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Citation: Rutherford, Helen and Rutherford, Leslie (2016) Anatomy of a Trojan Horse-Enabling Development Exposed. *Journal of Planning and Environmental Law*, 2016 (11). pp. 1074-1080. ISSN 0307-4870

Published by: Sweet & Maxwell

URL:

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Anatomy of a Trojan Horse- Enabling Development Exposed

By Leslie Rutherford and Helen Rutherford*

INTRODUCTION TO AN ATTRITIONAL APPEAL

This article follows the saga of continuing efforts by Barratt plc and private developers “the Sprys”, to gain planning permission for an enabling development, ostensibly to secure the future of “at risk” Hamsterley Hall in County Durham. The first appeal decision to consider an enabling development proposal under the National Planning Policy Framework (NPPF) was examined in this journal¹ and now a second appeal on a revised Hamsterley Hall proposal has taken place and calls for analysis.

SETTING THE SCENE

Hamsterley Hall is a Grade II* listed building dating at least to the 17th century and is amongst the top 8% of all listed buildings in England. It is the ancestral home of the 19th century author R.S.Surtees, famed for his sporting caricatures, particularly “Jorrocks, the Sporting grocer and Master of Foxhounds”. Many literary scenes and plots are directly identifiable as related to the Hall and its locality. Who can doubt that Hillingdon Hall was inspired by Hamsterley Hall itself or that Handley Cross Spa sprang from the chalybeate springs of nearby Shotley Bridge Spa?²

In May 2006 English Heritage (now Historic England, HE) assessed the Hall as, at best, worthless because of its poor condition. Nevertheless, the then owners the Gibsons, in July 2007, sold the Hall, including a modest parkland, to the Sprys for just over £1m. The Hall continued to deteriorate and in 2010 it was entered upon the English Heritage Buildings at Risk Register. Prior to the sale, negotiations with the then district council, Derwentside, and English Heritage resulted in a proposal for enabling development involving the Gibsons, the Sprys and the housebuilders Barratt plc (David Wilson Homes).

The scheme agreed amongst the parties was that should listed building consent and planning permission be granted for the Hall restoration together with an enabling 60 unit housing estate, the Gibsons would, for around £1m, transfer their remaining

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¹ [2012] Issue 12 pp1451- 1458

² See Robert Surtees and Early Victorian Society, Norman Gash, Clarendon Press Oxford, 1993, p.25

(option) land, on which the housing would be built, and the Sprys would transfer the Hall and parkland to Barratt plc. Barratts were to be contractually bound to refurbish the Hall and gardens (at a claimed cost of £6.3m.) and subsequently sell the restored Hall back to the Sprys for £2.77m. This complex process was to be financed by the housing development, valued at £22.7m, which would raise a “super profit” to fill the conservation deficit of £3.5m (representing the difference between what the Sprys would pay as the estimated value of the Hall, and the estimated cost of refurbishment, £6.3m).

ENABLING DEVELOPMENT

The notion of enabling development has grown from its origins in the Royal Opera case³ to justify breaches of settled planning policies where a desired end, particularly heritage asset refurbishment, is considered to justify undesirable means. In the Hamsterley Hall case the proposed housing development was clearly contrary to planning policies, being speculative housing in open countryside of high landscape value, but the refurbishment of the, “at risk”, Hall was a desirable end. The Strategic Planning Committee of Durham County Council, which succeeded the abolished Derwentside DC, rejected its officer’s recommendation to approve the application (the officer had formerly acted for Derwentside DC) and refused planning permission in January 2011.

