

ENABLING  
DEVELOPMENT  
AND THE CONSERVATION  
OF SIGNIFICANT PLACES



ENGLISH HERITAGE



# FOREWORD

In June 1999, English Heritage published a policy statement, *Enabling Development and the Conservation of Heritage Assets*, advocating a presumption against enabling development unless it met specified criteria, the most important of which was that the benefits should clearly outweigh the disbenefits. In June 2001, we republished the policy statement, supported by *Practical Guidance* to planning authorities on the assessment of applications – and so, of course, to owners and developers on what they should submit by way of justification.

The value of the first edition of this guidance was demonstrated by the speed with which it was taken up and applied by owners, developers, planning authorities, and the Planning Inspectorate.

Key aims of this second edition (which formally replaces the first) have been to update terminology, following publication of our *Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment*, as well as references to legislation (particularly the change to Local Development Frameworks), case law, and decisions on appeal or call-in.

The guidance now concentrates on those areas of practice that are particular to enabling development (and by extension other proposals where financial viability is a key issue), rather than common to most proposals affecting significant places, on which other guidance is now available. We have expanded coverage of topics particularly associated with enabling development, including historic entities, farm buildings, levels of restoration, and taxation.

I hope that this edition will prove even more helpful to practitioners.



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# INTRODUCTION

English Heritage remains concerned by the potential for damage by developments contrary to established planning policy, put forward primarily as a way of benefiting significant places,<sup>1</sup> but which destroy more than they save. Our policy and guidance are intended to:

- ensure that we offer consistent advice on those proposals for enabling development relating to significant places that are referred to us for advice;
- encourage a rigorous approach by planning authorities to the assessment of proposals for enabling development affecting any significant place; and
- help those seeking consent for enabling development, by making them aware of the tests that are likely to be applied and the extent of the supporting information required.

This policy and guidance applies only to development contrary to established planning policy, not proposals to secure the future of significant places that are in accordance with the local development framework and national policy (see 2.1.2). The policy itself now sits within the framework provided by English Heritage's *Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment* (2008), which promotes a values-based approach to assessing heritage significance. The detailed practical guidance provided here should be applied within the context provided by the *Principles*. Both documents are intended to amplify and reinforce, and should be used in conjunction with, the well-established criteria set out in PPG 15, *Planning and the Historic Environment* and PPG 16, *Archaeology and Planning*.

The Guidance is applicable to enabling development of any scale, but should be applied, and advice sourced, in proportion to the scale and complexity of the project. We encourage the evolution of enabling development proposals through pre-application discussion, so that applicants do not waste resources on schemes unlikely to be justifiable, that proposals are submitted with the necessary supporting information, and that determination is not unduly protracted. If, during pre-application discussion, it appears to an authority that it is unlikely that a case for enabling development can be substantiated, the applicant should be so informed at the earliest possible opportunity, to avoid futile expenditure on both sides. While the assessment process can be complex, it should be pursued with all reasonable speed, particularly if the place concerned is deteriorating at a significant rate.

<sup>1</sup> *Significant place* is used in this statement, in succession to 'heritage asset', as shorthand for any part of the historic environment that has heritage value, including but not limited to scheduled monuments and other archaeological remains, historic buildings (both statutorily listed or of more local significance) together with any historically related contents, conservation areas, parks and gardens either registered or forming the setting of a listed building, and registered battlefields.

## 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**
- b it avoids detrimental fragmentation of management of the place**
- c it will secure the long-term future of the place and, where applicable, its continued use for a sympathetic purpose**
- d it is necessary to resolve problems arising from the inherent needs of the place, rather than the circumstances of the present owner, or the purchase price paid**
- 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**
- g the public benefit of securing the future of the significant place through such enabling development decisively outweighs the disbenefits of breaching other public policies.**

If it is decided that a scheme of enabling development meets all these criteria, English Heritage believes that planning permission should only be granted if:

- a the impact of the development is precisely defined at the outset, normally through the granting of full, rather than outline, planning permission
- b the achievement of the heritage objective is securely and enforceably linked to it, bearing in mind the guidance in ODPM Circular 05/05, *Planning Obligations*
- c the place concerned is repaired to an agreed standard, or the funds to do so are made available, as early as possible in the course of the enabling development, ideally at the outset and certainly before completion or occupation
- d the planning authority closely monitors implementation, if necessary acting promptly to ensure that obligations are fulfilled.





# Summary

## **Section 1**

Enabling development is development that would be unacceptable in planning terms but for the fact that it would bring public benefits sufficient to justify it being carried out, and which could not otherwise be achieved. The key public benefit to significant places is usually the securing of their long-term future. To minimise the need for enabling development, local authorities should monitor the condition of their significant places and where necessary use their statutory powers to limit deterioration.

## **Section 2**

The complex task of assembling (by the applicant) and assessing (by the planning authority) an application for enabling development may be assisted by exception policies in local development frameworks. Planning briefs prepared as Supplementary Planning Documents are helpful for problematic places. Both applicants and planning authorities need access to the right range of professional skills from the outset. English Heritage encourages pre-application consultation about enabling development affecting nationally important places.

## **Section 3**

Where the appearance of enabling development is crucial to its acceptability – as it normally is – outline planning applications are not appropriate. Full information is necessary not just to demonstrate physical impact, but particularly to establish and quantify need, since the financial considerations involved are fundamental to the decision. Local authorities are empowered to demand it. Enabling development is a type of public subsidy, and so should be subject to the same degree of financial scrutiny, transparency and accountability as cash grants from public sources.

## **Section 4**

Understanding the nature and significance of the place is fundamental to any decision about its future, and needs to develop in parallel with the evolution of proposals. Assessment is ideally an interactive process between planning authority and applicant, but it should also involve the communities who may be affected by the development. Uses or management strategies must not only be compatible with the historic form, character and fabric of the place, but be financially viable. This means either that the place must have a positive market value on completion of repair and return to beneficial use, or there must be clarity about who will take responsibility for it in the long term. A solution that does not provide the means of meeting recurrent costs that cannot be generated by the place itself is no solution at all. If fragmentation of ownership is unavoidable, an overall management plan should be put in place.

The case for subsidy through enabling development normally depends upon the cost of repair and conversion to beneficial use being greater than market value on completion of those works. Market testing is normally the first step in establishing the need for subsidy, unless the place forms part of a larger 'historic entity' whose break-up and sale would greatly harm its significance. In such cases enabling development can legitimately be used to improve the long-term viability of the entity. Exceptions for certain traditional buildings in the countryside may sometimes be justified.

## **Section 5**

Establishing and quantifying need is at the heart of any application for enabling development. Specialist expertise is required to judge whether the extent of works proposed, the costs, the profit levels, and the anticipated final values are fair and reasonable. Detailed guidance on understanding and scrutinising the figures is provided. Establishing site value is considered in detail, against a presumption of zero if the place will cost more to repair and convert than it will be worth on completion. The basis of judging a fair developer's profit is considered, together with taxation issues and the need to limit restoration to the minimum necessary.

## **Section 6**

The process of decision-making, its transparency, and the clarity of the reasoning underlying it are particularly important when the interests of many stakeholders and a public subsidy are involved. Significant places are a finite and irreplaceable resource. Sustaining them is thus a high priority, but the disbenefits must be proportionate to the heritage values of the place. If the balance of advantage clearly lies in approval, planning permission should be granted.

## **Section 7**

Success depends on the benefits of the proposal being properly secured. Legally enforceable arrangements must be put in place to ensure that the commercial element of the development cannot be carried out or used until the heritage benefits have first been delivered, or there is a bond in place to ensure performance. This will normally require a 'section 106 agreement', which, where appropriate, should also secure management arrangements to protect the significance of the place in the long term.

## **Section 8**

The implementation of the development, and the delivery of planning obligations and discharge of conditions, needs to be actively and formally monitored by the local planning authority. Breaches of obligation or condition must be addressed as soon as they occur. When the scheme is complete, the outcome should be compared with expectations, and the results should inform future decision-making.

# I The concept of enabling development

## I.1 Definition and scope

**I.1.1** 'Enabling development' is development that would be unacceptable in planning terms but for the fact that it would bring public benefits sufficient to justify it being carried out, and which could not otherwise be achieved. While normally a last resort, 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, provided it is satisfied that the balance of public advantage lies in doing so. The public benefits are paid for by the value added to land as a result of the granting of planning permission for its development.

**I.1.2** Enabling development is not a statutory term, but was confirmed as a legitimate planning tool in 1988 when the Court of Appeal, in *R v. Westminster City Council ex parte Monahan*, upheld the validity of a planning permission authorising office development, even though contrary to the development plan, on the basis that it would provide funds to improve the Royal Opera House, Covent Garden, unobtainable by other means.

**I.1.3** The vast majority of significant places survive because they are capable of beneficial use. Their maintenance is justified by their usefulness to, and appreciation by, their owners, not just value in the property market, either in their own right or as part of a larger entity. An historic garden, for example, normally adds to the amenities and value of a house. The problem which enabling development typically seeks to address occurs when the cost of maintenance, major repair or conversion to the optimum viable use of a building is greater than its resulting value to its owner or in the property market. This means that a subsidy to cover the difference – the 'conservation deficit' – is necessary to secure its future.

**I.1.4** The scale and range of an enabling development proposal can vary greatly. Whilst often associated with residential development to support the repair of a country house, it can include, for example, an extension acceptable in historic building terms, but exceeding the maximum permitted under development plan policies in rural areas. Alternatively, it could involve a change of use, compatible with the character and appearance of an historic building, but otherwise contrary to policy.

**I.1.5** In *Northumberland County Council-v-Secretary of State for the Environment* (1989) JPL 700, 702, it was held that the land to be benefited does not have to be in close proximity to the land which is the subject of the application. Enabling development may therefore be proposed on some distant site in the same ownership as well as within the place or its setting; but in practical terms it will normally be within the same local planning authority area. Distant sites have the obvious advantage of avoiding any harm to the significant place or its setting.

## I.2 Reducing the need for enabling development

**I.2.1** The need for major funds to secure a sustainable future for a place often arises because its condition has been allowed to deteriorate over a long period. Functional redundancy, leading to the need to find the optimum viable new use, is often blamed for this. But

while it is an inevitable part of the life cycle of many significant places, it is not inevitable that it should lead to rapid decay, and the vandalism which an abandoned building tends to attract.

**1.2.2** In far too many cases the conservation deficit, and hence the need for subsidy through enabling development, would either not have arisen or would have been much smaller<sup>2</sup> if:

- the owner had taken timely action to prevent or limit deterioration, or in default, the planning authority had used its statutory powers promptly; and/or
- the planning authority had adopted a supplementary planning document when it was clear that the problem would arise.

It should be self-evident that in areas of England where property values are relatively low, a conservation deficit arises much earlier in the spiral of decay, further emphasising the need for a rapid response to emerging problems.

**1.2.3** PPG15, *Planning and the Historic Environment* (para 7.1) emphasises that ‘regular maintenance and repair are the key to the preservation of historic buildings. Modest expenditure on repairs keeps a building weathertight and routine maintenance . . . can prevent much more expensive work being necessary at a later date. Major problems are very often the result of neglect, and, if tackled earlier, can be prevented or reduced in scale. Regular inspection is invaluable.’

**1.2.4** This advice is, in principle, appropriate to sustaining any significant place. In *Buildings at Risk – A New Strategy* (1998), English Heritage stressed the importance of local planning authorities monitoring the condition of their listed building stock and taking preventative action as soon as a place shows significant signs of neglect, not waiting until it is *in extremis*. It is vital to use persuasion, backed up by Urgent Works and, if appropriate, Amenity (s215) Notices, to stem neglect at an early stage, and prevent further deterioration while a long-term solution is found. *Managing Local Authority Heritage Assets* (English Heritage 2003) stresses the need for local authorities to set a good example to others.

**1.2.5** *Stopping the Rot* (English Heritage 1998) provides a practical, step-by-step guide to serving Urgent Works and Repairs Notices; *Town and Country Planning Act 1990 Section 215: Best Practice Guidance* (DCLG 2005) may also be helpful. English Heritage is aware of the problems that planning authorities can face in using their statutory powers and can offer grants to underwrite the irrecoverable costs of serving Urgent Works Notices in respect of buildings listed Grade I or II\*, Grade II in conservation areas or anywhere in Greater London, and Repairs Notices in respect of any listed building. Details and application forms are available from English Heritage.

### **1.3 Insurance**

**1.3.1** English Heritage has emphasised elsewhere the need for owners to maintain adequate insurance (*Insuring Historic Buildings*, 2008). Enabling development is not justified by the owner’s insurance being inadequate to meet the cost of repair and reinstatement following a normally insurable loss.

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2 The problem of owners separating assets from liabilities is considered at Section 4.5 below.

## 2 Roles and responsibilities

### 2.1 The role and responsibilities of the planning authority

**2.1.1** As English Heritage set out in *Development in the Historic Environment* (1995), ‘local authorities have a responsibility to conserve the cultural built heritage in their areas, through the use of their planning powers and appropriate management of the physical resource’. Such management demands, particularly:

- the availability of expert professional advice, generally from specialist conservation staff with appropriate expertise, and/or from external consultants
- a detailed local policy framework, based on the local development framework, for the management of significant places, identifying opportunities as well as constraints.

**2.1.2** In relation to particular proposals, it was established in *R (on the application of Young) v Oxford City Council* CA 2003 JPL 232 that a local authority should first consider whether any proposed development would be acceptable, in planning terms, on its merits, as being in accordance with policy. If it is not acceptable because it would be in breach of policy, then it should be considered ‘as enabling development within the meaning of the [English Heritage] policy statement. That would involve a consideration of the policy statement and its application to the facts of the case.’<sup>3</sup>

### 2.2 Enabling development and the local development framework

**2.2.1** Since enabling development is by definition contrary to policy, local development frameworks can do no more than set out the criteria against which such applications will be assessed. Local authorities should consider doing so by reference to English Heritage policy in their development plan documents, particularly if they are aware that enabling development is likely to be proposed as a means of securing the future of significant places. The inclusion of such a policy does not obviate the need to refer to the Secretary of State for Communities and Local Government, as a departure application, any proposed enabling development considered against its criteria, if the authority becomes minded to approve it.

‘It is important that clear policies are formulated for cases where new development is proposed in order to provide income for the upkeep of historic buildings’.  
(PPG 15, para 2.8)

**2.2.2** Owners may propose, through the local development framework process, site-specific provision for enabling development in development plan documents on the grounds that it would help, or even be essential, to secure the future of a significant place. Such proposals should be resisted, since optimum uses, costs and values

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<sup>3</sup> See Mynors, C, *Listed Buildings, Conservation Areas and Monuments*, 4th edition (2006, London: Thomson), p 490, quoting [2002] 3 P.L.R. 86 CA

fluctuate over time. The case for enabling development can only be properly considered in the context of a specific application; and if a case is made, a binding and enforceable link to its heritage objective is a prerequisite to a grant of planning permission.

- 2.2.3** Moreover, site-specific provisions run the risk of becoming development in accordance with the statutory plan. By definition it would not be enabling development, and so could not be securely and enforceably linked to benefit to the place. Any link would depend on the goodwill of the owner; and owners, and their circumstances, can change in quite unforeseeable ways.

## **2.3 The importance of planning briefs**

- 2.3.1** Many proposals for enabling development concern vulnerable places whose future or sustainability has been a matter of concern for some time. Local authorities should consider preparing planning briefs (as Supplementary Planning Documents) for those where enabling development is likely to be put forward as a solution, preferably prior to their coming on to the market. Seizing the initiative puts the authority in proactive rather than reactive mode; but the absence of a brief should not delay consideration of a planning application on its merits.

- 2.3.2** The brief, whilst making clear that a solution will not necessarily involve enabling development, should:

- include at least an outline assessment of the character and significance of the place, together with any studies already undertaken, for example conservation area appraisals and other landscape assessments that put the place in context
- summarise the physical and policy constraints, including their management and maintenance implications
- draw attention to any opportunities, while avoiding advocating specific development proposals
- set out the aims and concerns of the authority and community
- give an indication of the kinds of issue that may need to be the subject of planning obligations, or where the authority's usual requirements in this regard might be waived (see 6.1.4)
- list the information that would be necessary to support a planning application (Appendix I of this Guidance should serve as a starting point).

- 2.3.3** Such a brief will provide the basis for preliminary discussion with potential new owners or developers, and should serve as a clear deterrent to acquisition on the basis of unjustified 'hope value'.

## **2.4 The role and responsibilities of the developer**

- 2.4.1** The statement of the responsibilities of developers (including private owners seeking planning permission) set out in *Development in the Historic Environment* (English Heritage 1995) is generally relevant to those proposing enabling development. They should:

- most importantly, hold pre-purchase discussions with the local planning authority, to avoid unrealistic expectations

- be fully aware, through commissioning the necessary expert advice and an adequate assessment of the place, of its heritage values in its contexts, and thus the opportunities and constraints
- explore a range of alternative development strategies
- set a realistic timescale for the proposed development, especially for preparing and submitting applications
- seek early, pre-application consultation with all who are likely to have a significant interest
- provide the local planning authority with clear, detailed proposals, supported by relevant and adequate information on the likely impact of the application
- demonstrate that the guidance in government policy and the statutory plan has so far as possible been followed
- propose an appropriate mitigation strategy to address any unavoidable harm
- be prepared to enter into any related legal agreements, such as a section 106 agreement, necessary to tie the implementation of the proposals to securing the future of the place.

## 2.5 Professional advice

**2.5.1** Many problems arise for both owners and local authorities when they do not have access to professional advisers with appropriate experience in dealing with the historic environment.

**2.5.2** The process of understanding a place and systematically developing an appropriate scheme requires a range of professional skills. This does not mean that every project requires a battery of specialists, but it is essential to have the range and depth of skills and experience to understand the place and its significance, and to develop options that respond sensitively to it within the framework of planning policies for the historic environment. As well as first-rate design skills, specific expertise in, for example, architectural and landscape history, archaeology and ecology may be needed. The local authority should be willing and able to provide advice to developers on the specialist skills necessary for a particular project, a brief for the information required, and a justification for their requirements.

## 2.6 The roles of English Heritage and statutory consultees

**2.6.1** English Heritage is the government's adviser on the historic environment. We encourage pre-application consultation with our regional teams about any proposal for enabling development that concerns a nationally important heritage asset, and on draft Supplementary Planning Documents or planning briefs intended to inform such proposals, in accordance with *A Charter for English Heritage Planning and Development Advisory Services* ([www.english-heritage.org.uk/planningadvice](http://www.english-heritage.org.uk/planningadvice)). Most of these cases will be subject to statutory consultation with, and formal advice by, English Heritage after a planning application is made. The *Charter* gives details of regional contact points and the information that should be submitted.

**2.6.2** It will usually be helpful to engage with the relevant national amenity societies about major or potentially controversial proposals at pre-application stage, rather than awaiting their response, as statutory consultees, to formal applications.

# 3 The legal basis for requiring the justification necessary to determine planning applications

## 3.1 Preamble

**3.1.1** It is of the essence of enabling development that a scheme that would otherwise be unacceptable in planning terms is necessary to generate the funds needed to secure the future of a significant place. It is entirely appropriate, therefore, to require applicants to provide evidence to the local planning authority in support of such a claim, particularly financial evidence.

## 3.2 Applications for planning permission

**3.2.1** 'Planning permission should only be granted if . . . the impact of the development is precisely defined at the outset, normally through the granting of full rather than outline planning permission' (Policy, p 5). The appearance of the enabling development is often crucial to its acceptability, and it may have a significant impact on the significance of the place, for example by affecting a registered park or garden. In such cases outline planning permission with substantive matters reserved for later approval is not appropriate. The 'illustrative material' may be convincing, but it cannot be regarded as representing how the scheme would appear when built. If, for example, implementation involves onward sale, a new developer may bring forward standard house types, larger buildings or substitute materials, which will be difficult to resist if the principle of development has been conceded, and appearance was not clearly at the heart of the original decision. The professional team may change, leading to dilution of the quality or integrity of the design, despite these factors being considered crucial to making the development acceptable. Highways requirements with regard to access and sight lines may have a quite disproportionate effect on the integrity of the place. It is essential, therefore, that the decision is based on a full understanding of the impact on the place and its setting.

**3.2.2** Local planning authorities have general powers in Regulation 4 of the Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812) to direct an applicant for full planning permission to:

- supply any further information, including plans and drawings, necessary to enable them to determine an application; and to
- provide one of their officers with any evidence in respect of the application as is reasonable for them to call for to verify any particulars of information given to them.

**3.2.3** This power of direction is wide ranging, and free of any particular procedural requirements save that the direction must be in writing. Local planning authorities are urged, therefore, to issue such directions if any information that is needed to justify the proposal is not otherwise forthcoming. If such directions are not

complied with, then in all probability the applicant will not have demonstrated that the harm inherent in a scheme of enabling development is outweighed by the benefits. Accordingly, refusal of planning permission is likely to be appropriate.

**3.2.4** Separate provisions, in article 3(2) of the Town and Country Planning (General Development Procedure) Order 1995 (SI1995/419), apply to outline planning applications. If a local planning authority is of the opinion that an outline application ought not to be considered separately from all or any of the reserved matters, then the applicant must, within one month, be notified that the local planning authority is unable to determine the application unless further details are submitted as specified.

**3.2.5** If an application is made in outline, the local authority should use the provisions in article 3(2) to ensure that the potential impact on the place is fully defined. The temptation to grant outline planning permission on the basis that a scheme of enabling development appears acceptable as a broad matter of principle should normally be avoided; exceptions will tend to be enabling development on sites distant from the significant place.

