always, the most appropriate…".

Paragraph 27: market testing

32. **Beginning this paragraph with "Exceptionally" creates problems, especially for 'historic entities' like country houses with relevant contents, because the sale and breaking-up of a**

historic entity would almost always cause harm in heritage terms. In these circumstances, not requiring market testing should be normal rather than "exceptional".

33. **The term "outstanding national importance" is vague, and moreover appears to imply a very elitist view of heritage, which might be argued to be confined to the handful of buildings which are Grade I listed. That would leave most historic entities unprotected. Being a listed building should be sufficient**.

Paragraph 28: Fragmentation

34. This paragraph should be split into two after "taken into account".

Paragraph 43: Market value assessment

35. There seems to be no obvious justification for the last sentence in this paragraph: other things being equal, it does not really matter if the enabling development happens many miles away provided it pays for the heritage work, and a site many miles away might be a better location for development. The 2008 advice (paragraph 1.1.5) made this point well.

Paragraph 44: Market circumstances

36. It would be helpful to point out at the beginning that the development market is very cyclical and that development values fluctuate considerably (see 40 below).

Paragraph 54: Site value: has too much been paid?

37. These points would obviously apply only where the site has changed hands in (say) the last 5-10 years: a price paid in (say) 2000 is no longer relevant.

Paragraph 57: "Developer's profit"

38. Given that "developer" and "profit" can be seen as loaded terms, and that some enabling development applications are made by owners rather than developers, this heading would better read as "Allowance for risk and profit", and the word "developer" should be avoided throughout the advice except where it is clearly appropriate.

39. Paragraph 60 needs expansion: many owners of heritage at risk will not have the skills required to carry out the non-heritage development, and/or will not wish to incur the ongoing risk of the non-heritage development. **It should be clear therefore that owners are able to enter into sale agreements or partnerships with developers, provided all the terms are revealed** (in confidence at least) to the LPA or an adviser acting for the LPA, and that planning conditions/agreements are complied with.

Pages 13-16:

40. The final pages of the advice need to need to give more guidance on what happens if or when market conditions change between the consent and the sale etc of the enabling development, usually several years later. The advice generally takes the view that this is an issue for 'the developer', who simply makes more or less profit accordingly, and that indeed works in some cases, but the parties need to be prepared for other situations, for example when a developer fails, or the enabling development becomes loss-making either before, or after, building work has

commenced. This advice cannot cater for every situation, but more advice would be helpful. It should also suggest sensitivity analyses as part of the appraisal process.

Paragraph 77: Making the decision

41. The reference to taking "a realistic… view of the consequences of refusal" is vital because it helps to discourage LPAs from kicking the can down the road, refusing applications as the building deteriorates, on the basis that some 'better' solution will somehow turn up.

42. Paragraph 77 continues the relentlessly negative tone of the whole document, and appears to ignore NPPF paragraph 140. The 2008 advice said (Summary, Section 6) that **"If the balance of advantage clearly lies in approval, planning permission should be granted"**. **This advice should conclude with a similar message**.

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