THE FIRST APPEAL

The applicants’ appeal⁴ was heard at a public inquiry closing on March 13, 2012. In a report dated June 26, 2012 the inspector applied the NPPF, which was introduced subsequent to the closing of the inquiry (opportunity was afforded to all parties to make written contributions in the light of the modified policy base of the NPPF). The appeal was dismissed applying NPPF, paragraph 140, “Local planning authorities should assess whether the benefits of a proposal for enabling development, which would otherwise conflict with planning policies, but which would secure the future conservation of a heritage asset, outweigh the disbenefits of departing from those policies”. The inspector also expressly applied English Heritage Guidance (2008) in

³ R. v. Westminster C.C. ex parte Monahan [1990] 1 QB 87; [1989] JPL 107

⁴ Appeal Ref. App./X1355/A/11/2152787

assessing the development proposal.⁵ These criteria are succinctly expressed in “The Policy”:

Enabling development that would secure the future of a significant place, but contravene other planning policy objectives, should be unacceptable unless:

- (a) It will not materially harm the heritage values of the place or its setting...
- (e) sufficient subsidy is not available from any other source
- (f) it is demonstrated that the amount of enabling development is the minimum necessary to secure the future of the place, and that its form minimises harm to other public interests...

The inspector concluded that despite attaching significant weight to the Hall’s restoration the enabling development could not be approved as such development would materially harm the setting of the Hall and associated Grade II heritage assets (the Old Lodge, entrance gates, pillars and walls). Moreover, important disbenefit was found in the harm which would be caused to the character and appearance of the area which was an unsustainable location for housing. The inspector was not satisfied that it had been demonstrated that the amount of development was the minimum necessary or, related to this, that the development minimised harm to other public interests (see (f) of The Policy, above).

THE AFTERMATH OF THE FIRST APPEAL

No sooner was the ink dry on the inspector’s report than planning officers were in discussions with the developers on a revised application, for 35 houses, on essentially the same site. This may be thought precipitous, given that the inspector had, in refusing the appeal, indicated that “...a lesser number of larger dwellings combined with breaking them down onto smaller sites might well assist in assimilation”, seemingly finding against mass housing on the appeal site. The planning officers were disinclined to apply s.70A of the Town and Country Planning Act 1990, which would have justified a pause for thought.

A RELATED DEVELOPMENT

Following the appeal dismissal the Sprys bought, from the Gibsons, the putative housing site (the option land) together with adjoining pasture land. The also sold their

⁵ Enabling Development and the Conservation of Significant Places, 2nd edn.

existing private residence, some half mile from the Hall, which had been the “home farm” to R.S. Surtees’ estate. In a second deal, land associated with this residence, together with a second dwelling on the land, was sold to a chicken farmer. These transactions effectively rid the Sprys of land which objectors to the enabling development had suggested might be suitable for the scheme. At around the same time as these transactions took place, the Sprys sought permission to convert and extend stables in close proximity to the Hall for use as a family home. A further application sought permission for the creation of a semi-detached pair of cottages for “estate workers” in proximity to the stables and the Hall.

The Derwent Valley Protection Society (DVPS), whose members actively opposed the enabling development proposals, saw the latter two applications as premature because such development would remove the stables/cottages locations as potential sites for more sensitive enabling development. The DVPS submitted that the risk of piecemeal development required that consideration of the stables/cottages proposals should wait resolution of the planning issues relating to the Hall’s restoration.⁶

Under the Durham County Council Constitution the stables/cottages application fell to be decided by an officer alone under delegated power. However, the Constitution provides that a written request by a councillor, made within 21 days of publication of the weekly planning list, would “call-in” applications for planning committee decision. There is also power vested in the chief planning officer to refer to committee if he considers the planning matters likely to have a significant impact on the environment or were by their nature particularly controversial.⁷

A local councillor did request referral to committee but owing to delays in case officer-supplied information the request missed the 21 day deadline by one day. Despite an urgent request, planning officers maintained that there was no “wriggle room” and refused to recognise that the Council had discretion to countenance a referral outside the 21 day period. Furthermore, despite trenchant argument that the relationship between the stables/cottages proposal and the wider issue of the Hall’s future meant the applications were “significant and particularly controversial” the chief planning

⁶ Rugby School Governors v. Secretary of State for the Environment [1975] JPL 97

⁷ Constitution, Table 4, Delegations, paras 13 (a) and (e)

officer declined reference to the planning committee.⁸ The stables/cottages application was approved, without a “worker’s condition”, by an officer acting alone under delegated power.