### **3.3 Associated applications, including listed building consent or scheduled monument consent**

**3.3.1** Applications for planning permission for enabling development concerning listed buildings, including changes of use, should normally be accompanied by any necessary applications for listed building consent, so that the impact on their special interest will be clear (PPG 15, para 2.12). This will not only allow the effect of the development on the listed building to be given proper and full consideration, but also avoids any suggestion being made, however mistakenly, that the granting of listed building consent has been pre-empted by an earlier grant of planning permission.

**3.3.2** Paragraph 3.4 of PPG 15 explains that it is for applicants for listed building consent to justify their proposals and show why the works in question are desirable or necessary. PPG 16, para 22, states that 'authorities can expect developers to provide the results of . . . assessments and evaluations as part of their application'. As part of this responsibility, applicants should provide the local planning authority with full information to enable them to assess the likely impact of proposals.

**3.3.3** If the enabling development is in support of, or involves, work to or on a scheduled monument, application to the Department for Culture, Media and Sport for scheduled monument consent should be made in parallel with any planning application, and the application copied to the local planning authority dealing with the planning application.

**3.3.4** Other consents may be needed, particularly for work in historic landscapes, for example a felling licence or consent under a Tree Preservation Order in respect of trees, operations in an SSSI, or in relation to protected species. It is important that either such consents are sought in parallel with planning permission, or it has been established that the relevant criteria can be met, so that the overall impact of the proposal is clear, and the enabling development scheme as a whole, if granted planning permission, is capable of implementation.

### **3.4 Environmental Impact Assessment (EIA)**

Projects may require an EIA if they fall within a description listed in the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293). The Regulations provide a systematic procedure for assessing the environmental implications of development likely to have significant environmental effects. Projects listed in Schedule 1 to the Regulations must always be subject to an EIA; those within Schedule 2, which are more likely to be proposed as enabling development, require an EIA if they are likely to have significant effects on the environment by virtue of factors such as size, nature or location. For further information see DETR Circular 2/99, *Environmental Impact Assessment*.

### **3.5 Transparency and accountability in decision-making**

**3.5.1** Enabling development is often seen as being an alternative to public funding; but arguably, it is more akin to a type of public funding. The idea of the community losing one asset to acquire a greater one is analogous to that of individuals paying taxes to acquire the right to public goods and services – including the conservation of the historic environment. The essential difference is that the community pays in kind which is converted to cash, rather than cash itself. On this premise alone, enabling development should be subject to the same degree of financial scrutiny, transparency and accountability as cash grants from public funds, or indeed all financial and quasi-financial decisions made by public authorities. The exercise of due diligence is essential.

### **3.6 Financial information**

**3.6.1** Financial considerations are fundamental to any decision about enabling development. From this follows a need not only for financial justification to be submitted, but also for its critical assessment by appropriately qualified professionals. The local planning authority should ensure that it has sufficient information to make an informed decision upon the application. If it fails to do so, its decision may be vulnerable to judicial review, and less likely to be supported on appeal.

**3.6.2** The information supplied should cover all financial aspects of the proposed enabling development, at a sufficient degree of detail to enable scrutiny and validation by the local authority and its professional advisers. This applies both to the definition of need – the condition of the place and the means and cost of addressing its problems – and the definition of the scale of development necessary to meet that need. It must also be demonstrated that sufficient funds are not realistically available from any other source, particularly grant aid.

### **3.7 The cost of critical assessment**

**3.7.1** If a local planning authority does not have the full range of expertise in house to assess the financial justification and the assessment of the needs of the place submitted in support of an application for enabling development, it will be necessary to involve external consultants. The principle is exactly analogous to the common use of consultant engineers to check structural calculations submitted in support of applications for Building Regulation approval.

**3.7.2** Critical assessment inevitably involves some expense. An applicant who believes that the figures support a case for enabling development may agree to meet or contribute to the cost, which then becomes part of the overall development costs (see 5.9.1). However, the refusal or inability of an applicant to contribute does not avoid the need for scrutiny, nor can it be taken to imply that their case is not well founded. If a contribution is offered, it is of course essential that the appointment is made directly by the local authority, uninfluenced in any way by the applicant.

## **3.8 Confidentiality**

**3.8.1** Applicants may well be reticent about providing financial information that is commercially sensitive, or claim that information that they would prefer not to provide is commercially sensitive. However, confidentiality cannot outweigh the need for proper financial information where the financial case is at the heart of the applicant's submission. It will normally be appropriate to treat such information supplied in pre-application discussions in confidence, especially where a place is being competitively marketed. There are provisions in Part VA of the Local Government Act 1972 which allow 'exempt information', including financial information of this kind, to be considered by local authority committees in private session. But once a planning application is made, such an approach effectively negates the ability of third parties to come to a view as to whether or not the benefits outweigh the disbenefits, which of itself may generate opposition.

**3.8.2** Ultimately, the applicant must decide whether the possible success of the application justifies releasing financial information that would otherwise remain confidential. But if applicants are unwilling to supply the very information that is the foundation of their case for overriding normal planning policies, refusal becomes all but inevitable. If the case goes to appeal, all relevant information will become public; no evidence can be treated on a confidential basis. At an inquiry, particularly, the credibility of a case for enabling development will depend not only on making available the development appraisal, but on the developer or his advisers being willing to answer questions about it.

### **3.8.3 PRACTICAL POINTS**

Local authorities should:

- wherever possible, seek full information at pre-application stage
- use their powers to demand the information reasonably necessary to make a justifiable decision
- if an outline application is submitted, consider whether it is appropriate to serve a statutory notice requiring full details, or details of design or siting, to determine the impact of proposed development – this must be done within a month
- seek associated applications, so that they can be considered concurrently with the planning application
- establish a policy in relation to seeking applicants' contributions to assessment costs
- submit enabling development applications to as much scrutiny as any public financial transaction
- make standing arrangements for obtaining ready access to specialist expertise.

## 4 Understanding the place and identifying options

### 4.1 The importance of understanding the place

- 4.1.1** The cases that in the past have caused most concern involved balancing the impact of a proposal on one aspect of the historic environment against another. The historic environment is a complex whole, so it is not acceptable, for example, significantly to damage a designed landscape forming the setting of an historic building simply to finance the building's repair, or vice versa. It is important to consider the place in its entirety, as well as the relative importance of its components, including archaeological remains, rather than elements of it in isolation.
- 4.1.2** Change in the historic environment is not only inevitable but can be positive, provided it involves a high quality of design in context. However, whilst skilful design will make the most of opportunities that exist, intrinsic design quality cannot overcome objections of principle in relation to siting and volume.
- 4.1.3** Understanding the impact of enabling development on the significance and integrity of a place involves exactly the same approach as any other development proposal. English Heritage's *Conservation Principles Policies and Guidance for the Sustainable Management of the Historic Environment* (2008) are relevant. The conservation planning process requires understanding the place, assessing its significance as a whole and in its elements, defining how that significance is vulnerable and setting out policies or guidelines for sustaining that significance. The more clearly the values of a place in its setting are understood at the outset, the easier it is systematically to develop a project which minimises harm by recognising both constraints and opportunities.
- 4.1.4** Where there are conflicting opinions about the weight to be attached to different values attached to the place, or it is particularly complex and ill-understood, it can be helpful to commission a conservation plan at the outset that can be the subject of consultation with all who have an interest in the place, in an attempt to reach a consensus view. Otherwise, it can be helpful to begin with a rapid appraisal, and develop that into a conservation statement or conservation plan if and when it becomes clear, through defining options, that the project has the potential to proceed. Further, targeted specialist investigation will still often be necessary fully to understand the impact of likely options, leading to a preferred option that will best sustain the significance of the place in its setting, and a mitigation strategy that will minimise any unavoidable harm. *Informed Conservation* (English Heritage 2001) provides practical advice on this process, and *Understanding Historic Buildings* (English Heritage 2008) provides policy and guidance for local authorities and applicants.
- 4.1.5** It may be relevant to consider whether the place has deteriorated so much that repair would involve such substantial reconstruction that its authenticity would be lost. If so, the justification for enabling development to rescue it is removed; but the judgement must be made in the context of the place as a whole. For example, 90% rebuilding of an isolated historic structure would generally not be justifiable, but might well be if it

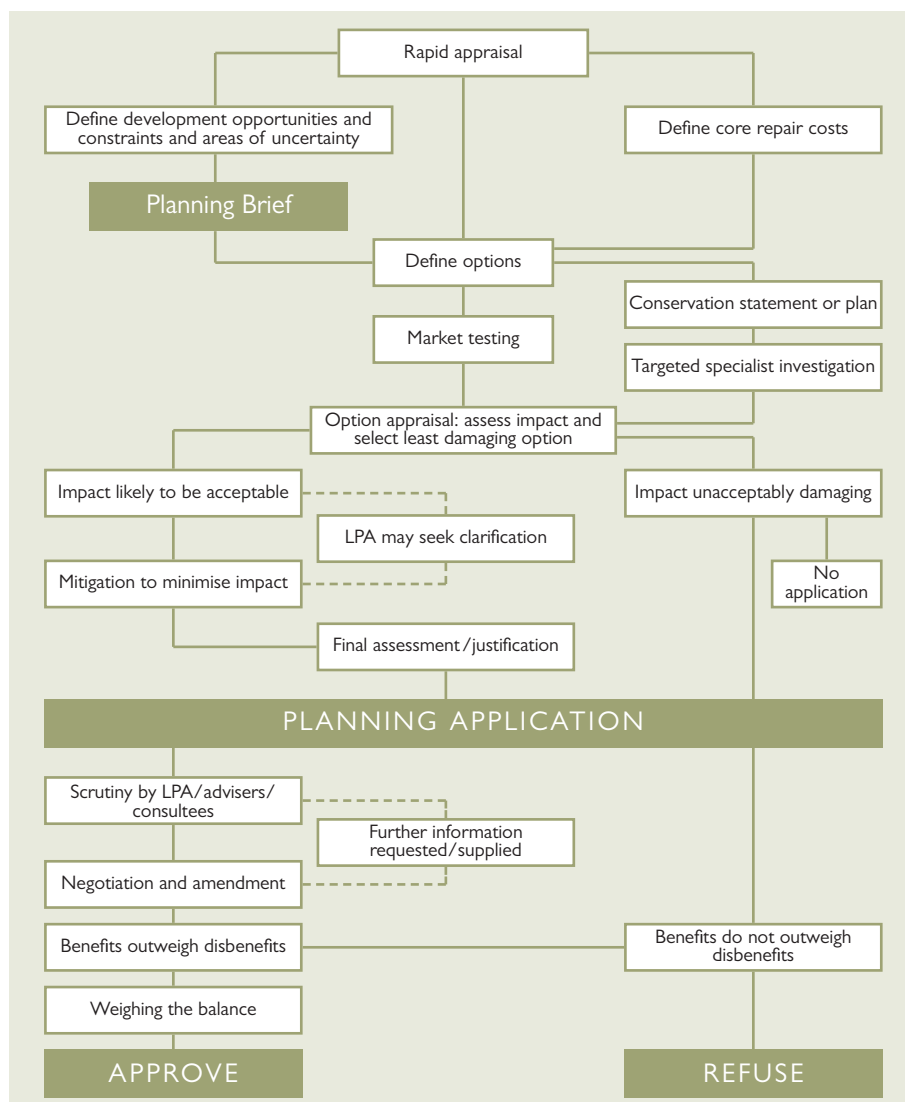
formed a crucial part of a larger whole, like a designed landscape, and there is compelling evidence of its previous form.

**4.1.6** A brief for the investigation should be agreed between the applicant and the local authority at the outset, setting out the work required and the justification for it. An example of a written brief for further information in support of an application for consent is provided in *Informed Conservation*, Appendix 2. Since a financial shortfall is inherent in any application for enabling development, it is particularly important that the process of understanding, outlined in para 4.1.3, is efficient in its use of resources, as well as adequate to inform the decision.

**4.1.7** Only where it is clear that proposals are acceptable in principle, but aspects of their detailed design need to be informed by further prior investigation, for example of an internal decorative scheme, is it appropriate to make both that further investigation and the detailed proposals based on it the subject of conditions in a statutory consent.

**4.1.8** The flow chart below may be helpful. It assumes the ideal situation of pre-application engagement between planning authority and applicant. If the 'pre-application' stages have not been undertaken before an application is made, they must clearly be undertaken subsequently.

An 'ideal' flowchart for handling an enabling development proposal



## 4.2 The need for a conservation management plan

**4.2.1** A 'conservation management plan' differs (in the present context) from a conservation plan produced in the context of imminent substantial change, considered in 4.1.3 above, in that it sets out the ongoing actions necessary to sustain the significance of a place once that change has taken place. One, of course, can readily be developed from the other. Typically, during implementation of a substantial project, understanding will develop through discoveries, significance will be affected (although hopefully not materially harmed), but the conservation issues policies and actions after implementation will tend primarily to concern the integrated management of a place which may now have multiple legal interests, requirements for planned maintenance of buildings and landscape, regular inspection, and periodic repair. Such a document can be an important source of information to everyone involved with the place, which of itself is helpful in ensuring that its care and use is informed by an understanding of its significance. A conservation management plan will also provide the substance of the legal obligations in a Management and Maintenance Plan which can, in appropriate circumstances, be included in the Section 106 agreement (Appendix 5).

**4.2.2** Informed Conservation, Section 6, provides useful advice on the preparation of conservation management plans, as does *Conservation Management Plans: A Guide* (Heritage Lottery Fund 2008).

### 4.2.3 APPEAL DECISIONS: IMPACT ON THE PLACE

'The enabling development would form an integral part of the layout of the estate, fundamentally modifying the approach to the Hall. Provided it were carried out skilfully, in my view, this modification would be an asset to the estate.'

*Church Lawton 2000*

'I consider that at present the Hall remains the centrepiece of its historic parkland setting. I am not convinced that that would remain the case with development of the scale that is currently proposed. In my view the new houses and the activity associated with them would markedly change the character of the grounds of Daresbury Hall and the way that they are perceived as the setting of a country house.'

*Daresbury Hall 2001*

'Although the conversion of the listed buildings would preserve their special architectural and historic interest, the new-build element of the scheme would have a significant and detrimental effect on the setting of the listed buildings, destroying much of what the new-build element purports to set out to protect.'

*Low Hall Farm 2002*

## 4.3 Assessing potential for use and funding

**4.3.1** A use for a place needs to fulfil two basic criteria:

- it must be compatible with the historic form, character and fabric of the place; and
- it must fit the needs of a user, either generic (meeting an established or predictable market demand) or specific, to fit the financially supportable needs of a particular user (which for, eg, commemorative structures, may be the public at large).

- 4.3.2** In the words of PPG 15, ‘Judging the best use is one of the most important and sensitive assessments that local authorities and other bodies involved in conservation have to make. It requires balancing the economic viability of possible uses against the effect of any changes they entail in the special architectural and historic interest of the building or area in question. In principle the aim should be to identify the optimum viable use that is compatible with the fabric, interior and setting of the historic building. This may not necessarily be the most profitable use if that would entail more destructive alterations than other viable uses.’ (para 3.9)
- 4.3.3** Whilst option appraisal must be wide-ranging, it must also be realistic. Uses that would be so damaging to a place that they would effectively destroy its interest, or those that perfectly fit the form of the building but for which no market is either present or likely, must be discarded at the initial stage. Imagination, and indeed consideration of the potential to create a market, is essential, but a degree of realism is necessary from the outset from both owners and planning authorities.
- 4.3.4** Market circumstances are also relevant. Historically, the UK property market has been strongly cyclical. When values are at their lowest, and risks heightened through lack of demand, the amount of enabling development necessary to achieve a particular objective will be much higher than in a more buoyant market. In a period of low or falling values, it will be worth considering mothballing the place – minimum works to make it wind- and weather-tight, and secure, to prevent further deterioration, or ‘meantime uses’ – in anticipation of an acceptable scheme being viable as the market recovers.
- 4.3.5** Option appraisal should include – and set out in the planning application – an investigation of the potential for grants, which may vary according to the different scenarios. If grants are available but are insufficient to cover the conservation deficit, they should be considered in combination with enabling development to secure the future of a place. Natural England’s Environmental Stewardship Scheme can provide incentives to restore and support ongoing traditional landscape management, and for the repair and restoration of historic buildings.
- 4.3.6** Enabling development should always be seen as a subsidy of last resort, since it is an inefficient means of funding a conservation deficit, often requiring enabling development with a value of three or four times the conservation deficit of the historic asset to break even. The simplified example (see p 23), based on residential enabling development, illustrates the point.
- 4.3.7** An option appraisal may reveal a threshold beyond which further enabling development would generate the need substantially to upgrade or provide roads, sewage and other services and even school provision, which itself could only be financed by yet further enabling development. In effect the capacity of the infrastructure is identified as a key constraint. Such constraints should if possible be identified at the outset through a planning brief.
- 4.3.8** In the case of buildings that, if in good repair, would have a positive market value, a subsidy to cover the amount by which repair and conversion costs (and sometimes the value of the existing use – see Section 5.6) exceed market value once repaired will be a once-and-for-all investment that should secure the long-term future of the building concerned. But the future of a structure or landscape without beneficial use, or capable only of limited use, can only be considered secure if there is both

| <b>Conservation deficit met by cash subsidy</b> |  | <b>£</b>       |
|---|--|----------------|
| Market value of historic building at the outset |  | 10,000         |
| Repair costs (inc fees)                         |  | 150,000        |
| Conversion to optimum beneficial use (inc fees) |  | 100,000        |
| Financing and other costs                       |  | 10,000         |
| <b>TOTAL COST</b>                               |  | <b>270,000</b> |
| Market value of place on completion             |  | 170,000        |
| Conservation deficit (difference)               |  | 100,000        |
| Grant to owner                                  |  | <b>100,000</b> |
| <b>BALANCE</b>                                  |  | <b>0</b>       |

| <b>Conservation deficit met by enabling development</b> |  |                |
|---|--|----------------|
| Acquisition costs                                       |  | 10,000         |
| Repair costs (inc fees)                                 |  | 150,000        |
| Conversion to optimum beneficial use (inc fees)         |  | 100,000        |
| Build costs enabling development (inc fees)             |  | 175,000        |
| Sales, legal costs etc                                  |  | 15,000         |
| Financing costs   |  | 20,000         |
| Developer's profit                                      |  | 70,500         |
| <b>TOTAL COST</b>                                       |  | <b>540,500</b> |
| Less Market value of historic building on completion    |  | 170,000        |
| Market value of enabling development (ditto)            |  | <b>370,500</b> |
| <b>BALANCE</b>  |  | <b>0</b>       |

*The inefficiency of enabling development*

a long-term source of funding for its maintenance (or the balance of it), and an entity, often a trust or public body, responsible for exercising that stewardship. Historic parks and gardens need very long-term management plans (50 years plus) as well as work programmes repeated over shorter cycles.

#### **4.3.9** It is therefore crucial to establish:

- **who** will be responsible for long-term management, how the exercise of that responsibility can be ensured, and how the public as well as any private interest in so doing will be safeguarded; and
- **how** it will be funded in the long term – either a capital endowment, rental income from part of the enabling development, or a practical and enforceable obligation on those who benefit (and their successors) directly to cover maintenance costs (as, for example, with communal gardens or an element of a larger estate).

**4.3.10** A solution that does not provide the means of meeting recurrent costs that cannot be generated by the place itself is no solution at all. Normally there will only be a single opportunity for enabling development without compromising the place (see 5.4.4).

#### **4.4 Who can unlock that potential?**

**4.4.1** Most buildings at risk capable of beneficial use are taken up by commercial developers or (in the case of houses) by private individuals. The latter, particularly, may see viability as much in terms of meeting personal needs or aspirations for their residence as in strictly financial terms, and take a longer-term view of the difference between cost and market value. Most historic houses whose setting has survived and which are not in serious disrepair can be expected to find a market as houses, even if they have been recently in another use. In such cases, single domestic use will generally be the 'optimum viable use' in terms of PPG 15.

**4.4.2** The key expertise of the commercial sector lies in judging the market and taking on the risks inherent in that judgement. This ability and expertise is, and will remain, crucial to securing the future of most historic buildings that have become functionally redundant. The mainstream commercial sector is not always best placed to see the potential through the veil of dereliction, and may overestimate the risks inherent in the repair of the historic fabric. However, there is a growing number of niche developers who specialise in historic buildings, and are generally better able to see potential and realistically estimate costs and end values.

**4.4.3** Building preservation trusts (BPTs), as property developers with charitable status and objectives, provide a vehicle for securing the future of some places that are not attractive in commercial terms. Many, but not all, operate on a relatively small scale, but interest from a building preservation trust can be a catalyst in prompting owners to bring forward workable schemes to secure the future of buildings, or to sell them. Increasingly, partnerships between BPTs or public-sector bodies and the commercial sector can be part of the solution to historic buildings at risk. In the context of enabling development, a trust may take on the repair and management (or onward sale) of an historic building or landscape, funded through enabling development undertaken by a developer. Another approach to public/private sector partnership and risk management is for a trust or heritage body to acquire an historic building, repair the structure and external envelope, and sell on the result to a developer to fit out and market. This may be the only means of unlocking potential if the current appearance of the place is so poor that major works are necessary to generate any private sector interest at all.

**4.4.4** Such approaches can bring together the expertise and skills of both sectors – the commercial sector deals with the market risks, which it knows best; and the trust deals with the risks inherent in the repair of the historic fabrics, which constitute its area of expertise, and unlocks funding only available to non-commercial bodies. They can result in more realistic and cost-effective proposals than either party alone could put forward, as at Murray's Mill, Ancoats, Manchester. The Architectural Heritage Fund and the Association of Preservation Trusts can put local authorities, developers and others in touch with appropriate BPTs.

## **4.5 Separation of assets from liabilities**

- 4.5.1** Owners may dispose of land essential to the setting, amenity, functioning or even vehicular access to an historic building, in an attempt to separate potential assets from an actual or potential liability. Sometimes they may appear to do so, while retaining through ‘arm’s-length’ companies the ability to bring the entity back together if circumstances change. Isolating non-viable parts of an estate may be part of an entirely legitimate approach to tax planning, but it is not acceptable as a device to justify enabling development proposals relating to the non-viable part or parts alone. The whole estate should be taken into consideration.
- 4.5.2** There is no legal sanction available to planning authorities to stop such fragmentation of ownership. But if ownership of the curtilage of an asset, or of an historic landscape, has or is likely to become divided, it is vital that local planning authorities take a firm line against granting consent for any development which could be considered detrimental not only to the asset or its setting, but also to its long-term viability. Proper planning requires that regardless of divisions of ownership, development proposals affecting an historic building and its environs, or an historic landscape, should be considered in terms of their effect on the place as a whole and not in isolation, whether or not they are put forward as ‘enabling’. If they are considered in isolation, there is a real danger of the long-term fate of the place being sealed by incremental erosion, and its ability to absorb changes necessary to sustain it being lost.
- 4.5.3** For the avoidance of doubt, where fragmentation of ownership has emerged as a factor militating against securing the long term-future of a place, or where a ‘brownfield’ site includes historic buildings in need of repair and reuse, the local planning authority should use a ‘supplementary planning document’ within the local development framework to state its intention to require a comprehensive approach and to resist any development that could be detrimental to the future of those buildings. A grant of planning permission for development in such circumstances should be subject to a section 106 agreement that will secure the long-term future of the significant place, bearing in mind the guidance in Section 7.
- 4.5.4** In the case of listed buildings, a pre-1948 building or structure subsidiary to the principal building will be subject to listed building control (and policy) if it lies in the curtilage, the extent of which may be judged by physical layout, past and present ownership, and past and present function. Fragmentation of ownership subsequent to listing does not take ancillary structures out of the curtilage of their parent building, nor remove them from control.
- 4.5.5** A sustainable future for any place will be prejudiced by ‘enabling development’ that actually deprives it of the amenities expected of a property of that type and size. A country house, for example, may need accommodation land, and reasonable privacy within it, and a town house a reasonable garden, to be attractive to purchasers at a price and for a purpose that will ensure long-term investment. Without such amenities, conversion to smaller units or other uses tends to become inevitable. A textile mill deprived of adequate parking or loading space will be difficult to maintain in commercial use.

## **4.6 Fragmentation as a consequence of enabling development**

**4.6.1** The integrity of many significant places depends on coherent, consistent and sustainable long-term management, based on a thorough understanding of their significance both as a whole and in their parts; enabling development must thus avoid ‘detrimental fragmentation of management of the significant place’ (see Policy, p 5).

**4.6.2** Where subdivision is necessary – for example of a large house into separately owned residential units, or the creation of individual residential units within an historic landscape – it is essential to secure a legally binding means of ensuring long-term co-ordinated management of those aspects of the place that are crucial to sustaining its significance. Such management should ideally be based on a conservation management plan (Section 4.2), and include a dynamic process for review which involves not only those bound by the agreement, but also those with a statutory or other significant interest.

**4.6.3** Key issues to be addressed include:

- separation of resources
- increased risk to minor structures (eg garden ornaments and statues, industrial outbuildings)
- maintaining the designed unity of the place
- management arrangements, including any necessary on-site facilities
- ensuring that contributions to the repair or maintenance of the significant place are achieved.

**4.6.4** The service charge will be a factor of both annual maintenance costs and the number of units over which it is spread. It is, however, essential to bear in mind that onerous obligations giving rise to high service charges will depress the market value of units in the development, and so generate the need for more extensive development, or even undermine its attraction to the market. In strictly financial terms, a charge can be capitalised at roughly ten times the annual cost; but the psychological deterrent can be much greater, because however buyers’ circumstances change, they must find the (inevitably indexed) cost. A charge in excess of about £3,000 pa for a residential unit is likely to have a significant effect on its marketability and capital value; in a low-value area, more than £500 pa could be detrimental. A balance must be achieved. It will often pay to minimise maintenance costs through initial capital investment, so long as this is in accordance with established conservation standards, and so does not involve harm to the values of the place.

## **4.7 The need for market testing**

**4.7.1** Before any enabling development is considered the applicant normally needs to demonstrate that real efforts have been made, without success, to continue the present use or to find compatible alternative uses for the place. This should normally include the offer of the unrestricted freehold or long leasehold (125 years or more) on the market at a realistic price reflecting the condition of the place, and, so far as ownership allows, with an appropriate curtilage. The offer of a shorter lease, or the imposition of restrictive covenants, would normally reduce the chances of finding a new use.

- 4.7.2** The question may arise of the extent of land and buildings that should be marketed, if they form part of a larger holding. Since the possibility of a repairs notice followed by compulsory purchase is likely to be a consideration in the case of a listed building ‘at risk’, the definition of ‘relevant land’ in the Planning (Listed Buildings and Conservation Areas) Act 1990 in relation to those powers is appropriate: ‘the land comprising or contiguous or adjacent to [a building] which appears to the Secretary of State to be required for preserving the building or its amenities, or for affording access to it, or for its proper control or management’ (s47(1) and (7)). Its extent will clearly vary according to the nature and scale of the place concerned, but can reasonably include, for example, the garden of a town house, or the park and outbuildings of a country house. It may include potential development land, the profit from which is necessary to subsidise the repair of a historic building.<sup>4</sup>
- 4.7.3** The marketing should be carried out by a suitable firm of chartered surveyors or estate agents who have a good knowledge both of the property and the local, national, or niche market as appropriate. Prior to marketing, any basic steps necessary to improve the presentation of the place, like clearing rubbish, should be undertaken. Solicitors should have ensured that the agents are aware of any restrictive covenants, rights of way, easements, etc and the nature of the title available. Particulars should then be produced which are appropriate for the type of property and the planning situation (where possible including a planning brief prepared by the local authority). Its list grade, whether it lies within a conservation area, registered landscape or the green belt, etc, should be clearly stated.
- 4.7.4** The property should then be properly and extensively marketed, including the placing of advertisements in all relevant journals, both locally and, if appropriate, nationally or via the internet. Use should be made of specialist listings of historic buildings for sale, especially for unusual or problematic buildings. The size of the advertisements and regularity of insertions in the journals are important, as well as the length and timing of the marketing campaign. Professional advice from the selling agent is essential. All enquiries and inspections should be recorded, and a proper audit trail kept, so that it can be demonstrated that every reasonable effort has been made to find a purchaser for the property.
- 4.7.5** Assuming normal market conditions, the minimum period of active marketing would be six months. The emphasis must be on active marketing rather than merely placing the property’s details on a website after an initial advertising campaign.
- 4.7.6** There will of course be exceptions to this rule, particularly where the property has been unsuccessfully marketed in accordance with paragraphs 4.7.3–4 above during the past 18 months, or has been recently acquired for a price that reflects its condition (see Section 5.6). For significant places that are essentially incapable of becoming self-sustaining, or there is no doubt that they have a substantial conservation deficit, it may be appropriate to accept that a building preservation trust or other charitable vehicle is the preferred option without testing the market, particularly if there is a risk of speculative purchase.

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<sup>4</sup> Mynors, C, *Listed Buildings, Conservation Areas and Monuments*, 4th edition (2006, London: Thomson) pp 300–1

**4.7.7** The following sections address two specific exceptions to the general need for market testing.

## **4.8 Traditional buildings in the countryside**

**4.8.1** National planning policy has become more receptive to the adaptive re-use of farm buildings as a means of unlocking their potential for rural diversification and regeneration, as outlined in Planning Policy Statement 7: *Sustainable Development in Rural Areas*, while continuing to support the traditional use, maintenance and repair of selected buildings through agri-environment schemes. Conversion to farm-related or commercial uses tends to be more sympathetic to the character and integrity of traditional farm buildings and their settings than residential conversion and raise fewer conflicts with continuing agricultural activity, but generate less value. English Heritage and the former Countryside Agency, in their joint guidance note *Living Buildings in a Living Landscape* (2006), further stated that:

'A very small number of traditional farm buildings (principally grade I and II\* listed buildings and scheduled monuments) are such historically or architecturally significant elements of our heritage that they should be conserved without alteration for the benefit of current and future generations. Even if they become redundant, they should be maintained and kept in good repair. Grants may be available from public funds, or, exceptionally, appropriate enabling development should be considered in line with current guidance.'

**4.8.2** Such buildings can be either large individual structures or form part of substantial groups, and may be in need of subsidy not only for the whole capital cost, but also, if maintained as monuments, to provide an endowment or income stream to support ongoing maintenance costs. However, proposals to provide the majority of that subsidy through enabling development would be self-defeating if its extent and scale would be out of keeping with the character of the local landscape.

**4.8.3** In the case of farm building groups of any grade, there may sometimes be good reasons to avoid fragmentation of long-standing ownership, or operational issues that make it impracticable. In such cases, enabling development in the form of the conversion of those buildings in a traditional group that are reasonably adaptable to residential use, to the extent necessary to generate the capital cost of repair of the group as a whole, may provide a solution. The remaining buildings can then provide low-key ancillary uses for the others, sufficient to justify their continued maintenance. If this approach is taken, it is essential that not only the repair but the ongoing management and maintenance of the group as a whole is secured through a section 106 agreement, otherwise there will be an incentive to allow deterioration and repeat the process until all are converted. Any proposals of this kind should consider the need to avoid undermining the amenities and thus the viability of the historic farmhouse itself.

## **4.9 Historic entities**

**4.9.1** An historic entity is an outstanding ensemble of historically associated buildings, often land (which may include archaeological remains) and normally contents, whose significance would be inevitably and materially harmed by break-up and sale.

In these circumstances, retaining the integrity of the whole may legitimately be the objective of enabling development. The most common examples of historic entities are country houses with their gardens, parks, and associated collections, including furniture, pictures, sculpture, books, and archives; but the concept can apply, for example, to a traditional manufactory with associated machinery, tools and perhaps archives, or a museum built to house a specific collection.

- 4.9.2** In such cases the objective of enabling development, normally in conjunction with charitable ownership or utilising the heritage provisions of the Inheritance Tax Act 1984, can legitimately be to help keep the entity together by ensuring that, taken as a whole, it is viable in the medium to long term. This requires that it break even in revenue terms, including being able to fund routine maintenance (including preventing loss of historic significance), and also to accumulate sufficient reserves to fund repair and periodic renewal. Such reserves may come from accumulated annual surpluses, endowment income, or a combination of the two; and calculations should take into account reasonable expectations of grant. The extent to which support is necessary or justifiable is essentially based not on the capital value of the entity, which can only be realised by its dissolution, but by a gap between revenue income and revenue costs, despite demonstrably efficient and effective management evidenced by estate accounts.
- 4.9.3** Enabling development that boosts estate income on a long-term basis is more likely to be feasible than enabling development to raise a capital sum to be invested as an endowment, because, given the need to re-invest most of the income to maintain the real value of the capital, a very large sum is needed to generate a very modest annual income in perpetuity. But the fundamental decision must be whether or not the value of the whole is so much greater than the sum of its parts that treatment on this basis is justified. If the case is accepted, any capital or accumulated income generated should normally lie with a charitable trust fund, with reversion to similar charitable purposes if the entity is eventually broken up and sold, or with a statutory maintenance fund set up in accordance with the provisions of the Inheritance Tax Act 1984.
- 4.9.4** The subsidy needed to sustain an historic entity may therefore include the whole cost of capital works rather than the conservation deficit, and may extend to the means of providing an income stream sufficient to offset long-term revenue costs. As well as public benefits, particularly securing the future of a significant place, it will often generate substantial private benefits for the owner; and the public benefit, or a large part of it, is delivered through maintaining aspects of the *status quo* indefinitely. This is much more difficult legally and practically to secure than defined capital works. For these reasons more stringent justification of enabling development is appropriate to applications on an historic entity basis, if a subsidy greater than the conservation deficit is sought.
- 4.9.5** In the view of English Heritage it will not be appropriate to consider a place as an historic entity, and therefore disregard its market value, unless the specific criteria set out in paragraphs 4.9.6–4.9.12 are met so far as they are applicable, in addition to the standard policy criteria for enabling development.
- 4.9.6** First, the ensemble is of outstanding importance in the national context. Normally, and certainly in the case of country house estates, this will mean that either the house, or its historic landscape (often, but not necessarily, both) are included in the

statutory list or landscape register at grade I or grade II\*, and the collection must make a substantial contribution to the historic significance of the entity. Industrial groups, where the importance of the buildings may lie primarily in their being designed to enclose processes and machinery, may be considered outstanding because of the importance of their machinery and equipment, and historic museum buildings because of their collections. In these cases, specialist advice will be required.

- 4.9.7** Second, the contents or other artefacts (including archives) are historically associated with the building or landscape, such that the significance of the whole is greater than the sum of its parts. This normally requires a long association with a house or the family inhabiting it, of at least 50 years, except in very special circumstances, for example the association of the collection of an artist of national repute with their home or studio, or a garden and sculptures designed as a coherent whole. Reassembled contents originally designed for the house, or otherwise closely associated with it or the family (or body) that owned it, will also meet the test of historical association. But it is not enough that a house contains furniture appropriate to its period, or that an industrial site or museum contains a recently assembled collection.
- 4.9.8** Third, there is a credible mechanism to minimise the possibility of the ensemble subsequently being broken up and the value of the enabling development realised as a private gain. In the case of country house estates, succession-planning measures are likely to be in place, for example the establishment of trusts and conditional exemption from inheritance tax secured by previous or current generations. The credibility of industrial ensembles, museums, etc in this regard is likely to lie in charitable ownership. The scope for provisions in the section 106 agreement relating to the connection between collections and 'land' should be considered.
- 4.9.9** Fourth, there is public access proportionate to the subsidy provided, secured by the section 106 agreement. The number of days per year should be specified, as should requirements for advertising such access. Many estates will be doing this already, either as part of their normal business or as a condition of previous grants or tax relief, but the requirement should still be confirmed through a section 106 agreement tied to the enabling development. Consideration should be given to permissive paths and open access to specified areas of land, and more generally to improving ease of access.
- 4.9.10** Fifth, the estate, once subsidised, is likely to be sustainable in revenue terms. Whilst it is possible and necessary to test viability by scrutinising accounts for a period of five to ten years and a business plan, the changing nature of agriculture and tourism mean that the long-term view must rely on a judgement of an estate's robustness – its diversity, ability to respond to changing circumstances (based on past performance), borrowing levels, upcoming major maintenance items, etc. This clearly needs to be subject to independent assessment by an experienced estate manager.
- 4.9.11** Sixth, private owners contribute to the ongoing maintenance costs of their own houses, in proportion to the amenity they enjoy. A maintenance fund or endowment through the public subsidy of enabling development cannot legitimately extend beyond the exceptional maintenance costs arising from the significance of the house, compared to those of an ordinary house of similar functional size.

**4.9.12** Seventh, the value of any estate assets that could be realised without harm to its significance or long-term sustainability is taken into account in calculating the enabling development required. It is axiomatic that enabling development should not harm the place it seeks to sustain. But if there are assets – for example developable sites beyond the boundary of an historic landscape – which could be disposed of without harm to the integrity of the historic entity, consideration should be given to whether doing so would reduce the overall need for enabling development. It is obviously necessary to consider not only realisable capital value, but also the effects of realising it on the revenue and long-term robustness and sustainability of the estate, which it would be counter-productive to compromise.

#### **4.9.13 APPEAL DECISIONS: ASSESSING POTENTIAL FOR USE**

‘Whilst something that could only be tested by marketing, as recommended as a pre-condition for enabling development by English Heritage ... it is possible that an individual seeking to restore the Hall as a single dwelling would be prepared to invest more in the property than it was worth and it is also possible that he or she would be prepared to defer expenditure on non-urgent items.’

*Daresbury Hall 2001*

‘The barn, with an appropriate area of site, has not been offered on the open market. No indication exists, therefore, of whether enabling development is necessary at all. Nor does any indication exist of options arising from offer on the open market of other uses besides that proposed, which might avoid enabling development or involve less extensive or less harmful enabling development.’

*St Clere’s Hall 2004*

‘I do not find there to be a significant cultural value in the link between the current owners and their possessions, and that which makes the historic parts of interest ... I do not consider the estate to be an historic entity, and hence consider that marketing should be undertaken.’

*Combermere Abbey 2005*

‘There is no reason to doubt the enthusiasm of the Arkwright Society, KRRC and other individuals and organisations for preserving Riber Castle by means other than those currently proposed. However, on the evidence available, I am not convinced that an approach based on establishing a Building Preservation Trust and seeking grant aid has a potential to succeed. I am also concerned that the need for action will become increasingly urgent within the next few years, if the listed building is to be preserved. It is questionable whether matters could move forward at sufficient speed to avoid further and more rapid deterioration of the listed building.’

*Riber Castle 2006*

#### 4.9.14 PRACTICAL POINTS

Local authorities should:

- ensure that the information about the nature of the place, its significance, and its vulnerability are adequate as a basis for each stage of decision-making, but not seek more information than is justified
- remember that the onus is on the applicant to justify an assertion that a particular form of development is the least damaging way of achieving what may be a common objective
- be flexible and realistic about uses, especially in planning briefs
- think about the long-term as well as short-term implications of proposals for the future maintenance and management of the place
- ensure that the marketing campaign is appropriate to the nature of the property and its likely market(s)
- try to avoid subsequent dispute about the adequacy of a marketing campaign by agreeing a marketing strategy in advance and ensuring it is properly documented.

## 5 Understanding the figures

### 5.1 Background

- 5.1.1** The essence of commercial property development is to try to maximise the return on investment, in order to compensate for the risk and time taken in carrying out a development. The purchase price paid is an important factor in this. Development sites will often be the subjects of intense competition between prospective buyers, all of whom are likely to have arrived at an offer figure aware of the competition and on the basis of likely returns. If, in the event, projected future returns are reduced, which is a distinct possibility in a falling property market, the viability of a scheme may be in doubt and it might not materialise.
- 5.1.2** Before acquiring a site, a developer will normally prepare a development appraisal, derived from initial information gathered from estate agents, surveyors, architects, engineers and others. The appraisal allows the developer to calculate a purchase price that will, if the appraisal proves to be accurate, provide the return on capital being sought. The appraisal process, however, is a matter of informed professional opinion. It is not an exact science, even if carried out with all due thoroughness, and in some cases developers pay a higher price for a property than the market justifies. The risk of doing so is clearly greater if, as sometimes happens, no detailed appraisal is carried out. Such miscalculations can trigger enabling development proposals, but cannot justify them.

### 5.2 Financing development

- 5.2.1** In order to carry out a property development, the majority of developers require external funding from a bank or institution. Before agreeing to finance a property development, a bank will wish to see the developer's accounts and track record. They will be required to provide substantiated development appraisals, setting out clearly how they intend to carry out the development, the level and term of borrowing needed, a schedule for repayment, for drawing down the loan and for making interest payments to the bank. Phasing of larger schemes is most important, for it determines the maximum exposure of, and total interest payable to, the bank.
- 5.2.2** A sudden rise in interest rates, which normally fluctuate in parallel with Bank Rate, can jeopardise the viability of a development. There are various financial mechanisms available to protect developers from this risk (essentially similar to those available to home buyers); but since they are effectively insurance policies, there is a cost attached. Institutions and banks will normally lend between 60% and 80% of the land value and development costs, and expect developers to invest their own monies to make up the balance. Availability of funds depends very much upon the nature of the development and the market conditions at the time.

## 5.3 Development appraisals

- 5.3.1** A development appraisal is a mathematical calculation used within the property industry for several purposes, including deciding the price to bid for a development site (ie the value of the property or land), assessing the profitability of a scheme, and in risk analysis. Development appraisals are nowadays invariably carried out on a computer – there are several proprietary software packages available. As with any financial calculation, the correctness of the information used determines the value of the result. Development appraisals by their very nature are prone to inaccuracy, because of the large number of variables, particularly building costs and projected end values. A typical layout for a development appraisal is shown at Appendix 2.
- 5.3.2** This section is not intended to instruct the reader on how to carry out a development appraisal, but rather how to comprehend those produced in support of enabling development schemes, by identifying and explaining the typical headings one would expect to find. This list is not definitive, as development situations vary considerably. There is no one universal layout; different developers and organisations have their own favourite structures.
- 5.3.3** The basic concept is simple. First, the market value of the completed development is calculated. From this is deducted the costs that would be incurred in carrying out that development, including a reasonable return to the developer, but excluding the acquisition cost. The remaining (or ‘residual’) sum can be attributed to the value of the land/building as it stands. The development will be viable if the land/building can be acquired for this sum or less. However, for complex, multi-phase schemes, generating an income stream rather than a lump sum on completion, a simple residual appraisal will not demonstrate the true return; considering cash-flow becomes crucial.

## 5.4 Conservation deficit

- 5.4.1** In financial terms, the case for enabling development normally rests on there being a conservation deficit. This is when the existing value (often taken as zero) plus the development cost exceeds the value of the place after development. Development costs obviously include not only repair, but also, if possible or appropriate, conversion to optimum viable use, and a developer’s profit appropriate to the circumstances. A development appraisal in such cases produces a negative residual value. If so, enabling development (provided it meets the other criteria in the Policy, p 5) may be justified, but only sufficient to cover the conservation deficit, ie to bring the residual value up to zero. The principal exception to this rule is historic entities whose break-up and sale would seriously diminish their significance. Enabling development may then be justified to ensure their long-term viability in revenue terms, as explained in Section 4.9.
- 5.4.2** Enabling development must always be justified by the inherent lack of viability of the significant place, not an owner’s inability to fund a commercially viable scheme. Conversely, the fact that an owner may have other means does not undermine the case for enabling development, provided the significant place has not been artificially separated from its context (see Section 4.5).
- 5.4.3** Fundamental to the concept of enabling development is that the developer takes on the commercial risk. The level of developer’s profit should be set to reflect those

risks, and the public benefits, particularly securing the future of the significant place, must normally be delivered at the outset. There is no mechanism for claw-back if the financial outcome is better than anticipated; similarly there can be no expectation of further enabling development if it is worse than anticipated.