The DVPS referred the Council’s refusal to recognise that it had discretion to mitigate the rigour of the 21 day deadline to the Local Ombudsman. After a protracted process the Ombudsman agreed that the Council had indeed “fettered its discretion” in failing to recognise that it had a power to recall a decision to Committee before its officer had exercised a delegated power. In short, the 21 day period was not mandatory in character. In a disappointingly weak analysis the Ombudsman concluded that as the officer was aware of the DVPS representations on the planning issues there was no injustice. This must be viewed as unsatisfactory because the basis for the Ombudsman reference was that the DVPS had suffered injustice in being deprived of opportunity to express its case to the planning committee. The Ombudsman did, however, state in her decision letter: “I have asked the Council to consider making changes to this policy to ensure it is not fettering discretion in future”.⁹ Sadly the Ombudsman’s request has not resulted in formal constitutional change albeit, at officer level, error has been acknowledged.

These events may be seen to have heightened significance in the light of the subsequent revised appeal, the details of which are now related.

THE REVISED APPLICATION FOR ENABLING DEVELOPMENT

On the casting vote of the chairman rejecting the case officer’s recommendation to approve, the new application for 35 houses was refused. An appeal was lodged against this refusal, with a starting date of 8th December 2014, accompanied by a request that it be dealt with by Written Representations. This request was acceded to by the Council but third parties, including the local M.P., strongly objected. These objections were dismissed and an inspector was appointed. However, in a late change, on 27th April 2015, the dates 29th and 30th June 2015 were set for the appeal to be considered using the Informal Hearing Procedure.

⁸ The original enabling development proposal had attracted over 100 letters of objection which included one from the local M.P.

⁹ Ombudsman’s Report 30th January, 2014

THE REVISED APPLICATION APPEAL PROCESS

In a letter of 8th December 2014 the “starting date” for the appeal was set and interested parties were given until 12th January 2015 to make additional comments to those submitted at the application stage. The appellants were given a further period to comment on these submissions and, indeed, produced a further Rebuttal Statement dated 10th February 2015. In the event, because the Written Representations procedure was replaced by the Informal Hearing, third parties were able to correct inaccuracies and erroneous claims in the Rebuttal Statement. This corrective would not have occurred had the Written Representations procedure been maintained.¹⁰

THE INFORMAL HEARING

The Hearing, on 29th June 2015, lasted one day with an accompanied site visit the following day. It was agreed by all participants that the Hearing should close on 29th June and therefore there were no further discussions “on site”.

In preliminary proceedings the inspector confirmed that the emerging Local Plan, the County Durham Plan, which had been the subject of a critical “Summary of interim views”, was no longer to be relied upon as the Plan-making process had halted. The Plan had proposed encompassing the appeal site within an extended Green Belt and also that the site should be returned to an earlier designation as “Historic Parkland”. The Council’s objection to the enabling development on grounds of prematurity, in view of the advanced stage of the County Durham Plan, was withdrawn.¹¹ However, Saved Policies of the Derwentside Local Plan were, as in the first appeal, confirmed to be consistent with the NPPF and directly applicable.

Main issues to be decided

The main issues were identified by the inspector as the effect of the proposal on the character and appearance of the surrounding countryside; the effect on the setting of nearby heritage assets; the suitability of the site for housing having regard to policies on sustainable development; whether the amount and type of proposed enabling

¹⁰ See later on alternative sites, analysis *Combermere Abbey*.

¹¹ NPPF Annex I: Implementation, paragraph 216, “the more advanced the preparation, the greater the weight that may be given”.

development was justified having regard to the listed status of Hamsterley Hall; and any public benefits arising from the scheme.

THE INSPECTOR'S REPORT AND DECISION

The inspector's decision was issued on 29th December 2015, six months to the day of the Hearing.

Character and Appearance

Agreeing with the previous inspector, the inspector was unable to conclude that particular attention had been paid to the landscape qualities of the Area of High Landscape Value and that the proposal failed other policies requiring that development in the countryside should be sensitively related to the landscape, preventing encroachment into the countryside. These local plan policies do not differ from those set out in the NPPF.