- 5.4.4** Taking an incremental approach to enabling development, in which additional enabling development is sought once the scheme is under way or completed, as a means of recovering unforeseen or underestimated costs, is not an acceptable practice. Such an approach distorts the process, because it is necessary to consider the effects of the enabling development proposals in their entirety before deciding whether the benefits outweigh the harm. The developer bears the risk – there can be no ‘second bite of the same cherry’. This does not, of course, apply to a strategic approach (for example to an historic estate), which is agreed at the outset and implemented in stages.

#### **5.4.5 APPEAL DECISIONS: NEED OF THE OWNER OR THE BUILDING**

‘It was accepted at the inquiry that the previously approved enabling development appears to be in the process of implementation and there is no reason to believe it will not be completed. It is clear, therefore, that the additional dwellings are not linked to, or necessary on the basis of, securing the future of Coleorton Hall or its grounds. On this basis, having regard to the definition in the English Heritage document, the proposal cannot properly be described as enabling development.’  
*Coleorton Hall 2002*

‘The “incremental approach” leads to a further distortion of the process. If the original scheme had been framed and considered on the basis of a greater conservation deficit (including holding costs), necessitating even more new housing in the grounds, then its physical impact on the setting of the Hall and its surroundings may well have been judged to be too great. Planning permission may well have been refused on that basis.’ *Coleorton Hall 2002*

‘It appears to me that the [English Heritage] Guidance concentrates on the needs of the asset and finding the solution that best meets those needs, rather than the needs of any particular owner. Whether or not the two needs coincide, the outcome must still be focused on the preservation of the listed building.’  
*Combermere Abbey 2005*

### **5.5 Calculating the market value of a completed scheme**

- 5.5.1** The means of arriving at the market value of a completed scheme depends on the type of development. For a residential scheme, the capital values of the completed units are normally calculated using the comparison method. This involves comparing, where possible, the actual sale prices of similar properties in the vicinity to those in the proposed scheme, making adjustments based on professional judgement and experience for minor differences in location, quality, communications, nearby facilities, etc. A more accurate approach involves calculating a sales figure per square foot or metre from the sale prices of properties of comparable

type and location and applying that to the proposed units. Again, the professional judgement of the surveyor, based upon local knowledge of the residential property market, is needed to weigh the various factors involved.

- 5.5.2** The 'shortcut' method of using the comparison method of valuation for residential development should not be relied upon. This approach is to say that if residential plots sell for between 25% and 33% of completed capital value, then the conservation deficit divided by that plot value equals the number of units required. This is not normally an accurate method of deciding the number of units to be allowed, although it may be used as a rough check.
- 5.5.3** In the case of a commercial development where the units will be let rather than sold, valuation is normally undertaken by the investment method, which involves capitalising the value of the income stream, using an appropriate yield. The more secure the income stream, as a result of the location and nature of the property and the financial standing of the tenant, the lower the yield.
- 5.5.4** Hotels (and other leisure businesses) are generally valued by reference to profits which are then capitalised, using an appropriate yield, reflecting market sentiment, to calculate the market value. With such operating businesses, it is important to assess the sustainable levels of turnover and profit (usually expressed as EBITDA, Earnings Before Interest, Tax Depreciation and Amortisation) that the business, when mature, is capable of generating in the hands of a competent operator. Levels of income and profit will be governed by the nature of the proposed business, the competitive set in which it will be operating and the operating costs of the business (payroll, maintenance, etc). Specialist valuation advice should always be sought in checking the viability of proposed hotel and leisure developments.
- 5.5.5** The hotel property market can be fickle, generally reflecting the economic cycle, with the capital value of a hotel or leisure business dependent on demand from potential buyers. Such demand is also influenced by the style of the business and the facilities that it offers, including numbers of bedrooms, availability of leisure amenities, restaurants, etc. A budget hotel needs many bedrooms, whilst a specialist 'destination' hotel demands a much smaller number.
- 5.5.6** A hotel included in the proposed development of a significant place will usually be an up-market (4\* or 5\*) or boutique hotel, reflecting the appeal of listed buildings and their settings. Such hotels will generally be expected to include one or two restaurants, banqueting and conferencing facilities, together with some leisure amenities. The leisure provision can include gym facilities, a spa and treatment rooms, a swimming pool, tennis courts and, where the historic landscape allows, a golf course. Judging the minimum number of rooms necessary to generate a viable business operation, and thus the long-term viability of a hotel, needs specialist advice, as does minimising the impact of golf courses in historic landscapes and assessing their viability. If a scheme is approved that is too small to be viable, it can be difficult to resist extension despite harm to the place.

## **5.6 Site value: has too much been paid?**

- 5.6.1** One of the most common problems when dealing with proposed enabling development is that too high a purchase price was paid for the property. The acquisition cost for the purposes of enabling development calculations should be

the market value of the property in its existing condition and having regard to the advice of PPG 15. Given that the market value of a property is theoretically the sum remaining once development costs have been subtracted from end value, the result for some significant places in very poor condition will be negligible or negative. The actual purchase price paid by the developer must be disregarded if it is based on the hope or anticipation of consent for development contrary to established planning policy. However, for the sake of openness, the actual purchase price paid should be disclosed in any application for enabling development.

- 5.6.2** Planning authorities should be aware that if a developer pays more for a site than is justified in the market, a proposal for enabling development may be put forward essentially as a way to recover the developer's position. Although the advice in paragraph 3.17 of PPG 15 is not directed specifically at schemes of enabling development, it is of particular relevance to them:

'The Secretaries of State would not expect consent to demolition to be given simply because redevelopment is economically more attractive to the developer than repair and reuse of a historic building, or because the developer acquired the building at a price that reflected the potential for redevelopment rather than the condition and constraints of the existing historic building.'

- 5.6.3** The most straightforward case to consider is where the form or advanced decay of a listed building means that, as it stands, it is incapable of reasonably beneficial use, and it is associated only with a proportionate area of accommodation or agricultural land, subject to planning policies that normally prohibit additional development. In the context of Repairs Notice followed by Compulsory Purchase Order (CPO), compensation could well be minimal, but a still-nominal purchase price of a few thousand pounds might be accepted as a valid development cost, to save the time and cost of the statutory procedures.

- 5.6.4** Where the property is in usable condition, site value should be the market value as defined by the Royal Institution of Chartered Surveyors (RICS) *Appraisal and Valuation Standards* ('The Red Book'), which must take account of the structural condition of the property and the planning constraints upon it. In the context of testing the need for enabling development, this figure should clearly allow for the 'hope value' of any potential for development or alternative uses in accordance with the development plan, but exclude any allowance for the possibility of consent being obtained for development in contravention of established planning and conservation policy. The RICS *Standards* (PS 3.2.5) uses the term 'hope value' to define justifiable expectations; its common use to refer to unreasonable expectations can be a source of confusion.

- 5.6.5** The most problematic cases can be buildings with a viable, often low-key, use, from which the return does not justify permanent repair, but which, without the need for any planning permission, gives them a modest market value for as long as they are usable with limited expenditure. This value should clearly be taken into account. If left to the point where they become completely derelict, the conservation deficit is likely to be significantly greater than while they remain in low-key use. Bringing repairs forward sooner rather than later may thus still reduce the need for enabling development, even though it means allowing the existing use value as a valid development cost.

- 5.6.6** Break-up value can be relevant if subsidiary buildings or extensive land could be sold off and used separately, again without the need for any planning permission, and in the case of listed buildings, could not reasonably be included in a CPO following a Repairs Notice on the main building. The intrinsic value of such subsidiary buildings cannot be disregarded. Either their value should be deducted from the purchase price to arrive at the real price paid for the place for which enabling development is sought or, if they nonetheless form part of an overall development scheme (which is desirable if their separate sale would fragment the place), their initial value, the cost of repair and conversion, and their end value should be included in the overall development appraisal.
- 5.6.7** Such buildings may be lodges, cottages or stable blocks associated with institutions or country houses, whose contribution to significance is either positive or neutral. Some, indeed, are likely to be key elements of designed landscapes. Others, however, like modern office blocks or laboratories, may be so detrimental to the setting of the place that their removal would recover or reveal significance. If they have an intrinsic value through a viable use, and that use could continue without the need for any planning permission, removing them will generally and legitimately entail taking their existing use value into account in determining the need for, or amount of, enabling development. Their intrinsic market value, less any increase in the value of retained buildings due to their removal, plus the cost of clearance, would be allowable costs in the development appraisal.
- 5.6.8** However, arguments for existing value must be consistent. It is not credible to argue that, for example, purpose-built offices in the grounds of a country house have a substantial value, and at the same time assert that they cannot be let because there is no demand for them in that location. It is users that give buildings monetary value. On this issue, the inspector's reasoning in the Coleorton Hall case, quoted on p 39, may have over-simplified the position by not considering whether the unlettable office buildings in question could achieve a positive residual value through conversion or use for other, no more detrimental, purposes acceptable in policy terms (notwithstanding the desirability of removing them from the historic landscape). However, it clearly exposed the flaw in the appellant's argument.
- 5.6.9** Many historic buildings in rural locations have in the past become the focus of accretive development that is of no intrinsic merit, and frequently detracts from the setting of the historic building itself. Typical examples are country houses that have been used as institutions, and the historic nuclei of purpose-built institutions like hospitals. If they are in a Green Belt, then PPG 2, Annex C, sets out the circumstances in which further development or redevelopment may be appropriate. Generally, so far as 'major developed sites' in the Green Belt are concerned, such as redundant hospitals, redevelopment may be in accordance with policy where such sites are identified for redevelopment in the local development framework. If so, such redevelopment is generally subject to strict criteria. One is that development should not normally occupy a larger area of the site than the footprint of existing permanent buildings.
- 5.6.10** Otherwise, redevelopment proposals must be considered primarily in relation to national sustainability policies, which particularly militate against isolated residential enclaves and other single-use developments, remote from services, generating substantial travel needs and dependent on private motor vehicles for access (see

especially PPS1, para 27; PPS3, paras 36–38; PPG13, paras 4, 41). There is certainly no presumption that the footprint of existing buildings of low value can be replaced by new residential buildings of high value, or that existing buildings of no intrinsic or contextual value in heritage or landscape terms may be converted to new uses, if doing so would be incompatible with sustainability. Such proposals may, of course, be advanced as ‘enabling development’, but if so, the case must be considered on its merits as such, not skewed by a perceived ‘right’ to redevelop existing buildings.

### 5.6.11 APPEAL DECISIONS: SITE VALUE, HOLDING COSTS

‘Another way to look at it is whether site value should count in the calculations. In this particular case, I see no reason why it should. The surveyors on either side may agree that the offices have a relatively substantial value but that seems hypothetical to me. It is part of the appellant’s case that there is no demand for any office use that could secure the preservation and enhancement of the Hall and its grounds. If that is correct, no value should be attributed to the existing offices so far as an enabling development calculation is concerned. This means that the present value of the site can be described quite simply as the difference between the value of the Hall and grounds restored to an effective use and the costs of the demolition, conversion and restoration works necessary to bring about that use. If the costs were to exceed the value of the restored property, then some form of enabling development would be justified.

I do not consider that incidental (or historic) costs should count in assessing the need for enabling development. Instead, I consider them part of the owner’s responsibility in maintaining the property as an asset. It should be no part of a justification for enabling development that, without day to day maintenance, the building or grounds would deteriorate more quickly and therefore cost more to restore. I do not think it appropriate to include the Top Lodge or gardener’s cottages in the valuations for the proposed development. The dwellings already exist and represent a potential source of income irrespective of decisions on these appeals. In the end, my conclusion hinges on the need for enabling development. I have taken the estimates and valuations provided by both sides, but, rather than look at the appeal scheme as a whole, I have applied them to what I consider the essential elements – subdivision of the Hall, restoration of the landscape and redevelopment of the stables (the last because whether by restoration or redevelopment, there ought to be a building on the site of the original stables). The result of my calculations is that there may well be a need for some enabling development, but certainly not on the scale proposed.’ *Coleorton Hall 1999*

‘They also argue that, because the bungalow and houses could be sold off for residential purposes and, that if planning permission was required, the likelihood is that it would be granted, account of the value of these elements should be taken into consideration in a valuation exercise. Whilst separate disposal may be undesirable and unwise in relation to its impact on the future of the hall and grounds, it would appear to be an option open to the owners. I would consequently accept that financial appraisals of various development options should recognise the loss of these assets.’ *Daresbury Hall 2001*

## 5.7 Other costs associated with acquisition

**5.7.1 Costs incidental to acquisition** All are valid only to the extent that they would be incurred on acquisition at market value as discussed in Section 5.6.

**5.7.2 Stamp Duty Land Tax** The current government tax on all land acquisitions, levied as a percentage of the purchase price, but in this context allowable only to the extent that it would be incurred on the site value as defined above.

**5.7.3 Site legal fees** These are the legal fees incurred in connection with the site purchase, and are often expressed as a percentage of the site cost.

**5.7.4 Agent's fees on site acquisition** In some cases, an agent will introduce a site to a developer and will therefore be entitled to a 'finder's introductory fee'. This fee is usually expressed as a percentage of the site cost (although it could be a lump sum) and normally varies between 0.5% and 2% of the site acquisition costs.

**5.7.5 Holding costs** Holding costs, such as security, maintaining heating, or holding repairs, incurred between acquisition and commencing the development, are valid development costs. It will not be in the interests of the place that such matters be neglected. However, they are only valid for the period reasonably necessary to work up and submit an application that takes account of relevant planning and conservation policies. This will of course vary according to the scale and complexity of the project. Cumulative costs from a period of inactive ownership, incurred whilst pursuing proposals clearly unacceptable in policy terms, or when the place could reasonably and practically have remained in or been put to beneficial use, are not valid development costs.

## 5.8 Design and construction costs

**5.8.1 Survey costs** Measured surveys of the site and buildings will be required if not already available, as, often, will condition surveys of both structures and landscapes. The costs vary depending on the size and complexity of the place concerned.

**5.8.2 Research and analysis costs** These are costs involved in understanding the place and the potential impact of proposals upon it (including an Environmental Impact Assessment if required); any excavation or recording prior to or during the development required in mitigation of loss; and the preparation of a conservation management plan as a basis of long-term integrated management under the terms of a section 106 agreement.

**5.8.3 Contamination costs** If there is a likelihood that contamination has occurred, investigation will be necessary; any response will be related to the uses proposed.

**5.8.4 Construction costs** The cost of demolition of intrusive structures, and the repair and refurbishment of the significant place, should be set out separately from the cost of any new build, and should be supported by a quantified schedule of works. The appropriateness of works is considered in Section 5.15.

**5.8.5 Landscaping costs** As part of the development costs, landscaping and the restoration of important historic features may be required; but it is essential to consider what level of restoration is necessary (Section 5.16).

**5.8.6 Professional fees** Design and professional consultant fees are usually expressed either as a percentage of the total building cost or an amount. The rates are likely to be higher for work to the significant place than for the new-build element. Typical professional fees in relation to design and construction tend to be in the range:

- project manager 0.5–1.5%
- architect/surveyor 8–14%
- landscape architect 8–14% of landscape costs
- quantity surveyor 2–6%
- structural engineer 0.5–4%
- M&E engineer 0.5–4% of M&E costs only
- planning supervisor 0.5–2%

**5.8.7** It should be noted that these are only an indication of the possible fee percentages and range of skills required. A great deal will depend upon the role of the professional, the level of complexity and size of scheme. Some professionals will work on an hourly basis, whilst others have a standard fee. Project management fees are not always incurred in historic building work as the role still tends to be undertaken by the architect or surveyor. Planning authorities and their advisers must check whether the fees quoted are reasonable in the particular circumstances of the case.

**5.8.8 Contingency** A contingency is a sum included in the appraisal to address the risk of unforeseen additional building costs. The amount of the contingency should relate to the risk of additional expenditure occurring, which usually relates to the level of information available. It would normally be expressed as a percentage of the design and construction costs, within a range typically between 2.5% and 10% for new building work, and 10% to 15% for conservation work. There is normally no ‘second bite of the same cherry’ (5.4.4), so it is essential to do sufficient investigation to be confident about the contingency level.

## **5.9 Statutory and other charges**

**5.9.1 Planning and building control fees** The statutory fees payable to the local authority, and any additional contributions to the authority’s scrutiny costs (see 3.7.2).

**5.9.2 Funding and valuation fees** In order to carry out a development, it is normally expected that a developer will approach a bank or other lending institution to fund a percentage of the site acquisition and construction costs. In addition to the interest payable on the loan, banks generally charge an arrangement fee and a valuation fee, both expressed as a percentage of the loan. Other fees attached to the funding may be financial capping costs (see 5.2.2), the funder’s legal fees and any costs attached to a second charge, and the fees of their monitoring surveyor.

**5.9.3 Section 106 agreement** The legal cost of drafting the agreement varies according to its complexity. It is customary for developers to meet the legal costs of the planning authority as well as their own. There may also be implementation costs other than those directly connected with the heritage objective, for example a contribution to the local authority’s education or highway infrastructure costs.

**5.9.4 Interest charges** A developer will pay interest on monies borrowed, which vary from month to month depending upon the level of borrowing. In order to calculate accurately the total amount of possible interest payable on a site development, a cash-flow exercise is usually required which will calculate the borrowing requirement, and thus the interest due, on a monthly basis. Allowance must be made for interest payable during any void period at the end of the construction period. The amount of interest payable may be affected by the phasing of the scheme and some larger residential schemes can, with careful phasing, become self-financing.

## **5.10 Letting and sales costs**

**5.10.1 Agents' letting/sales fees** are fees payable either to an agent to introduce tenants, which can vary between 10% and 13% of the first year's annual rental, or the agent's fees on sales, which can vary between 1% and 2% of the sale price.

**5.10.2 Legal fees on lettings/sales** are normally expressed as a percentage, but may vary considerably depending upon the size of the development and the amount of legal involvement needed.

**5.10.3 Promotion costs** Marketing costs are a legitimate cost, encompassing advertising costs, the cost of an appropriate brochure and in some cases a marketing suite/show flat/house. The cost of marketing a site depends upon the size and nature of the property.

## **5.11 Deductions from costs**

**5.11.1 Short-term income** Any income derived from the site during the period from acquisition to completion of construction, such as fees from car-parking or advertising hoardings.

**5.11.2 Grants** Any public subsidy, whether or not heritage-related, given in cash towards reducing the deficit on the project.

## **5.12 Developer's profit**

**5.12.1** It is naturally right and proper that a developer be allowed a fair and reasonable return on his investment, to reflect the risk involved in the development project. There are many different types of developer. The developer/builder will usually require a lesser profit than the pure entrepreneur, as the builder will usually generate a profit on the cost of carrying out the actual construction, whereas an entrepreneurial developer is purely the catalyst whose vision, management and development skills need to be rewarded. In a competitive market, development companies may accept a lower margin in the hope that the finished product will sell quickly or values will rise ahead of costs; but during a recession risks are obviously greater and a higher percentage return will be sought.

**5.12.2** There are a number of ways of calculating profit. The simplistic 'return on cost' is an accepted guide used by a number of developers. As a very rough guide, in today's market, a pure entrepreneurial residential developer will look for an overall return on costs of between 15% and 20%, while a builder/developer may seek only a 10% return on the construction cost element, as a builder's profit should be

included in those construction costs. It is important that a double profit is not allowed. Some developers look to a percentage of turnover, which can be as low as 5% on short-term schemes; the norm is 7% to 10% per annum. Another method of assessing the profitability of a scheme in comparison with other forms of investment, which tends to be used by larger developers and institutions, is to consider the Internal Rate of Return (IRR). This percentage figure can be calculated on an annual basis using standard cash-flow computer models.

- 5.12.3** Developer's profit is normally allowable on all valid development costs, including appropriate site costs (as defined above), since all involve financing costs and risk. The principal exception is cash subsidies from public sources, for example English Heritage or a regional development agency. These are deducted from total development costs before developer's profit is calculated. While enabling development is itself a form of subsidy, it is normally included in development costs, because it must be funded and bears risk. If that risk is lower than for the development of the significant place itself (as is often the case), it may be subject to a lower profit margin, or a rate applied to the whole that balances the different levels of risk of the parts. Each scheme is different, and must be assessed on an individual basis, normally within the range indicated.
- 5.12.4** It will be clear that, so long as it does not involve inherently greater risk, a developer will normally wish to maximise the conservation deficit to be covered by enabling development, and thus the quantum of development, in order to maximise allowable profit, since it is directly related to the scale of the operation. As well as the obvious approach of not seeking to generate maximum value from the historic building that is normally the focus of the proposal, it can be in the developer's interests to, for example, accommodate community expectations about facilities, access, restoration and so forth, and perhaps even to generate them through a community planning exercise. This can be especially true if house builders are involved as principals or development partners; they tend to be attracted to enabling development projects primarily because the new development will sustain their core business. The public interest will almost always lie in minimising the quantity of enabling development.
- 5.12.5** When judging what is a fair and reasonable return, it is necessary to take into account the location of the development, length of development, the target market, complexity of the scheme, possibility of unforeseen problems (although a contingency figure in the building costs should, if professionally estimated, take this risk into account), the stability of interest rates, etc. Local authorities should therefore seek professional advice (as part of their scrutiny of the development appraisal) on what constitutes a fair and reasonable level of developer's profit. Allowing too great a profit could result in permission being granted for more units than is necessary, whilst if sufficient profit is not allowed, the development may fail.

## **5.13 VAT and capital taxation**

- 5.13.1** The impact of VAT upon the scheme should be taken into account and, so far as possible, minimised. Specialist advice may be needed in complex cases.
- 5.13.2** The impact of capital taxation on enabling development can be a complex matter. Charities, including building preservation trusts, are exempt from tax on most

forms of income and gains if they are applied to charitable purposes. The activities of commercial developers, including the disposal of property, are normally taxed as trading profits; whatever the real 'developer's profit' turns out to be will be subject to tax at the prevailing rate of income or corporation tax.

**5.13.3** The situation regarding individuals and non-trading companies is much more complex. The sale of land to fund the repair or reuse of a significant place is a 'chargeable event' for capital gains purposes, and the fact that the funds raised must, under a section 106 agreement, be applied to meeting a conservation deficit does not, of itself, change that position. The value added to the land by the grant of planning permission, intended to subsidise the repair of the significant place, will normally be liable to taxation as a capital gain, subject only to standard reliefs and allowances. If, however, the value of the remaining property is not expected to rise by the amount of the section 106 expenditure, there may be scope to apply the principle that any proceeds received for capital gains purposes should be lowered by the difference between the uplift in market value of the remaining property and the amount spent on the restoration. It is of course this difference, the 'conservation deficit', that enabling development should be designed to meet. Analysis of specific transactions is necessary to establish if this principle can be applied.

**5.13.4** The tax implications for each individual case should therefore be addressed in detail by the landowners and their advisers. Local authorities should carefully scrutinise exceptional arguments by landowners, to the effect that significantly more enabling development is necessary to address taxation liabilities, given that a key principle of enabling development is that it should meet the needs of the significant place, rather than its owner for the time being. It may be necessary to consider a more tax-efficient mechanism to deliver the desired outcome.

## **5.14 Due diligence**

**5.14.1** Carrying out a development appraisal is a skilled task, involving the input of a number of professional disciplines. By its very nature, the development appraisal can provide a wide range of end figures, depending upon the accuracy of its components. Consequently, when carrying out due diligence exercises, local authorities should employ qualified and experienced professionals who are familiar with the development process and who can investigate and verify the figures being put forward.

**5.14.2** Local authorities should be careful not, in any way, to endorse the profitability of the scheme, for it is up to the developer/owner to provide the information to justify their proposal. It is the local authority's role to carry out a due diligence exercise in order to verify that the information being provided is a reasonable assessment of the proposed development and the supposed 'conservation deficit' as at the date of the application. It is important that the figures used in the development appraisal are as at today's date rather than projected, as this adds a further layer of possible inaccuracy.

**5.14.3** Once the development appraisal has been verified, and the basic figures agreed, a sensitivity analysis that varies the main figures (eg construction costs, projected revenue and interest rates) is a useful exercise in order to take an overall view of the scheme. Is it robust, or unduly vulnerable to relatively minor changes in one variable?

## **5.15 Assessment of repair and conversion – reasonable works, reasonable costs?**

- 5.15.1** It is vital to consider whether the works proposed conform to good conservation practice, involving neither too much nor too little work; and whether they are realistically costed. To do so, a specification synopsis describing the standard of repair, and a schedule of the extent of repair, are essential.
- 5.15.2** Repair proposals should generally conform to English Heritage advice in *The Repair of Historic Buildings* (1991), avoiding the twin temptations to do too much – often in pursuit of an unrealistic goal of a long subsequent period free of maintenance – or to do too little, so that the ‘solution’ would be short-lived. This general advice must, however, be tempered by the nature of the building and the end-user. To make a repaired and converted building readily marketable, it may be necessary to undertake major work, like re-covering the roofs, which could, with good routine maintenance, be deferred a little longer. It tends to be difficult, for example, to let a building to tenants on the basis that they must incur the cost and disruption of such major works within a few years of moving in; and the cost will probably be less if tackled alongside other major works. The same principles apply to buildings and structures which form part of an historic park or garden, which need to be put into sound repair at the outset if a management plan to secure their long-term future is to be effective, and management charges reasonable (see 4.6.4).
- 5.15.3** Equally, it may be necessary to accept compromises if costs and the extent of enabling development are to be kept within acceptable limits; the perfect solution may have to be left to the next generation. For example, profiled metal sheeting rather than slate on the roof of a mill may be acceptable if the alternative is no mill; or the structure of a rock garden may be made sound, but its replanting simplified. The compromises to avoid above all are short-term repairs to roofs, gutters and other crucial weathering elements of buildings, the inevitable failure of which will result in rapidly escalating deterioration. A package funded through enabling development must result in a significant place that will remain reasonably sound through normal routine maintenance, although on occasion it will leave scope for future enhancement.
- 5.15.4** Where buildings are to be sold, after repair they must be of a quality standard that is saleable in the market. Multiple residential conversions, particularly, must achieve standards acceptable in performance terms to owners and occupiers, as well as building control officers; and be sufficient to secure appropriate certification or warranty, or they will not be mortgageable with mainstream lenders.
- 5.15.5** Judging the appropriate approach to repair and conversion should normally be within the expertise of local authority conservation staff. Assessing estimates of the cost of major and complex works, however, is likely to require specialist support in the form of a quantity surveyor with expertise in historic building or landscape works.

## 5.16 Restoration

**5.16.1** It is important to remember that the ‘ideal’ solution in conservation terms for a particular place – not only repair, but full reversal of past detriment – may generate demand for a quantum of enabling development whose impact on other interests would be very significant. Optional restoration and enhancement may therefore be problematic in enabling development cases, even if justifiable in terms of conservation policy (for which see English Heritage *Conservation Principles, Policies and Guidance*, paras 126–37). Such proposals commonly include the removal of inappropriate accretions to buildings or landscapes, usually coupled with the reinstatement of lost or seriously damaged architectural features or planting schemes.

**5.16.2** The Policy establishes a presumption against enabling development unless ‘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’. Enabling development should therefore be primarily directed towards meeting the conservation deficit arising from repair and conversion work that is essential to secure the long-term future of the place, including making it fit for purpose and marketable, or that is essential to sustain an historic entity. That may, of course, involve reversing changes that are so harmful to character and value that they are essential to achieving those ends. Restoration and enhancement that goes beyond that threshold should therefore normally be limited to work that adds as much or more to value as it does to cost, and so does not increase the need for enabling development; but there will be exceptions where substantial public benefit can be achieved at minimal public cost.

**5.16.3** Unlike buildings or structures, planted landscapes tend to deteriorate slowly and can be recovered after a longer interval of neglect. The restoration of such landscapes *per se* will not normally justify enabling development, but, subject to all the criteria of the Policy, securing the future of important historic buildings and structures (including the main house) within them may do so. In such circumstances, it is likely to be appropriate to re-establish the framework of the landscape, and elements crucial to accessing and enjoying the buildings; and through the section 106 agreement to put in place a long-term conservation management plan within which further elements of restoration may take place incrementally, as opportunities arise and Environmental Stewardship or other funding becomes available. Obligations that ‘run with the land’ can be particularly important in ensuring that such landscapes are not subsequently lost through the effects of divided ownership or damaged by intrusive uses outside planning control. But as with buildings, it is desirable to seize any opportunity to achieve substantial public benefit at minimal public cost.

#### 5.16.4 APPEAL DECISIONS: APPROPRIATENESS OF WORKS

‘Some of the items you pointed out make me reluctant to accept that everything listed is necessary or even wholly desirable. The schedule appears not to have been prepared on the principle of minimum intervention; such an approach could significantly reduce the amount of work to be carried out and the amount of new material on the face of the building and in its fabric. The execution of all the works listed would no doubt put the building into an excellent state of repair, but it appears to me that the building is not in any significant danger, and that many of the works, though desired by the owners, are either not strictly necessary or necessary to the extent proposed. In my view, this seriously undermines the weight to be given to the benefit to the listed building arising from granting planning permission for the present proposal.’ *Horspath 1995*

‘Understandably the costed schedule of required repairs prepared for the applicant was based on an assessment of both visible and potential but unseen problems. As a result, a number of major cost items were allowed for in the Schedule of Remedial Works which would not necessarily be high on the priorities of an owner occupier. For example, although there was very little visible evidence of rising damp, an allowance of some £48,000 had been made for inserting a damp proof course throughout the house and all its annexes, together with consequential removal and replacement of much of the existing plaster, joinery and services. This figure would also include dry rot treatment, work to strengthen the floor, replacement joinery and redecoration. Although there was only minimal evidence of actual structural movement, an additional £25,000 was allowed for the underpinning and part rebuilding of walls. The cost of replacement ceilings and cornices, none of which in my opinion required urgent replacement, was estimated at £10,000. The existing under floor ventilation was assumed to be inadequate, with £2,000 allocated for remedial work. It thus seems to me that the approach or the “acceptable” standards adopted by the appellants’ professional advisers would not necessarily be those of a private owner occupier who would be more likely to address problems as they actually arose.’ *Woolhangar Manor 1997*

### 5.17 Commissioning development consultants

- 5.17.1** If a local authority does not have the professional valuation and development appraisal expertise ‘in-house’, it is important that the appropriate external professional advice is obtained from specialist consultants. The consultant should clearly state that they have no conflict of interest and that they are fully conversant with both the local market conditions and with the development process. A specimen letter of invitation to tender is at Appendix 3.
- 5.17.2** Failure to apply an appropriate level of scrutiny to evidence of both cost and value means that, on appeal, an inspector is likely to accept the appellant’s figures.

### 5.17.3 APPEAL DECISIONS: THE NEED FOR EXPERT SCRUTINY

'The appellant's figures of costs and receipts and the estimates on which they are based were not seriously challenged by the Council, although other means of overcoming the shortfall were suggested. I suggest that they provide a reasonable basis for determining this case.' *Wyndley 1995*

'I give no weight, however, to the Council's analysis of viability, based as it was on rough and ready figures and a notional scheme.' *Daresbury Hall 1997*

### 5.17.4 PRACTICAL POINTS

Local authorities should:

- ensure that the case is based on the needs of the place, not the owner
- appoint an experienced firm of independent advisers who are familiar with the development process, have knowledge of the relevant market(s), and are familiar with the policy guidance in PPG15 and that produced by English Heritage
- ensure that they are supported by specialist expertise in the assessment of repair and other construction costs: valuers are not quantity surveyors
- ensure that only an appropriate, normally nominal, site or acquisition value is included
- look carefully at the repair specification and other cost generators
- ensure that the emphasis in landscape restoration is on re-establishing the historic framework
- take a realistic view of profit levels, based on professional advice, and bearing in mind the degree of risk.

## 6 Making the decision

### 6.1 Introduction

- 6.1.1** Section 4 addressed the assessment of impact on the place itself. This section is concerned with the wider context, and becomes relevant only if the proposal is likely to be beneficial in heritage terms, and so has potential for approval. Weighing the benefit to the place (and any other benefits offered) against the harm to other public interests, particularly conflict with other planning policies, necessary to secure its future is not a simple exercise, for neither can be reduced solely to monetary value in a balance sheet. Policies established at national level, and in the local development framework, cannot be lightly overturned, particularly given the statutory duty (under s38(6) of the Planning and Compulsory Purchase Act 2004) normally to determine applications in accordance with it.
- 6.1.2** There will be occasions where proposed enabling development would result in marginal harm to some aspect of the significant place or its setting, yet it complies with the other criteria, and after thorough investigation it is clear that it represents the least harmful means of securing the future of the place as a whole. If so, rather than dismiss the proposals outright, it may be appropriate to weigh the benefit to the place (and any other benefits offered) against the harm not only to other public interests but also the place itself.
- 6.1.3** It is particularly important to consider the objectives of all planning policies that the proposed enabling development would contravene, and the local, strategic and long-term implications of those contraventions. The equation also needs to be considered from the standpoint of all the stakeholders involved. The problems are, of course, not confined to planning applications for enabling development, for weighing the balance is the very basis of planning decisions. This section therefore concentrates on some aspects of the process that tend to be particularly relevant to enabling development.
- 6.1.4** The delivery of public benefits in addition to securing the future of the significant place, for example affordable housing, tends to increase the amount of enabling development required, and should therefore normally be avoided, but some flexibility may be appropriate. The inclusion, for example, of some small dwellings at the lower end of the market, rather than minimising numbers of dwellings, may have little impact on the scale of enabling development required, but can help address rural need and contribute to sustaining a balanced community.
- 6.1.5** Where applications offer benefits in addition to securing the future of the place – for example to biodiversity or by generating rural employment or other community benefits – it is important that these are subjected to a level of testing equivalent to that applied to the claims for the place itself, involving the appropriate level of expertise.

## **6.2 Biodiversity**

**6.2.1** Biodiversity value is an attribute of most historic landscapes, and can include natural habitats and associated wildlife, as well as designed features such as avenues and specimen trees and other plants. Buildings may be used by bats, stonework colonised by important lichens, and parks will usually have veteran trees. Significant places can include a variety of valuable habitats (grassland, heathland, wood pasture, woodlands, hedgerows, lakes, coastal, etc) and associated species, including legally protected ones such as amphibians, mammals (eg bats), birds and plants. Securing the future of a culturally significant place does not normally warrant detriment, actual or potential, to a Site of Special Scientific Interest (SSSI) or protected species, nor vice versa, but mitigation strategies may make some works acceptable. English Heritage has a duty under the Countryside and Rights of Way Act 2000 to take reasonable steps to further the conservation of the special interest of SSSIs.

**6.2.2** Enabling development in support of places of cultural heritage value should clearly seek to minimise harm to the natural heritage, and where possible – through integrated, long-term management plans, for example – make a positive contribution to maintaining and enhancing biodiversity. Mitigation is likely to be required if development is detrimental to biodiversity interests. An integrated, holistic view should be taken of the management of all environmental assets and values. The advice of Natural England should be sought, and taken into account, where nationally important habitats and species are involved, as should the advice of the Environment Agency in relation to water habitat.

## **6.3 Sustainability**

**6.3.1** There are many aspects of sustainability. It requires integration of the social, economic and environmental strands of sustainable development into strategies, policies and programmes at all levels. Sustainable development is the core principle underlying planning (PPSI, para 3). This Guidance is primarily concerned with one approach to sustaining and enhancing cultural heritage values in our landscape, urban and rural, by avoiding loss or detriment to important and irreplaceable places; but in applying its recommendations, it is essential to bear in mind the wider picture.

**6.3.2** Proposals for enabling development essentially involve departures from local, regional or national planning policies, for example controlling development in the Green Belt or in the open countryside. It is clearly necessary to consider the effects of these departures on the objectives that the policies were designed to achieve and the amenities that they were designed to protect. Particularly relevant is the need to make settlement and land-use patterns more sustainable. Demand for water resources by, particularly, golf courses, may also raise the issue of sustainability and generate unintended consequences.

## **6.4 Community participation**

**6.4.1** Since the concept of enabling development involves public disbenefit being accepted in return for a potentially greater public benefit, consultation with the communities and constituencies of interest (or 'stakeholders') involved is

particularly important. The degree of participation should be proportionate to the level of community interest in or ‘cultural ownership’ of the asset. Where the impact on a definable community – for example a village or urban neighbourhood – would be considerable, consultation should reasonably extend beyond the statutory notification procedures, to encompass active participation in line with the authority’s Statement of Community Involvement. At the same time, it is important to be aware of the dangers of community manipulation – for example by a developer raising expectation or demand for additional public amenities and benefits – in order to increase the amount of enabling development, and thus his return from the project (see 5.12.4).

- 6.4.2** Participation can take many forms, but it should involve an attempt to understand local perceptions of the values attached to the place – which may well differ from the national, expert, assessment – and the relative importance of particular issues that enabling development may generate. The process is likely to be easier if there is a background of community involvement through village design statements or conservation area appraisals and enhancement strategies. Participation should provide an opportunity for active involvement in decision-making. Consensus is rare, because of the different, essentially individual, value sets each player brings to bear, but it is important to understand the range of opinion represented.
- 6.4.3** Communal values are increasingly recognised as a type of cultural heritage value. But it is important to recognise that not only are they unlikely to be fully reflected in statutory designations, but also that the local community is likely to attach considerable weight to them. A war memorial in an abandoned churchyard may, for example, be of great local significance but unlisted. The local community will want to continue to visit it and remember. Conversely, a lack of local ‘ownership’ does not negate the importance of national, statutory designation.
- 6.4.4** Many significant places acquire a strong degree of community ‘ownership’ and amenity value through informal recreational use – dog-walking in the park, occasional public events held within the building such as annual fêtes, or other uses which confer a degree of public access. This sense of ownership can be beneficial – local people may help informally with maintenance or fundraising; regular use of the grounds can reduce vandalism; voluntary groups may help with research or interpretation. Development which reduces the element of local access in order to generate the resources needed to secure the future of a place may in the longer term be counterproductive, if the local community cease to feel a degree of ownership or responsibility for the place. The provision of permissive paths or other appropriate access under the section 106 agreement can often address such concerns. It is important to work with groups who value and care for significant places, and to deal sensitively with them; but such local interests should not override well-considered and widely supported schemes.

## **6.5 The balance of advantage**

- 6.5.1** Sustaining significant places is a high priority, and statutory designation imposes a presumption in favour of their preservation. However, this does not automatically justify doing so through enabling development if the disbenefits are out of proportion to the heritage and other public values of the asset. It does, however,

suggest that the decision should be made in the light of a realistic (but not overly pessimistic) view of the consequences of refusal, particularly where the place is rapidly deteriorating and there is no other likely source of the subsidy necessary to secure its future.

- 6.5.2** These are not decisions to be taken lightly. They should follow the evaluation of all potential options as part of the assessment process. The enabling development may, for example, lie within a Green Belt, on which government policy is clear; indeed the principle is relevant to all decisions involving enabling development:

‘Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.’ (PPG2, para 3.2)

- 6.5.3** The sustainability of the development in the long term, and its impact on all stakeholder groups, normally determined by community involvement, are important considerations. But enabling development is a legitimate planning tool; if, after full assessment, the balance of advantage clearly lies in approval, planning permission should be granted.

#### **6.5.4 APPEAL DECISIONS: WEIGHING THE BALANCE**

‘I consider that the comparatively limited visual harm to both the Green Belt and the setting of Henbury House is clearly outweighed by the potential of the scheme to provide for repairs and restoration of what is acknowledged to be an important grade II\* listed building. I believe that the future for the listed building may be bleak if those repairs are not carried out within the next few years.’ *Henbury House 1995*

‘... whilst it is in the nature of enabling development that it is contrary to established planning policies ... the contravention in this case is not just against the letter and broad aims of certain policies; it would jeopardise the achievement of strategic regional aims. It would, in my judgement, adversely affect the economic and social regeneration of urban areas. It is my judgement that the development of 100 dwellings in a poorly accessible, greenfield, countryside location, with harm to the parkland and the main road frontage, in an area of housing restraint, where that which is developed should be aimed at the regeneration of towns, and with little public consensus, is too high a price to pay for the benefits that this scheme brings.’ *Combermere Abbey 2005*

‘Notwithstanding the fact that most of the application site falls within the definition of previously developed land, there is agreement between the applicant and the planning authority that the application site is not in an accessible location. From that perspective, the development is unsustainable. However, in terms of overall sustainability, the proposals would have a limited effect on the quality of the historic built environment and on the wider countryside and would secure, through imaginative design, the preservation of an important heritage asset. On that basis, I conclude that the proposals are neutral in sustainability terms.’ *Riber Castle 2006*

### 6.5.5

#### PRACTICAL POINTS

Careful assessment of the impact of options or proposals on the wider community is particularly important where:

- the community places a significant value on the place, whether through faith, through commemoration, use, memory, identification or in other ways
- the place has a current community use
- there is a potential or active community involvement in caring for a site (eg through voluntary work on site)
- the proposals could impact on the local community through change of use, or change in traditional patterns of access, or in other ways

# 7 Securing the benefits

## 7.1 Introduction

**7.1.1** Where a decision has been taken that proposals for enabling development are acceptable in principle, it is essential that the benefits are properly secured. Legally enforceable arrangements must be put in place to ensure that the commercial element of the development on which the scheme has been predicated cannot be carried out or used without the heritage benefits materialising. Local authorities need to ensure that they have access to appropriate legal advice on the drafting of such agreements.

## 7.2 Condition or obligation?

**7.2.1 Planning condition:** A condition imposed upon the grant of planning permission. The principal powers are in sections 70, 72, 73, 73A and Schedule 5 of the Town and Country Planning Act 1990. Government advice on the use of conditions can be found in DoE Circular 11/95, *The Use of Conditions in Planning Permissions*, which includes a set of 79 model conditions and a list of types of conditions that are unacceptable.

**7.2.2** As a matter of policy, conditions should only be imposed where they meet the six general criteria for validity that have been laid down by the courts. These are that the condition should be:

- necessary
- relevant to planning
- relevant to the development to be permitted
- enforceable
- precise
- reasonable in all other respects

Guidance on each of the criteria appears in the Circular.

**7.2.3 Planning obligation:** An obligation entered into by a person with an interest in land, either by way of agreement with the planning authority or unilaterally, that conforms to the requirements of section 106(1) of the Town and Country Planning Act 1990. It is essentially a legally binding covenant that runs with an identified legal interest in land, thereby binding future owners of that interest.<sup>5</sup>

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<sup>5</sup> The Planning Bill, currently before Parliament, provides for the so-called Community Infrastructure Levy, which will operate as a form of tariff upon developments. As currently proposed, local authorities may choose to adopt the relevant legislation in their area. Whether or not an authority chooses to do so, it seems there will still be a need for section 106 obligations to deal with site-specific issues.