Setting of Listed Buildings

Once again, the proposal was found to be harmful to the setting of "other heritage assets" (the Old Lodge etc.), as well as to the historic setting of the Hall itself. This harm was assessed as "less than substantial" for the purposes of paragraph 134 of the NPPF, which requires such harm to be weighed against public benefits.¹²

Sustainability

Once more the proposal was found not to amount to sustainable development, being in the open countryside where it would be largely reliant on private transport and make little contribution to sustaining local facilities; largely it appeared owing to the absence of any such facilities. In short, for the purposes of paragraph 8 of the NPPF the proposal would have little social cohesion with the existing community, be remote from services and facilities and be harmful to local landscape character and visual amenity. Paragraph 55 of the NPPF was, however, noted as recognising that enabling development may be likely, by its very nature, to be located in a rural area and that this fact should be considered in weighing the scheme in the overall balance.¹³

¹² Paragraph 133 of the NPPF provides, inter alia, in the case of "substantial harm" authorities should refuse consent in the absence of "substantial public benefits" that outweigh the harm.

¹³ Paragraph 8, NPPF "...to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system".

Justification for an enabling development, the amount and type

At the Hearing, in response to the inspector's questions, Mr Spry confirmed that the Hall and most of the surrounding land was purchased with the intention of making it a family home "but with an enabling development in mind". This is perhaps a singular admission as the Spry family, being property developers, accepted that a housing development contrary to policy was a fundamental aim and not, it appears, a "subsidy of last resort" as required by the HE Guidance.¹⁴ The inspector's finding on the first appeal that English Heritage declined grant aid, in part, because funds might be achieved through the proposed enabling development earned the inspector's comment that such a ground for grant refusal "sits uneasily with the HE Guidance that enabling development is a subsidy of last resort".

In the first appeal, the inspector found that there was "an imbalance between the conservation deficit and residual profit" from the proposed enabling development and hence criterion (f) of the HE Guidance was not satisfied.¹⁵ On the second appeal, the inspector accepted that 35 units were the minimum required to repair the Hall so as to remove it from the Buildings at Risk Register and that the concerns of the previous inspector had been addressed. This would leave further works to render the Hall fit for use as a dwelling to be funded by the Sprys.

However, the inspector explained that

the avoidance of loss of a heritage asset does not mean that any enabling development is acceptable. Rather, securing its future, including by means of enabling development requires to be assessed under NPPF paragraph 140, in the light of the HE document. To this end, the HE Enabling document explains that before any enabling development is considered, active marketing for a minimum period of six months should normally be undertaken to try to secure a viable future use.

It is, of course, unsurprising that there had been no active marketing of the Hall as the Sprys always expressed an intention to occupy it as a private dwelling. Indeed, the controversial stables/cottages development (now wholly occupied by the Spry family) renders effective marketing of the Hall an unrealistic proposition. The inspector concluded that the Statement of Common Ground between the appellants and Historic England acknowledged that enabling development should always be seen as a

¹⁴ HE Guidance s.4.7

¹⁵ See above.

subsidy of last resort but that in the absence of a marketing exercise it had “not been demonstrated that enabling development would be the measure of last resort and the only means by which the future of the heritage asset may be safeguarded”.

Possible funding by grant must always be assessed before an enabling development should be contemplated.¹⁶ Evidence in this second appeal established that English Heritage and the National Heritage Lottery refused funding, citing insufficiency of public access as inimical to an award. The National Heritage Lottery firmly stated that any renewed application would need “to demonstrate a step change in terms of public access and engagement with the heritage”. Having refused grant aid, however, HE supported the enabling development proposal, arguing that the “urgent need to repair the property outweighed the “preference” for marketing the Hall. The inspector was unimpressed.

The Balancing Exercise

The main public benefit that would arise from the proposals would be the restoration of the Hall and this was accepted to “weigh heavily in favour”. A section 106 agreement covered various related issues such as an annual Red Cross charity weekend and educational access subject to the owner’s discretion. These community benefits were acknowledged to attract moderate weight.