**7.2.4** Government advice on planning obligations is given in ODPM Circular 05/05, *Planning Obligations* and *Planning Obligations: Practice Guidance* (DCLG 2006). The Secretary of State's policy is that they should only be sought where they meet certain tests, namely that they are:

- relevant to planning
- necessary to make the proposed development acceptable in planning terms
- directly related to the proposed development
- fairly and reasonably related in scale and kind to the proposed development; and
- reasonable in all other respects.

**7.2.5** DoE Circular 11/95, *The Use of Conditions in Planning Permissions*, advises that a condition should be imposed in preference to entering into a planning obligation, since the latter does not give the opportunity to have the restrictions varied or removed by means of an application or appeal if they are, or become, inappropriate. Planning obligations can only be varied by agreement for the first five years, after which application can be made to the local planning authority (with a right of appeal to the Secretary of State) to vary or discharge them on the basis that they no longer serve their purpose.

**7.2.6** For schemes of enabling development, however, it is of paramount importance that the heritage objectives of the scheme are met. This will very often justify a planning obligation, not least because there is a limit to the extent to which detailed drafting can appropriately be accommodated within planning conditions. Measures may also be justified that go beyond the scope of valid planning conditions, such as requiring the payment of money, the deposit of a bond or the transfer of land. There is a strong public interest in ensuring that the detriment cannot be caused without a compensating benefit being put in place.

**7.2.7** It would not be appropriate for a planning obligation to be preferred to a planning condition simply because the former cannot be the subject of an appeal to the Secretary of State within five years. This need not be a concern, of course, if the condition in question is properly drafted and protects the place adequately, along with such other measures as may be needed.

## **7.3 Planning obligations**

**7.3.1** There are numerous legal points to bear in mind in drafting planning obligations, and it is usually appropriate to obtain specialist legal advice. The key points to bear in mind, however, are that:

- only a person 'interested in land' in the area of the local planning authority concerned may enter into a planning obligation
- obligations bind only the parties to them and their successors in title – they cannot be imposed on third parties.

**7.3.2** An important characteristic and benefit of planning obligations is that they are enforceable not only against any person entering into the obligation, but also any person deriving title from that person, notwithstanding that ownership may subsequently become fragmented, for example as a result of a housing development. In short, they are capable of 'running with the land'. This is an important

consideration because it is vital that the local planning authority's requirements are robust in the face of changing circumstances, particularly changes in ownership of part or all of the land in question. Title should always be checked at the outset and just before the obligation is extended into.

- 7.3.3** Particular care should be taken that not only does the person entering into a planning obligation have an interest in the land concerned, but an interest sufficient and appropriate to deliver the objectives of the obligation. A leaseholder, for example, cannot enter into a planning obligation capable of binding a freeholder; so if the lease in question were to end, the freeholder could deal with the site free of the planning obligation. This would not be a satisfactory situation, but can be overcome if the superior interests are willing to be bound into the obligation. Anyone with an interest in land who could act contrary to the objectives of the obligation must agree to be a party to it if it is to be effective.
- 7.3.4** Care should also be taken to ensure that any existing mortgagees are party to the planning obligation and so are clearly bound by it should they subsequently come into possession of the land. This could well happen in circumstances where the enabling development permitted has not been the commercial success that was hoped for.
- 7.3.5** Often, applications for planning permission for commercial development are made by developers upon the basis of a conditional contract or option to purchase the freehold. This is not, however, the same as dealing with the freeholder, so a covenant given by a developer in that capacity will not bind a future freeholder. The planning authority should insist that the freeholder is party to the agreement.
- 7.3.6** Section 106(1) of the 1990 Town and Country Planning Act provides that planning obligations may be entered into by a person interested in land:
- to restrict the development or use of the land in any specified way
  - to require specified operations or activities to be carried out in, on, under or over the land
  - to require the land to be used in any specified way, or
  - to require a sum or sums to be paid to the authority on a specified date or dates or periodically.
- 7.3.7** If a provision in a planning agreement does not fall within one of these four categories, then it may not be invalid as such, but it would not amount to a planning obligation that has the effect of running with the land.
- 7.3.8** It is crucial that the key planning obligations to secure the 'heritage objective' fall within the confines of section 106(1), and:
- are 'attached' to the appropriate land
  - make plain when they must be performed
  - wholly or partly prevent the commercial element of the development from being carried out or used until they have been performed.
- 7.3.9** Adherence to these criteria should ensure that changes in circumstances do not frustrate the heritage objectives that have justified the scheme. For example, a typical scheme of enabling development may involve the building of houses in circumstances that would otherwise be unacceptable, in order to secure beneficial repairs and long-term maintenance to an historic property. It may be that the

development site and the historic property are in different ownerships. Accordingly, an obligation to carry out work to the historic property cannot be imposed upon the owner of the development site, who has no legal interest in the land that is the subject of the obligation. The proper course, therefore, is to require the owner of the development site to enter into an obligation under section 106(1)(a) restricting the construction or use of the new houses until certain specified works to the historic property have been done. Corresponding obligations to allow the works to be done could be entered into by the owner of the historic property, as a party to the same agreement. Both parties must be bound to act jointly, and their obligations must run with the land.

- 7.3.10** The timing of the obligation is critical for enforcement purposes. The most effective mechanism is for the permissible progress upon or use of the commercial scheme to be related to the carrying out of works to the historic property or the payment of funds for its benefit. It is not sufficient simply to require works to be done or payments made at certain stages of the commercial scheme. If the obligation is to be capable of effective enforcement it must allow for progress upon the commercial scheme or use of it to be prohibited until the agreed benefits have materialised. In the case of breach, an injunction can be sought if necessary.
- 7.3.11** Where, as for example with historic landscapes, long-term adherence to a conservation management plan is fundamental to the success of the scheme, the requirement to do so should be the subject of a planning obligation created through the section 106 agreement.
- 7.3.12** Schemes of enabling development are often inherently complex. This precludes having a standard approach to drafting the planning obligations that may be required. Nonetheless, a form of section 106 agreement is provided at Appendix 4, which illustrates certain drafting principles that may be of use in considering what may be required in a given case. In the example, the heritage benefits are secured not only by enforceable restrictions upon the progress of the commercial development, but also by a bond under which the planning authority can look to a surety, usually a bank or other financial institution, to meet its costs should the authority need to take remedial action in circumstances of default.

## **7.4 Planning conditions**

- 7.4.1** Planning conditions, allied with (but not duplicating) planning obligations, can be used to ensure that the justification for a scheme at the application stage is brought to fruition. This is particularly so where it is important that the commercial element of a scheme is built to a certain standard and level of detail. Planning conditions should not be used to delay important decisions until later on – they are best used to ensure that details put forward at the application stage are adhered to. Accordingly it is often advisable to include a condition specifically requiring adherence to certain approved drawings unless the local planning authority permits otherwise.
- 7.4.2** It is quite pointless to have a condition that requires further investigation of matters that are relevant to understanding the impact of a proposal on the significance of a place, as once planning permission has been granted such investigation can no longer influence the outcome. However, conditions can be used to control details of work established as acceptable in principle, including undertaking any investigation

necessary to inform it (see 4.1.7), and to secure mitigation strategies, particularly those involving archaeological excavation and analytical recording of elements of the place whose disturbance cannot be avoided. PPG 16, paragraph 30, includes a model condition for archaeological work in mitigation of unavoidable damage.

**7.4.3** It may also be appropriate in enabling development cases to use planning conditions to withdraw permitted development rights, the exercise of which could be detrimental. Specific guidance on this is provided in paragraphs 86–88 of Circular 11/95. These explain that although there is a general presumption against restricting the use of permitted development rights, exceptional circumstances may justify conditions which do so, if necessary in order to secure a clear planning purpose. Model conditions 50–52 in the circular provide appropriate wording.

**7.4.4** Planning conditions may also be required to regulate the phasing of a development. This may be necessary in order to ensure that the developer does not simply omit an element of the development to the detriment of the heritage objectives that justify the scheme. It may also be appropriate to ensure that the development is carried out in a particular sequence. The circular provides a model phasing condition (No. 42).

**7.4.5** The complexity of the arrangements necessary to regulate the future maintenance or management of a property might well call for a section 106 obligation to be in place in order that the necessary drafting can be accommodated. The possibility that provisions of similar effect can be contained within planning conditions ought, however, to be considered.

**7.4.6** It may be that a development ought not to proceed or be brought into use until such time as works have been carried out on land that is not within the developer's ownership or control. Such works often involve improvements to the public highway that are required to ensure safe and efficient access to the site by vehicles. In these cases a so-called 'Grampian Condition' is needed, such conditions taking their name from the 1984 case of *Grampian Regional Council v City of Aberdeen District Council*. Grampian conditions must be worded in a negative way so as to impose a restriction upon land that is within the developer's ownership or control – typically a restriction upon development being commenced or used – until such time as certain works have been satisfactorily completed. In the 1993 case of *British Railways Board v Secretary of State for the Environment and Hounslow LBC*, the House of Lords ruled that such conditions are not rendered unlawful on account of the fact that there is no reasonable prospect of their being fulfilled. This may be the case, for example, where the owner of the land upon which the works are to be carried out has made it plain that he has no intention of selling the land or granting the necessary rights over it. As a matter of policy, however, the Secretary of State has stated that conditions of this kind should only be imposed where there are at least reasonable prospects of the action in question being performed within the life of the permission.

## **7.5 Securing the investment**

**7.5.1** All development involves risk. Costs can rise, the market can fall, and even the most prudent and experienced developers can fail as a result. Ideally the place should be repaired before the enabling development commences, or the funds

necessary to do so deposited with a trust, or a performance bond or guarantee obtained. However, these options can add to the developer's financing costs, and so increase the amount of enabling development required. With larger projects, an effective compromise can be phasing, so that once a defined block of work has been done or payment made, the first phase of enabling development may proceed, with subsequent development phases scheduled to follow the delivery of subsequent benefits. It is essential that the benefits are a step ahead of the detriment, not a step behind.

- 7.5.2** An agreement requiring phased repair of the place linked to stages in the realisation of the enabling development, rather than on its completion, mitigates the risks but can still result in financial difficulties. Such agreements should ensure that the phases of works to the place are undertaken in a logical sequence, beginning with repairs to the structure and external envelope, so that clear benefit is achieved even if the development is aborted. The degree of risk needs to be carefully assessed in each case, but the objective of enabling development should always be secured as early as possible, and certainly not later than the use or occupation of the new development.
- 7.5.3** A section 106 agreement may provide for sums of money to be paid to the local planning authority to be used to finance repairs to a significant place or fund its future maintenance. However, section 106 does not directly provide for sums of money to be paid to others. Thus a requirement that payments be made other than to the planning authority should be framed as an appropriate restriction on proceeding with some or all of the enabling development until the requisite payments have been made.
- 7.5.4** There should be clear arrangements for the use of money paid over in this way. A separate interest-bearing account, specific to the property, is normally appropriate. The payer may reasonably insist upon being provided with information as to how funds provided are spent and repayment provisions for funds that have not been applied.
- 7.5.5** An alternative approach, that may have a lesser effect on cash-flow projections and financing issues, is to require the heritage benefits of a scheme to be protected by a bond in the planning authority's favour. Bonds are commonly used to guarantee obligations in infrastructure agreements and can be used to guarantee obligations for the benefit of significant places. An example of how such a bond might be drafted is included in Appendix 4. Their advantage is that the developer (or other party concerned), instead of having to produce funds before the scheme itself has generated any return, effectively insures the heritage benefits by procuring a surety to whom the planning authority can turn for payment in circumstances of default. Such a bond would, however, involve the surety being paid a fee for accepting potential liability, in the same way as any insurer will require an insurance premium.
- 7.5.6** It is usual for the surety only to accept liability to make payments up to a specified maximum sum, and for the bond to operate so as to reduce the surety's potential liability as particular stages in the project are completed. The arrangements will be a matter for negotiation in the context of the scheme in question, and usually the local authority will want to be satisfied that the surety is a reputable one before accepting the bond.

**7.5.7** Performance bonds of this kind tend to follow a standard approach. The ‘bond sum’ represents the maximum amount recoverable from the surety under the bond. It is also fairly common for bonds to specify that action shall only be taken against the surety (sometimes known as a bondsman) by the local authority after it has taken such other action in default against the developer as is reasonable in the circumstances.

## **7.6 Securing long-term management**

**7.6.1** Enabling development will not serve its proper purpose if it does not secure the long-term maintenance of the place, as well as its initial repair. The local authority will probably not want to become involved in the ongoing maintenance of a place in which it has no legal interest. However, it should ensure that appropriate mechanisms for maintenance are put in place, both through the section 106 agreement and the structure of ownership and management, such that it can intervene if difficulties arise.

**7.6.2** In the simplest case of, say, a small listed house, maintaining its value in the market is normally likely to provide sufficient incentive to future owners to keep it in repair. Including an obligation to maintain in the section 106 agreement is nonetheless desirable, and if problems do arise, likely to be more effective than the ‘long stop’ of the use of statutory powers.

**7.6.3** Commonly, the place and the enabling development are part of the same historic entity, with common elements, for example development in the grounds of an historic house or institution. In such cases, where fragmentation of management of the place could be detrimental to its significance, compliance with a management plan will normally be required under the section 106 agreement (see Section 4.6), together with provisions to ensure that there is a workable mechanism for carrying out and funding its provisions for maintaining the house and its gardens and (if applicable) landscape setting.

**7.6.4** In such cases, the public interest in securing long-term management coincides with the mutual interest of the various owners in protecting the amenity and value of their assets in the long term. Thus the normal arrangement is for individual units to be let on leases, with the freehold held by a management company of which the lessees are shareholders. Notwithstanding the problems of leasehold enfranchisement, such an arrangement remains preferable to fragmentation of the freehold, since positive covenants bind subsequent purchasers. Funding normally comes from service charges, but more complex mechanisms involving, for example, rental or other income, are possible.

**7.6.5** Whatever solution is adopted, the owner of the place should undertake appropriate long-term maintenance responsibilities according to covenants in a section 106 or other agreement. Alternatively a third party will discharge this responsibility under the authority of contracts drawn up between the developer, the council and the third party. Indeed a scheme may involve several interlocking agreements that may well be complex documents, in that they must identify with sufficient precision the works in issue and the means of raising funds (source, amount and timing) for the purpose. It will usually be advisable, therefore, to instruct a solicitor to undertake this work. The example section 106 agreement at Appendix 4 includes, in paragraph 1.1, a suggested definition of a management plan, and Appendix 5 an example plan.

**7.6.6** A further possibility is the establishment of a trust or other legal entity, the object of which is to care for the place in the short and long term. Trustees may be appointed by the local authority, heritage groups and others who have an interest in the long-term management of the place, as well as those having a more direct proprietary interest. Such trusts may be set up to hold a place, particularly one with a limited market value, indefinitely, or take the form of a revolving-fund building preservation trust. Generally, however, setting up such a body requires specialist legal advice.

### **7.6.7 APPEAL DECISIONS: SECURING THE BENEFITS**

‘The s106 agreement sets out obligations with regard to ownership, the lodging of a performance bond to secure the repair and rebuilding of the Hall if the developers default, the submission of a safety certificate for the dam prior to the occupation of any dwelling, and the extinguishment of business uses on the site before the start of development. It also required a draft conservation/management plan for the Woodland Reserve to be prepared and application to be made to the Heritage Lottery Fund for its implementation. If the application for funding were to fail, the owner undertakes to maintain the trees, public footpaths, stiles and gates, and to allow public access subject to constraints necessary to protect habitats and wildlife.’ *Church Lawton 2000*

‘The Secretary of State considers that the completed planning agreement under section 106 of the Town and Country Planning Act 1990 would achieve its aim of obliging the owner of the Hop Farm to repair and maintain the listed buildings on the site from the revenues of the holiday-let units, not to separate or sell independently the units and to place occupancy restrictions on them.’  
*Hop Farm 2005*

‘On balance, I consider that the new buildings are justified as enabling development. Unfortunately, because of the inadequacy of the completed s106 agreement, the whole of the benefit would not be secured before the disbenefit occurs. In the absence of this safeguard I conclude that the applications should not succeed.’  
*Sandhill Park 2006*

‘The section 106 agreement ... seeks to overcome possible objections to the development or to mitigate its possibly adverse effects. Importantly, it would ensure a sequence of development that would secure restoration of the Castle and its outbuildings before any wholly new development took place. That would inevitably impose a financial burden on the developer, in that the least profitable aspects of the scheme would need to be completed before any benefit could be obtained from the enabling development. It is, nevertheless, essential as a justification for permitting development that, in several ways, conflicts with development plan policy objectives and national planning guidance.’ *Riber Castle 2006*

### 7.6.8 PRACTICAL POINTS

Local authorities should ensure that:

- all relevant parties and interests in land are bound into any section 106 agreement, by checking the Land Registry entry immediately prior to signing the agreement
- the benefit is delivered before the disbenefit is incurred, or a performance bond is obtained to guarantee delivery
- permitted development rights are withdrawn where their exercise could involve material harm to the place or its setting
- public benefits are sustained through appropriate obligations to maintain and manage the place in the long term
- if historic gardens or landscapes are involved, a management plan is in place.

## 8 Monitoring and enforcement

### 8.1 Importance and basis

- 8.1.1** There have been many instances of schemes involving enabling development not delivering the promised benefits because implementation has not followed in accordance with the section 106 agreement that set out the rights and obligations of the parties. Such an agreement is a contract between the community, represented by the local authority, and the developer, to deliver a defined output, at a defined cost (paid in kind), to a defined standard, and at a defined time. In essence, it differs little from a contract to empty the dustbins, and should be subject to a similar degree of management and monitoring of deliverables in relation to both time and quality.
- 8.1.2** As soon as the contract is signed, it is essential to look forward. First, agree which officer of the local authority (or indeed external consultant) will be responsible for its practical monitoring. The appointed officer will need to set up regular meetings with the developer to review progress, both at and between milestones in the programme agreed in, or in consequence of, the contract. Phased schemes demand a formal arrangement for 'signing off' delivery of the benefits required before the next phase of development can begin. Monitoring will need to be focused on the areas which represent the greatest risk, for example achieving a sufficient quality in historic building and landscape repair, or developing a marketing strategy that will deliver the end values on which the scheme is predicated.
- 8.1.3** While a nominated officer with lead responsibility is essential, monitoring can be facilitated by corporate working within the planning authority, for example by involving building control staff who will be visiting the site in the course of their normal duties. Once an agreement is in place, the developer may well execute the works as quickly as is practicable, to limit financing charges and risk, and it is essential to keep up with the pace of work.
- 8.1.4** Requests to relax conditions imposed to secure the benefit of enabling development are frequently received. However, since experience suggests that conservation work deferred until the completion of development has a tendency not to happen, they should normally be firmly resisted.

### 8.2 Breaches of section 106 agreements and planning conditions

- 8.2.1** Action must be taken rapidly in response to any problems or breaches of obligations or conditions that may arise. Where a section 106 agreement (or unilateral undertaking) is breached, various options are available to the local planning authority when considering enforcement action.

- 8.2.2** An injunction can be obtained. This will often be the appropriate remedy to pursue, as the local planning authority may well not have sustained any financial loss capable of compensation by payment of damages. There is now specific authority for obtaining injunctions to enforce section 106 agreements in section 106(5) of the Town and Country Planning Act 1990.
- 8.2.3** Under section 106(6), where a requirement to carry out operations in a section 106 agreement (or unilateral undertaking) has been breached, the local planning authority may, upon notice, enter upon the land to itself carry out the works and recover its reasonable expenses for so doing from those against whom the obligation is enforceable. Section 106(12) provides that regulations may provide for sums owed to the local planning authority in these circumstances to be charged upon the land, but as yet no such regulations have been made. The money is recoverable, however, as a civil debt in the usual way.
- 8.2.4** In addition to these two specific remedies mentioned in section 106 itself, the local planning authority can enforce planning agreements (or unilateral undertakings) in contract. By operation of section 106(3), the usual rules of privity (ie that a contract is only enforceable by and against the parties to it) are adjusted so as to allow the local planning authority to enforce not only against the party or parties that entered into the planning obligation in question, but anyone deriving title from them. Enforcing the agreement in this way may well be appropriate where, say, money due to the authority for a particular purpose has not been paid over.
- 8.2.5** Where there has been a breach of a planning condition, the local planning authority can serve a breach of condition notice under section 187A of the 1990 Act, requiring the steps specified in the notice to be taken. Such notices can be served upon the person who is carrying out the development to which the condition relates or any person having control of the land concerned. There is no right of appeal in the Act against such a notice, and a failure to comply is a criminal offence. Further, local planning authorities can take enforcement action by issuing an enforcement notice in the usual way under section 172 of the 1990 Act.

### **8.3 The importance of final evaluation and feedback**

- 8.3.1** On completion of the development, both the authority and the developer – preferably jointly – should compare the outcome of the project to their respective expectations. Key aspects are clearly the quality of work achieved to the place, the actual rather than predicted impact of new work, and the actual financial outcome compared with the prediction on which the scheme was based.
- 8.3.2** The results of the evaluation, including any experience and lessons that it would be desirable to take into account in future policies and decisions, should be reported to the planning committee, and hence made available to the public. This respects the public, community interest in enabling development schemes, and fulfils the need for accountability and transparency inherent in the nature of enabling development agreements, although some financial details may need to be kept confidential between the parties.

# APPENDICES

## **APPENDIX I**

### **Checklist for applications for planning permission for enabling development**

The following specific items should normally be included in the information accompanying an application for planning permission for enabling development:

- Survey drawings and reports showing the existing form of the building and how it has developed through time
- Conservation Statement or Plan, defining all aspects of significance of the building and landscape, its vulnerability, and guidelines for sustaining its significance
- Design and access statement
- Options appraisal
- Evidence of market testing
- Proposals, defined in sufficient detail to understand impact on the significance of the place
- Impact assessment, including results of detailed targeted investigations to define impact
- Development appraisal for option proposed, substantiated by
  - justification for current value, if not nominal
  - justification for end values, based on comparable transactions
  - detailed costed schedules of works
  - justification for any other exceptional costs
  - sensitivity analysis
- Suggested heads of terms for section 106 agreement, including mechanisms for long-term management and maintenance as appropriate
- Parallel application (if applicable) for listed building consent.

## APPENDIX 2

### Example of a typical development appraisal layout for a single-phase development

#### Site costs (Section 5.6–7)

Market value of property in existing condition

Costs incidental to acquisition:

Stamp Duty Land Tax on acquisition at market value

legal fees on acquisition at market value

agent's fees on acquisition at market value

reasonable holding costs

---

Total site costs £ xxx

#### Design and construction (Section 5.8)

Survey costs

Research and analysis costs

Contamination costs

Construction costs:

repair

conversion

new build

Landscaping costs

Professional fees:

project manager

architect/surveyor

landscape architect

quantity surveyor

structural engineer

M&E engineer

planning supervisor

other

Contingency on design and construction costs

---

Total design and construction costs £ xxx

#### Statutory and other charges (Section 5.9)

Planning fee

Building control fee

Funding and valuation fees:

funding fees

financial cap

bank valuation fee

bank's legal and monitoring fees

second charge costs

Payments required under section 106 agreement

Legal costs of section 106 agreement

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Total statutory and other charges £ xxx

**Interest** (*preferably calculated by way of cash flow*) (Section 5.9)

Site cost + fees

Construction + fees

Statutory and other charges

Voids

---

|                      |       |
|----------------------|-------|
| Total interest costs | £ xxx |
|----------------------|-------|

**Letting and sales costs** (Section 5.10)

Agent's letting fees

Legals on letting agent's sale fees

Legals on sales promotion costs

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|                               |       |
|-------------------------------|-------|
| Total letting and sales costs | £ xxx |
|-------------------------------|-------|

**Deductions from costs** (Section 5.11)

Short-term income from site

Grants

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|                  |         |
|------------------|---------|
| Total deductions | (£ xxx) |
|------------------|---------|

**Developer's profit** (see Section 5.12)

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|                         |       |
|-------------------------|-------|
| Total @ x% on net costs | £ xxx |
|-------------------------|-------|

---

|             |       |
|-------------|-------|
| TOTAL COSTS | £ xxx |
|-------------|-------|

|                                  |         |
|----------------------------------|---------|
| COMPLETED MARKET VALUE OF SCHEME | (£ xxx) |
|----------------------------------|---------|

|                 |     |
|-----------------|-----|
| SURPLUS/DEFICIT | £ 0 |
|-----------------|-----|

NOTES:

- In an enabling development scheme, the surplus /deficit should be approximately zero.
- VAT can be an important element. Most development appraisal packages include provision to include VAT calculations and can differentiate between recoverable, non-recoverable and exempt items.
- Developer's profit is calculated on all costs except any cash grant or subsidy from public funds (see Section 5.12.3).

## APPENDIX 3

### Model invitation to tender for valuation and development consultants

Dear

[NAME OF PROPERTY]

[Following our telephone conversation in connection with the above property] I would be most grateful if you would submit a fee proposal in accordance with the following brief.

#### 1.0 Background

[Description of the subject property, ownership, details, tenure (ie freehold/leasehold), details of any tenancies, planning background, location plan, site plan, brief details of applicant's proposals.]

#### 2.0 Description of brief

Having regard to PPG 15 and in particular the English Heritage publication *Enabling Development and the Conservation of Significant Places* we require professional advice as to the validity of the information supplied to us by [name of developer/agent].

The purpose of carrying out the exercise is to assess a number of key questions:

- Are the costs submitted realistic?
- Are the calculations of the amount of enabling development necessary to meet the conservation deficit realistic in terms of assumptions about building costs, end values, profit levels and so forth, bearing in mind the inherent risks in all development?
- Is the amount of enabling development proposed the minimum necessary to secure the future of the place?
- Has the applicant fully considered and investigated the possibility of alternative, possibly more profitable, uses and have these options been market tested?

Should your firm be appointed, all the relevant documentation will be provided.

#### 3.0 Site Visit

Should you wish to visit the site/property, prior to making your fee submission, this is to be arranged with [name, address, telephone number].

#### 4.0 Fee Proposal

Your fee proposal should contain the following information:

- 1 A clear statement confirming that your firm does not have any conflicts of interest.
- 2 The names and qualifications of the partners who would be carrying out the remit, and of any sub-consultants that you would engage to provide specialist input, together with a brief résumé of their relevant experience.
- 3 Examples of similar exercises carried out by your firm.
- 4 Your fee proposal for providing us with advice should include [where appropriate] the hourly rates to be charged by the senior partner and assistants.

## 5.0 Confidentiality

The above matter must be treated in the strictest confidence. In the event of your firm being appointed, no communication with the press, including the technical journals or other outside body, or disclosure or publication of any matter arising from the commission, whether by photograph or otherwise, may be made without prior consultations with and approval in writing from [*name of appointing body*].

## 6.0 Timetable

Your firm's submission should be accompanied by two copies and must arrive at the offices of [*name of appointing body*] no later than [*date*]. Upon receiving your submission, it is intended that an informal interview will take place on [*date*]. Thereafter, an appointment is likely to be made within seven working days and, subject to discussion, we would expect the report to be with [*name of appointing body*] within [*number of working days*].

I trust that the above is sufficient to enable you to put forward a fee proposal. However if you have any further questions, or if you wish to meet with me in order to discuss the brief further, please do not hesitate to contact me.

Yours sincerely

### NOTES:

- It is recommended that fee submissions be sought from three or more appropriate firms, and the fee proposals analysed. It is English Heritage's normal practice to interview the firms prior to appointment. The purpose of the interview is to determine whether the firm has the necessary expertise and understanding both of the valuation issues and the planning background. In addition, in the event of the matter going to a public inquiry, it is important that the lead partner has the necessary experience of acting as an independent expert witness.
- Because quantity surveying skills/knowledge are necessary in order to verify the building costs being submitted, it is important that the firm appointed has these skills (or can acquire them) either in-house or by using an external firm of quantity surveyors.

## APPENDIX 4

### Example section 106 agreement for securing the objective of enabling development, incorporating a form of bond

The breadth of possibility is such that it is not possible to produce a standard planning agreement that can be universally applied to enabling developments. The following, however, is a relatively simple form of agreement under section 106 of the Town and Country Planning Act 1990 of a kind that might be drawn up in circumstances where housing development is proposed in the grounds of a listed building so as to provide funding for the repair of that building. It assumes that:

- substantial funding for the repair works will not be forthcoming until some money has been generated from the housing development, although some initial works of repair will be undertaken at the outset
- the land is subject to a mortgage registered against the freehold interest
- the prospective developer of the houses has entered into a contract to buy the freehold interest in that part of the estate to be developed for housing, the contract being conditional upon planning permission being obtained. The rest of the estate is to remain unsold
- the obligations to repair are to be protected by the deposit of funds or by a bond. The Developer will be concerned that the linked repair work to the listed building, which he will not own, is done, so that the agreement does not prevent the housing development being fully carried out.

The Developer will want to ensure, therefore, that there are arrangements in place pursuant to which:

- the Owner is obliged to carry out the repair work; or
- the Developer has rights to do so; and
- there are restrictions upon the Owner selling the building on without similar arrangements applying.

The position would, of course, be simplified considerably if the developer were to acquire the whole estate; and in many cases this is what will happen, particularly if the listed building is to be incorporated into the development.

For cases where long-term adherence to a conservation or management plan is appropriate (see main text, Section 7.6), a draft definition is included in the interpretation section, together with an operative clause at 6.1.

The simple form of performance bond, at Annexe 4 to the agreement, allows the local planning authority to recover from the surety in default up to a maximum amount. The circumstances may well call for additional provisions, providing for matters such as the reduction of the bond sum in stages, provisions as to notification of the surety should a claim be in contemplation, and the steps that must first be taken against the party in default, to name but a few.

In drafting any section 106 agreement, the following fundamental issues should be kept in mind:

- what land and interests in that land are involved?
- which of those interests ought to be the subject of planning obligations?
- what happens if there is a disposal of an interest in the land in whole or in part?
- when should particular obligations, whether positively or negatively expressed, take effect?
- when should obligations be released?
- how would a breach of an obligation be enforced?
- does the obligation fall within section 106 of the 1990 Act?

THIS AGREEMENT is made the [day] of [month] [year]  
BETWEEN

- 1 ABC DISTRICT COUNCIL of [address] (the 'Council')
- 2 A B JONES of [address] (the 'Owner')
- 3 DEF DEVELOPMENT LIMITED whose registered office is at [address] (the 'Developer')
- 4 XYZ BANK LIMITED of [address] (the 'Mortgagee')

WHEREAS

- A The Owner is the proprietor of the freehold interest in the property known as [name and address] title to which is registered at HM Land Registry under title number [number]
- B The Developer has applied to the Council for planning permission to carry out a development consisting of 25 dwellings and associated works on the Development Site and listed building consent to undertake certain works of repair to the Building
- C The Developer has agreed to buy and the Owner has agreed to sell the freehold interest in the Development Site pursuant to a contract that is conditional upon, *inter alia*, a planning permission and listed building consent being obtained
- D On the [date] the Planning Committee of the Council resolved to grant planning permission and listed building consent pursuant to the said applications provided that an agreement is entered into under section 106 of the 1990 Act that provides for certain works of repair to be carried out to the Building in tandem with the housing development
- E The Building is included in the list compiled by the Secretary of State under Section 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and is in a serious state of disrepair

NOW IT IS AGREED AS FOLLOWS:

## **1.0 Interpretation**

1.1 In this Agreement unless the context otherwise requires:

- 'Bank Account' means a bank account that conforms to the requirements of Schedule 1.
- 'Building' means the building known as [name] which is situated upon the Land and which is shown shaded in brown on the Plan.
- 'Development Site' means the site the subject of the Planning Application which forms part of the Land and which is shown edged in blue on the Plan.
- 'Housing Phase 1' means the part of the Development Site shaded in [colour] on the Plan.
- 'Housing Phase 2' means the part of the Development Site shaded in [colour] on the Plan.
- 'Housing Phase 3' means the part of the Development Site shaded in [colour] on the Plan.

- ‘Implement’ means to carry out a material operation as defined in Section 56(4) of the 1990 Act, except for works of site clearance and preparation.
- ‘Land’ means the property described in recital A of this Agreement that is shown edged in red on the Plan.
- ‘Listed Building Consent Application’ means the application for listed building consent made to the Council on [date] the Council’s reference for which is [ref].
- ‘Listed Building Consent’ means listed building consent granted pursuant to the Listed Building Consent Application in the form of the draft consent at Annexe 3.
- [‘Management Plan’ means a written document (with plans and illustrations as appropriate) agreed with Council (and which can thereafter be adjusted with the written agreement of the Council) the purpose of which is to establish a scheme for the long-term future management and/or conservation of the Building including its grounds following completion of the Phase I Repairs the Phase 2 Repairs and the Phase 3 Repairs and which plan shall include *inter alia*:
  - detailed arrangements for the provision, banking, withdrawal and application of funds and for accounting for the same
  - a schedule of items to be periodically maintained with maintenance intervals
  - a schedule of works to be carried out and a timetable for such works
  - arrangements for the verification by the Council of performance pursuant to the plan.]
- ‘Occupied’ does not include temporary occupation for the purposes of site security storage or as a show house.
- ‘Owner’ includes successors in title but not individual occupiers of the houses built on the Development Site pursuant to the Planning Permission.
- ‘Phase I Repairs’ means the works listed in Part I of Schedule 2.
- ‘Phase 2 Repairs’ means the works listed in Part II of Schedule 2.
- ‘Phase 3 Repairs’ means the works listed in Part III of Schedule 2.
- ‘Plan’ means the plan at Annexe 1.
- ‘Planning Application’ means the application for planning permission made to the Council on [date] the Council’s reference for which is [ref].
- ‘Planning Permission’ means planning permission granted pursuant to the Planning Application in the form of the draft planning permission at Annexe 2.
- ‘1990 Act’ means the Town and Country Planning Act 1990.
- ‘Surety’ means a surety under a bond entered into in accordance with clause 3.2.1.

1.2 Where the context so requires:

1.2.1 the singular includes the plural; and

1.2.2 reference to recitals clauses schedules and annexures are references to the same in this Agreement.

1.3 Any approval to be given by the Council under this Agreement shall be given in writing and shall not be unreasonably withheld or delayed.

## **2.0 Legal effect**

2.1 This Agreement is a planning obligation for the purposes of section 106 of the 1990 Act and the Council is the local planning authority by which it is enforceable.

- 2.2 No person shall be bound by this Agreement in respect of any period during which he no longer has an interest in the Land or that part of the Land to which the obligation in question relates.
- 2.3 The Mortgagee enters into this Agreement in order to acknowledge its consent to its terms but for the avoidance of doubt this Agreement shall not be enforceable against the Mortgagee only on the basis that it is the proprietor of a charge over the Land or any part of the Land.
- 2.4 If the Planning Permission is revoked or modified by a statutory procedure without the consent of the [Owner/Developer] then this Agreement shall cease to have effect.
- 2.5 Nothing in this Agreement shall be construed as prohibiting or limiting any right to develop the Land or any part of the Land in accordance with any planning permission granted after the date of the Planning Permission.
- 2.6 The [Owner/Developer] shall pay the Council's legal costs of [ £ ] in the preparation of this agreement.
- 2.7 The Council shall forthwith register this Agreement as a local land charge.

### **3.0 Restrictions upon residential development**

- 3.1 The Owner hereby agrees not to implement or procure the implementation of the Planning Permission until the Phase 1 Repairs have been carried out to the Council's approval.
- 3.2 The Owner hereby agrees that:
- 3.2.1 No dwelling within Housing Phase 1 shall be occupied until either (at the Owner's election) the sum of [ £ ] has been deposited in a Bank Account or the Owner or the Developer has entered into and provided the Council with a copy of a bond with a reputable surety to guarantee the obligations in clause 4 of this Agreement that conforms substantially to the draft bond at Annexe 4 and in which the Bond Sum is [ £ ].
- 3.2.2 No dwelling within Housing Phase 2 shall be occupied until the Phase 2 Repairs have been completed to the written satisfaction of the Council.
- 3.2.3 No dwelling within Housing Phase 3 shall be occupied until the Phase 3 Repairs have been completed to the written satisfaction of the Council.
- 3.3 If the Owner elects to deposit sums in a Bank Account under clause 3.2.1 then the said account shall operate in accordance with Schedule 1.

### **4.0 Carrying out repairs**

- 4.1 The Owner hereby agrees that it will within 14 days of the occupation of any dwelling within Housing Phase 1 commence the Phase 2 Repairs and will use reasonable endeavours to complete the same to the reasonable satisfaction of the Council within [weeks/months] of their commencement.
- 4.2 The Owner hereby agrees that it will within 14 days of the occupation of Housing Phase 2 commence the Phase 3 Repairs and will use reasonable endeavours to complete the same to the satisfaction of the Council within [weeks/months] of their commencement.
- 4.3 For the avoidance of doubt should the repair works necessitate the obtaining of any planning permission listed building consent or other statutory permission

approval or consent then it shall be for the Owner or the Developer to obtain the same and nothing in this Agreement shall operate to require the Council to grant any such permission approval or consent or so as to fetter the Council's statutory discretion in any way.

4.4 Without prejudice to the Council's statutory rights in section 106(6) of the 1990 Act and to any other means at its disposal to enforce this agreement at law any servant agent or employee of the Council (duly given written authority to do so by the Council's Chief Planning Officer) may enter upon the Land and may also enter the Building with or without such vehicles plant machinery equipment or workmen as may be reasonably required at any reasonable time upon not less than 7 days notice in order to carry out such works and/or inspections as may in the Council's opinion be appropriate to remedy any breach of this Agreement.

4.5 The Owner shall forthwith upon written request pay to the Council any costs and expenses (including legal and administrative costs and expenses) incurred by the Council in the exercise of its rights under clause 4.4 to the extent that such costs and expenses have not been recovered by the Council from the Bank Account.

## **5.0 Notification**

5.1 The Owner shall notify the Council in writing of the anticipated dates of the following events:

- the Implementation of the Planning Permission
- practical completion of the first of the dwellings to be built within Housing Phase 1
- practical completion of the first of the dwellings to be built within Housing Phase 2
- practical completion of the first of the dwellings to be built within Housing Phase 3
- commencement of the Phase 1 Repairs and the estimated duration of those works
- commencement of the Phase 2 Repairs and the estimated duration of those works
- commencement of the Phase 3 Repairs and the estimated duration of those works.

The notices required by clause 5.1 shall be given between 7 and 21 days before the event to which it refers and any change in an anticipated date since notice was given under clause 5.1 shall be similarly notified to the Council.

## **[6.0 Management Plan**

6.1 Before Implementing the Planning Permission the Owner shall have agreed in writing with the Council the terms of a Management Plan the terms of which shall thereafter be strictly adhered to.]

IN WITNESS of which these parties have sealed this Agreement as a Deed on the date first written above.

### **Schedule 1: Operation of Bank Account**

- 1 The Account shall be held at a reputable clearing bank.
- 2 The Account shall be in the name of *[the Council]*.
- 3 The Account shall be an interest-bearing account and interest earned therefrom shall be added to the Account.
- 4 *[The Council]* shall release sums from the Account to *[the Owner]* as follows:
  - (a) [ ££ ] upon the satisfactory completion of the Phase 2 Repairs
  - (b) the balance upon the satisfactory completion of the Phase 3 Repairs.
- 5 In the circumstances of a breach of the obligations in clause 4 of the Agreement, the Council shall be entitled to recover from the Account any sums due to the Council under clause 4.5 of the Agreement.
- 6 The Council shall be entitled to recover from the Account any expenses it has reasonably incurred in administering the Account.
- 7 The Council will promptly comply with any reasonable requests made by or on behalf of the Owner as to the current standing of the Account.

### **Schedule 2: Repairs**

Annexe 1: Plan

Annexe 2: Draft planning permission

Annexe 3: Draft listed building consent

Annexe 4: Form of bond

BY THIS BOND *[Owner/Developer]* whose registered office is at *[address]* and *[name of entity acting as surety]* ('the Surety') whose registered office is at *[address]* are bound to *[name of local planning authority]* ('the Council') to the extent of the Bond Sum as defined herein

Sealed with our seals this *[day]* of *[month]* *[year]*

WHEREAS by an agreement dated *[day]* of *[month]* *[year]* and made between *[insert names of parties of the agreement in question]* the *[Owner/Developer]* entered into obligations with the Council to execute and perform certain works therein mentioned in the manner and by the time therein specified and subject to such terms provisions and stipulations as are mentioned in the said agreement

NOW THE CONDITION of the above-written bond is such that if the *[Owner/Developer]* *[or its successors or assigns]* shall well and truly perform fulfil and keep all of the covenants clauses provisos terms and stipulations in the agreement according to the true purport intent and meaning thereof or if upon failure by the *[Owner/Developer]* so to do the Surety shall satisfy and discharge the same or fully reimburse the Council in carrying out works required by the said agreement up to the amount of the Bond Sum which for the purposes of this bond is [ £ ] then the above-written bond shall be void but otherwise it shall be and remain in full force and effect and the giving by the Council of any extension of time for the performing of the agreement or anything therein mentioned or contained and on the part of the *[Owner/Developer]* to be performed or fulfilled or any other forgiveness or forbearance on the part of the Council to the *[Owner/Developer]* or its successors or assigns shall not in any way release the Surety from the Surety's liability under the above-written bond

THE COMMON SEAL etc

## APPENDIX 5

### Example outline management and maintenance plan

#### Introduction

The draft section 106 agreement at Appendix 4 ('the planning agreement') includes the possibility, at paragraph 6.0, of imposing upon the owner an obligation to adhere to the provisions of a 'management plan'. The purpose of such an obligation would be to secure the long-term maintenance of the building and surrounding landscape that forms the subject matter of the enabling development to which the planning agreement relates. This appendix sets out an example of the form such a management plan might take, although the nature of the building and its grounds in each case will determine the appropriate form. It would slot into the draft section 106 agreement as Annexe 5.

It will not always be necessary or appropriate to include such a plan, but where, for example, a house is converted to leasehold residential units and the freehold vested in a company owned by the lessees, it may be useful, in particular, to secure appropriate ongoing maintenance of the external fabric, common parts and grounds, and garden buildings or structures within them. This legal form of management plan is not synonymous with a conservation management plan, but if the latter has been prepared, the management plan will normally incorporate its relevant management provisions (see Section 4.2).

[insert name of building]

#### MANAGEMENT PLAN

[insert date]

#### I Definitions

I.1 In this Management Plan, the following terms shall have the following meanings ascribed to them, unless the context otherwise requires:

- (a) '**Building**' means the building[s] known as [insert name of building] situated at [insert postal address] and shown shaded blue on the Plan;
- (b) '**Initial Repair Works**' means the phase 1, phase 2 and phase 3 repair works, to be carried out by the Owner to the Building and the Surrounding Landscape in accordance with the provisions of the Planning Agreement;
- (c) '**Maintain**' means to inspect, repair, adjust, alter, remove, reconstruct and replace, and maintenance shall be construed accordingly;
- (d) '**Maintenance period**' means the period of [insert the term during which maintenance is to be secured] following completion of the Initial Repair Works;
- (e) '**Plan**' means the plan attached to this Management Plan;
- (f) '**Planning Agreement**' means the planning agreement entered into between [insert name of owner] and [insert name of council] pursuant to section 106 of the Town and Country Planning Act 1990, of which this Management Plan forms part;
- (g) '**Property**' means that area of land belonging to the Owner and shown delineated in red on the Plan [of which the Building and the Surrounding Landscape form part];
- (h) '**Restored condition**' means the condition of the Building and the Surrounding Landscape following the completion of the phase 1, phase 2 and phase 3 repairs as listed in parts I, II and III of the section 106 agreement, as detailed in Schedule I to this Management Plan;

- (i) **'Scheduled Works'** means the works set out in Schedule 2 and Schedule 3 of this Management Plan; and
- (j) **'Relevant Grounds'** means those areas of land surrounding the Building, shown shaded green on the Plan.