In contrast, there was moderate harm to the AHLV affecting both the landscape and its visual character. Less than substantial harm arose in relation to the Hall itself. Such harm also arose in relation to the various associated heritage assets (the Old Lodge etc.) in their setting. Such harmful consequences were to be aggregated with weight given to the desirability of preserving the settings of listed buildings.¹⁷ The proposal did not amount to sustainable development although this harm could be given reduced weight in the context of enabling development related to a country estate.¹⁸ Applying paragraph 140 of the NPPF, the balancing exercise weighed against the proposal.

Although this adverse finding on the balancing exercise was undertaken following a second in-depth assessment of the appeal site, it may be felt that the failure to

¹⁶ See (e) of the HE Policy above.

¹⁷ See s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990

¹⁸ Paragraph 55, NPPF]

demonstrate that the enabling development was the only means of securing the future of the Hall would have been fatal in itself.

ANALYSIS

1. This decision has confirmed the view of the first inspector that no matter how the appellants may argue the urgency of their case, it remains for them to demonstrate an acceptable site and that the least unacceptable will not do.
2. The DVPS sought to demonstrate that the Sprys had removed from their portfolio more acceptable sites and, indeed, that the land bank of the joint appellant Barratt plc ought to have been considered. The Development Director for Barratt/David Wilson Homes maintained that there was no such available land bank despite the published accounts of Barratt Developments plc showing £4.5bn spent on land acquisition since 2009.¹⁹ But a search for a more remote site may be worthwhile.
3. The appellants' Rebuttal Statement of 10th February 2015 asserted, relying upon the "Combermere Abbey Appeal decision 2005", that "removing ownership from the equation would lead to difficulties" and that: "It is entirely appropriate to only consider land within the same ownership as the heritage asset in need of enabling development." However, this reference to the "Combermere Abbey Appeal decision 2005" failed to take account of the 2013 Appeal on the Combermere Abbey enabling development.²⁰ Here, enabling development was approved on land in separate ownership from the Abbey some three miles distant. The Abbey, a private house, is to be open to the public 40 days each year. It is difficult to avoid the conclusion that there was an unwillingness to acknowledge the first inspector's view, in rejecting the original scheme, that "a lesser number of larger dwellings combined with breaking them down onto smaller sites" may facilitate assimilation.
4. There appears to be considerable policy resistance to "throwing the baby out with the bathwater". An adverse impact upon heritage assets that would arise from enabling development is given significant weight.²¹

¹⁹ Annual Report and Accounts 2012

²⁰ APP/R0660/A/12/2179033, January, 2013

²¹ See s.66, Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990

5. Despite the simple expression of the balancing test in paragraph 140 of the NPPF, the detailed HE Guidance remains a vital policy tool. The inefficiency of enabling development lies at the heart of the stricture that enabling development must be seen as a subsidy of last resort. In the first appeal the development value was some eight or nine times the conservation deficit, in this case a conservation gap of £3-3.5m. required enabling development valued at over £17m., amounting to some five or six times the conservation deficit. This deficit does, of course, include a significant element of developer's profit. It may be conjectured that the Hall's owners, as property developers, will be able to effect restoration at considerably less cost than the projected commercial scheme.
6. Whilst it was accepted by the inspector that single ownership of the Hall was the optimal use, it may be questioned whether this would be a realistic model for future security. In the Hall's 19th century role as the centre of Surtees' estate of farms, collieries, railways and forestry extending to over 2,000 acres, the Hall functioned as an administrative headquarters and not as a sequestered luxury residence. Use as a mere residence deprived of its estate coincided with the Hall's 20th century decline.
7. The piecemeal development of the stable/cottages may be viewed as a fatally flawed decision. It is difficult to envisage a realistic marketing of the Hall with the constraints on development in its proximity which the stables/cottages entail.
8. There may be perceived a need for caution as to the role of HE, which would deny funding to an ailing heritage asset because of a lack of public access, yet support enabling development at the expense of public amenity.

The events associated with enabling development proposals for Hamsterley Hall should be seen as a cautionary tale for those tempted to seek the cover of a conservation deficit as the key to access development in open countryside.