1.2 Where, in this Management Plan, a term not defined in paragraph 1.1 above begins with a capital letter, it shall have the same meaning as is ascribed to it in the Planning Agreement.

## **2 Responsibility for Maintenance**

- 2.1 The Owner shall use all reasonable endeavours to maintain the Building and the Relevant Grounds in the Restored Condition throughout the Maintenance Period.
- 2.2 In particular, and without prejudice to the generality of the provisions of paragraph 2.1 above, the Owner shall:
  - 2.2.1 maintain each of the items specified in Schedule 2 in the manner and at the intervals specified therein
  - 2.2.1 carry out each of the works specified in Schedule 3 in accordance with the timetable specified therein.

## **3 Maintenance Log**

- 3.1 The Owner shall keep a detailed maintenance log, noting therein all Scheduled Works carried out to the Building and the Relevant Grounds throughout the Maintenance Period. If, following inspection, no maintenance works are considered by the Owner to be required, this fact should also be recorded.
- 3.2 Throughout the duration of the Maintenance Period, the Owner shall, upon receiving a reasonable written request to do so, provide the Council with access to, or a copy of the maintenance log, either in electronic or paper format.

## **4 Enforcement**

- 4.1 In the event of the Owner failing in its responsibility to carry out any of the works referred to in paragraph 2 above within a reasonable time after receiving reasonable notice in writing from the Council, without prejudice to the Council's statutory rights in section 106(6) of the 1990 Act, the Council may enter the Property and carry out such of the Scheduled Works as it may reasonably deem necessary, in a proper and workmanlike manner. In such circumstances, the Council may recover all of its reasonably incurred costs from the Owner.

## **5 Changes to the Management Plan**

- 5.1 The Owner may, with the consent of the Council, which consent shall not be unreasonably withheld or delayed, adjust the provisions of this Management Plan at least every [ ] years. In particular, the Scheduled Works may be amended to reflect any modifications to the Building or the Relevant Grounds.

## **6 Management Company**

- 6.1 Without prejudice to its obligations in the Management Plan the Owner shall establish to the Council's satisfaction (and thereafter maintain) a management company the primary purpose of which shall be to discharge effectively and efficiently the obligations of the Owner in the Management Plan and the management company shall at all times organise its affairs such that all lessees of the Property and others

who are required to make payments for the purpose of defraying expenses incurred on account of obligations in the Management Plan shall be entitled to play a part in the management of the management company commensurate with the amount of such payments and the purpose of the management company as prescribed by this paragraph.

## **SCHEDULE 1 RESTORED CONDITION**

### **Part One – The Building**

*[insert a detailed description of the building's condition following completion of the initial repair works – may include photographs]*

### **Part Two – Surrounding Landscape**

*[insert a detailed description of the building's surrounding landscape – may include photographs]*

## **SCHEDULE 2 SPECIFIC ITEMS TO BE PERIODICALLY MAINTAINED**

### **Part One – Building**

For example:

- Internal plasterwork to be inspected annually and repaired where necessary.
- Stained-glass window to be kept in a state of good and proper repair.
- Slated roof to be kept in a proper repair and such that the Building remains weatherproofed at all times.

### **Part Two – Surrounding Landscape**

For example:

- Water fountain/feature to be kept in a good and proper state of repair.
- Trees to be inspected every *[state period]* years by an arboriculturist and appropriate works to be undertaken as recommended.

## **SCHEDULE 3 WORKS TO BE CARRIED OUT**

### **Part One – Works to the Building**

For example:

- Rainwater goods should be inspected and cleared on at least two occasions each year and generally kept in a good state of repair.
- All exterior walls to be repainted at least every four years.

### **Part Two – Works to the Surrounding Landscape**

For example:

- Boundary fences to be repainted every two years and generally kept in a proper state of repair.

# REFERENCES

## LEGISLATION

Ancient Monuments and Archaeological Areas Act 1979  
Countryside and Rights of Way Act 2000  
Inheritance Tax Act 1984  
Local Government Act 1972  
Planning (Listed Buildings and Conservation Areas) Act 1990  
Planning and Compulsory Purchase Act 2004  
Town and Country Planning Act 1990  
Town and Country Planning (Applications) Regulations 1988 (SI 1988/1812)  
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999 no 293)  
Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419)

## GOVERNMENT GUIDANCE

### **Environment circulars**

11/95: *The Use of Conditions in Planning Permissions*  
02/99: *Environmental Impact Assessment*  
01/01: *Arrangements for Handling Heritage Applications – Notification and Directions by the Secretary of State* (as amended by Circular 09/05)  
05/05: *Planning Obligations*

### **Planning Policy Statements and Guidance Notes**

PPS 1: *Delivering Sustainable Development* (2005)  
PPG 2: *Green Belts* (2001)  
PPS 3: *Housing* (2006)  
PPS 7: *Sustainable Development in Rural Areas* (2004)  
PPG 13: *Transport* (2001)  
PPG 15: *Planning and the Historic Environment* (1994)  
PPG 16: *Archaeology and Planning* (1990)

### **Other government guidance**

Department for Communities and Local Government 2005. *Town and Country Planning Act 1990 Section 215: Best Practice Guidance*  
Department for Communities and Local Government 2006. *Planning Obligations: Practice Guidance*  
Department for Culture, Media and Sport 1999. *The Disposal of Historic Buildings*  
Department of the Environment 1995. *Preparation of Environmental Statements for Planning Projects that Require Environmental Assessment: A Good Practice Guide*

## ENGLISH HERITAGE GUIDANCE

*Buildings at Risk: A New Strategy* (1998)  
*A Charter for English Heritage Planning and Development Advisory Services*  
([www.english-heritage.org.uk/planningadvice](http://www.english-heritage.org.uk/planningadvice))  
*Conservation Principles, Policies and Guidance for the Sustainable Management of the Historic Environment* (2008)  
*Development in the Historic Environment* (1995)  
*Easy Access to Historic Landscapes* (2005)  
*Farming the Historic Landscape: Caring for Historic Parkland* (2005)  
*Guidance on Golf in Historic Parks and Landscapes* (2007)  
*Guidance on the Management of Conservation Areas* (2006)  
*Informed Conservation* (2001)

*Insuring Historic Buildings* (2008)  
*Landscape Advice Notes*, especially 3: *Conservation of Bats*; 11: *Bat Roosts in Historic Properties*;  
7: *Conservation of Wall Flora*  
*Living Buildings in a Living Landscape: Finding a Future for Traditional Farm Buildings* (2006)  
*Managing Local Authority Heritage Assets* (2003)  
*Repair of Historic Buildings: Advice on Principles and Methods* (1991)  
*Stopping the Rot: A Step by Step Guide to Serving Urgent Works and Repairs Notices* (1998)  
*Understanding Historic Buildings: Policy and Guidance for Local Planning Authorities* (2008)

## **OTHER GUIDANCE**

Architectural Heritage Fund 1997. *How to Rescue a Ruin*  
Association of Local Government Archaeological Officers 1997. *Analysis and Recording for the Control of Works to Historic Buildings*  
Countryside Agency (now Natural England) 2004 *Conditional Exemption and Heritage Management Plans: An Introduction for Owners and their Advisers*  
Essex Gardens Trust 2003. *Historic Designed Landscapes: Planning and Conservation Guidance*  
Heritage Lottery Fund 2008. *Conservation Management Plans: A Guide*  
Inland Revenue 1986. *Capital Taxation and the National Heritage*, IR 67  
Inland Revenue 1999. *Capital Taxes: Relief for Heritage Asset*  
Institute of Field Archaeologists 1996 (revised 2001). *Standard and Guidance for the Archaeological Investigation and Recording of Standing Buildings or Structures*,  
Landscape Design Trust 1997. *Historic Parks and Gardens in the Planning System: A Handbook*  
Natural England 2007. *European Protected Species Guidance Note*  
Royal Institution of Chartered Surveyors 2006 (revised edition). *Appraisal and Valuation Standards*

## **FURTHER READING**

Askwith, C 1999. *Rescued or Ruined: Dealing with Enabling Development*. London: Georgian Group  
Kerr, J S 1990. *The Conservation Plan*. Sydney: National Trust of New South Wales  
Mynors, C 2006. *Listed Buildings, Conservation Areas and Monuments*, 4th edition (especially pp 486–91). London: Thomson

## **PLANNING DECISIONS QUOTED IN THE TEXT**

**Church Lawton 2000** PNW/5144/219/22: Lawton Hall, Church Lawton, Kidsgrove, Cheshire. Consent granted by the Secretary of State following call-in.

The Hall, landscaped park and walled gardens date from the early 17th century. It was a hotel prior to use for defence activities in the Second World War. Subsequently used as a school until 1986, it fell into dereliction, leading to its listing being downgraded from grade II\* to II. Following an inquiry in 2000, applications were approved for its repair and restoration, the conversion of the house and stable block to form 12 residential units, and for 20 new-build units in the walled gardens. The Secretary of State accepted that the Hall was capable of restoration and that the enabling development represented the minimum necessary to fund it. Demolition of garage workshops and barrack buildings enhanced the visual openness of the green belt, and the park would be restored. The scheme has been implemented.

**Coleorton Hall 1999** APP/G2435/E/99/1020920 & 1020867: Coleorton Hall, Coleorton, Leicestershire. Appeal against non-determination by North West Leicestershire District Council dismissed.

This grade II\* listed house in a grade II\* registered garden was built in 1804–8, with the top storey

added in 1862. It was converted to office use in the mid-20th century by the National Coal Board, who built new office blocks in the grounds. It was sold in the 1990s, and following a series of applications for enabling development on the site, an appeal was dismissed in 1999 for conversion of the Hall to 15 apartments, rebuilding of the stables to form 5 dwellings and the erection of 24 new dwellings. The scale of enabling development was considered excessive. Permission was granted in 2001 for the subdivision of the hall to form 12 apartments, and to build 28 dwellings within the walled garden.

**Coleorton Hall 2002** APP/G2435/A/02/1088960: Coleorton Hall, Coleorton, Leicestershire. Appeal against non-determination by North West Leicestershire District Council dismissed.

An application for a revised layout to include 3 more dwellings was dismissed following a public inquiry in 2002, on the grounds that such an 'incremental approach', in this case to recover holding costs, did not constitute enabling development since the site had already been sold to a housing developer who was implementing the 2001 consent at the time of the inquiry (and subsequently completed it). Such additional development would also have had a negative effect on the setting of the Hall.

**Combermere Abbey 2005** APP/K0615/A/04/1155047: Combermere Estate, Whitchurch, Shropshire. Appeal against refusal by Crewe and Nantwich Borough Council dismissed by the Secretary of State.

Combermere Abbey is a grade I listed house, whose north wing was in particularly poor condition. It stands in a grade II registered landscape that includes numerous other listed structures. The applicants proposed a new village of 100 houses plus roads and facilities to fund the backlog of repair on an 'historic entity' basis. The Secretary of State concluded that this scale of development would jeopardise the achievement of strategic regional policy, was not in accordance with English Heritage policy and that the disbenefits would outweigh the benefits.

**Daresbury Hall 1997** PNW/5147/219/3 & 5149/270/22: Daresbury Hall, Daresbury, Cheshire. Refused following call-in by the Secretary of State.

This 1759 grade II\* listed country house in the green belt had for many years been used as a residential home and training centre. Consent for 23 dwellings in the grounds, to subsidise restoration of the Hall, was refused following a public inquiry in 1997, on the grounds that it was excessive in relation to need and would both erode the green belt and harm the setting of the listed buildings.

**Daresbury Hall 2001** APP/D0650/A, E/00/1039485-6 & 104395-6: Daresbury Hall, Daresbury, Cheshire. Appeals against refusal by Halton Borough Council dismissed by the Secretary of State.

Further applications, for 24 and 27 dwellings, were refused in 2000, and the decisions upheld on appeal, for the same reasons, in 2001, despite a reduction in the spread and footprint of the proposed new dwellings. A further application for enabling development was being assessed late in 2007.

**Henbury House 1995** T/APP/UI240/A/88/112039/P7: Henbury House, Sturminster Marshall, Dorset: Appeal against refusal by East Dorset District Council allowed.

This small Georgian country house, listed grade II\*, was built c 1730. Planning permission was granted in 1986 for 39 holiday units, of which 35 were new-build within the grounds. The consent was an exception to green-belt policy in order to support the repair of the house, which suffered from major subsidence damage and other structural problems. A reduced level of development, with no restriction as to occupancy, was allowed on appeal against the local planning authority's refusal in 1995, following the quashing of an earlier appeal decision by the High Court. A total of 29 new dwellings was eventually built. The listed building has been repaired and remains in use as a single dwelling.

**Hop Farm 2005** APP/H2265/V/04/1164862: Hop Farm Country Park, Beltring, East Peckham, Kent. Consent granted by the First Secretary of State following call-in.

The proposals concerned a former hop-drying centre consisting of traditional oasts and granaries, dating from the 19th century and c 1936 (all grade II\* listed). Known as 'Bells 1–5', they have been a visitor attraction since the 1980s. The wider site includes a museum, craft workshops and restaurants. The proposed development comprised 64 holiday bungalows close to the existing complex, intended to support the existing businesses and the upkeep of the listed buildings. The tests for enabling development were considered to be met, providing the very special circumstances necessary to permit development within the green belt. Construction was in progress in 2007–8.

**Horspath 1995** T/APP/Q3115/A/95/251433/P3: Land at 36 Church Road, Horspath, Oxfordshire. Appeal against refusal by South Oxfordshire District Council dismissed.

A new house was proposed in the grounds of the grade II listed former manor house at Horspath, in part to fund repairs to the listed building. The inspector considered that much of the proposed work was maintenance and its extent not justified; it could not justify planning permission for a development that would seriously harm the setting of the manor house.

**Low Hall Farm 2002** APP/N4720/E/1076044-5: Low Hall Farm, Low Hall Road, Horsforth, Leeds. Appeal against refusal by Leeds City Council dismissed.

Conversion of a grade I listed group of mostly 16th to 17th-century farm buildings in the green belt to residential use and offices, and the erection of 7 new dwellings, was dismissed at appeal. The listed buildings were in a very poor condition and their wider setting was degraded, including warehousing and car parks. However, the inspector considered that the proposed development did not represent the minimum necessary to secure the future of the listed buildings, that the loss of a single-storey curtilage building was not justified, and that the proposed new houses would have a significant detrimental impact on the setting of the listed building. The listed buildings were subsequently repaired and converted for office use.

**Riber Castle 2006** APP/PI045/V/05/1172803: Riber Castle, Riber, Matlock, Derbyshire. Approved following call-in by the First Secretary of State.

The grade II listed castle and its outbuildings were built in 1862–8. The castle is a well-known local landmark, which by the 1970s had become a roofless shell, thereafter in danger of becoming unstable. Preservation of it as a romantic ruin was not financially viable. The proposal was to form 26 apartments in the shell of the castle, with 10 dwellings by conversion of outbuildings and 10 new-build houses. It was considered to have only a limited effect on the countryside and heritage asset, and would secure its preservation.

**St Clere's Hall 2004** APP/M1595/A/02/1083410: St Clere's Golf Club, Stanford Road, Stanford-le-Hope, Essex. Appeal against non-determination by Thurrock Borough Council dismissed.

Outline planning permission was granted in 1997 for an 18-hole golf course, a 9-hole golf course and a hotel situated within the green belt, in the setting of St Clere's Hall (1735). Conditions and a legal agreement were attached to the permission, to ensure measures to restore St Clere's Hall (grade II\* listed) and to arrest the decline of its barn (grade II listed). An appeal that sought an extension of time to submit reserved matters was dismissed in 2004. The English Heritage enabling development guidance that had emerged since the original application was seen as a material consideration. The barn was not offered on the open market and other options in terms of funding and less harmful development had not been explored.

**Sandhill Park 2006** APP/D3315/V/04/1172822: Sandhill Park, Bishops Lydeard, Taunton, Somerset. Dismissed following call-in by the Secretary of State, who varied the grounds for refusal proposed by the Inspector.

Built c 1720, with portico and wings added c 1815, the grade II\* listed house became a hospital from the 1920s until its closure in the early 1990s. The site includes several original outbuildings. A scheme for change of use of the mansion to a museum, and residential development of 50 dwellings within the park, was approved in 1997, and the Lethbridge Park development was the consequence. Consent for restoration of the mansion, its residential conversion and 44 further new dwellings was refused in 2006, on the grounds that the benefits would not justify further extensive new housing at an unsustainable location.

**Woolhanger 1997** SW/P/5178/270/93: Woolhanger Manor, Parracombe, Barnstaple, Devon. Refusal of listed building consent for demolition following call-in by the Secretary of State.

The Manor House is a modest but attractive (grade II listed) Exmoor country house, of at least early 19th-century origin, to which a flamboyant music room was added by Sir Henry Carew. A proposal to replace the house by a grander one, put forward on the basis that it would justify the cost of restoration of the music room, was rejected after a public inquiry. The house has since been sensitively restored by an owner/occupier without enabling development, but with a limited amount of rebuilding of the service wings.

**Wymondley 1995** T/APP/X1925/A/94/239458/P5: Wymondley House, Little Wymondley, Hertfordshire. Appeal against refusal by North Hertfordshire District Council dismissed.

This grade II\* listed country house was built in 1724, with later extensions, including a ballroom and conservatory of 1904. Planning permission was granted for 17 dwellings in the curtilage, in accordance with policy, but with the intention that the developer would fund the conservation deficit on the repair and conversion of the main house to flats. Consent for a further two detached houses, to cover a shortfall that had arisen because of a subsequent slump in the housing market, was refused. That decision was upheld on appeal in 1995, primarily because of the detrimental impact on the garden setting of the house. It was then sold to another developer, who carried out the conversion without any additional development.

# GLOSSARY

## **Conservation deficit**

The amount by which the cost of repair (and conversion to optimum beneficial use if appropriate) of a significant place exceeds its market value on completion of repair and conversion, allowing for all appropriate development costs, but assuming a nil or nominal land value

## **Conservation management plan**

Document which sets out the significance of a place and how that significance will be sustained in the future, and a specific set of actions or proposals for the ongoing management of the site. It is based on the conservation planning process

## **Conservation planning process**

The process of understanding a place, assessing its significance as a whole and in its elements, defining how that significance is vulnerable and setting out policies or guidelines for sustaining that significance.

## **Enabling development**

Development that would be unacceptable in planning terms but for the fact that it would bring public benefits, in this context to a significant place, sufficient to justify it being carried out

## **Heritage impact assessment**

The process of establishing the impact of a specific proposal on the significance of a place, and identifying ways of mitigating any adverse impacts

## **Historic entity**

An historic entity is an outstanding ensemble of historically associated buildings, often land (which may include archaeological remains) and normally contents, whose significance would be inevitably and materially harmed by break-up and sale

## **Hope value**

In this publication, value attached to land arising from the hope of obtaining planning permission for development in excess of what would be permitted through the normal and reasonable application of local and national planning policy; for wider use of the term see para 5.6.4

## **Illustrative material**

Information, usually consisting of plans and other drawings, the purpose of which is to show how a development or elements of development might appear when completed, but which is not intended to form part of a planning approval

## **Mitigation**

Action taken to reduce potential damage to a significant place. This may include avoiding damage, design solutions, options appraisal or seeking further information, as well as, where damage is unavoidable, recording elements that will be destroyed.

## **Outline planning permission**

Permission for development granted subject to a condition requiring the subsequent approval of one or more reserved matters

**Permitted development rights**

Development for which planning permission is deemed to be granted by virtue of the Town and Country Planning (General Permitted Development) Order 1995 or pursuant to local development orders

**Planning gain**

Public or infrastructure benefits provided by a developer as a condition of a grant of planning permission

**PPG**

Planning Policy Guidance (Government guidance on national planning policy, now being replaced by Planning Policy Statements, PPS)

**PPS**

Planning Policy Statement (Government guidance on national planning policy)

**Rapid appraisal**

An initial understanding of a place, based on collating existing written and graphic information, and a site visit, to establish the nature, extent and significance of historic fabric

**Reserved matters**

In relation to an outline planning permission, or an application for such permission, any of the following matters in respect of which the details have not been given in the application, namely access, appearance, landscaping, layout and scale

**Section 106 agreement**

An obligation entered into by a person with an interest in land, either by way of agreement with the planning authority or unilaterally, that conforms to the requirements of section 106(1) of the Town and Country Planning Act 1990. It is essentially a legally binding covenant that runs with an identified legal interest in land, thereby binding future owners of that interest

**Significant place**

Any part of the historic environment which has heritage value(s), including but not limited to scheduled monuments and other archaeological remains, historic buildings both statutorily listed or of more local significance together with any historically related contents, conservation areas, parks and gardens either registered or forming the setting of a listed building, and registered battlefields

**Yield**

The annual return on property, through net rental income, expressed as a percentage of the capital value of the property. The greater the risk that the income stream is not secure, the higher the yield expected by investors

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#### Equalities impact assessment

Public bodies are legally required to ensure that their plans, policies and activities do not unfairly discriminate against a group protected by equalities legislation. It is the responsibility of those public bodies for whom we provide advice to ensure that that they have conducted any relevant Equalities Impact Assessment that may be required when implementing the advice of English Heritage.

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