How many mickles to make a muckle? Heritage tests still not well understood

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Planning should be about creative judgment and common sense. A recent High Court case[1] concerning the conversion of a pub next to the former Camden Palace Theatre, now a nightclub, to residential use highlights the need to get the basics right first.

The nightclub owner succeeded in quashing the permission for the neighbouring scheme. The local planning authority had grappled with the risks to the nightclub operation of allowing a noise-sensitive use next door and the effects on the surrounding conservation area. The permission was quashed on grounds of misleading reporting of noise issues and unlawful tinkering with conditions imposed by the planning committee.

The committee report identified the proposal's effects on the conservation area's character and appearance, and was thus held to have discharged the duty to pay special regard to this under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. But it failed to explain to members the statutory duty to pay special regard to the desirability of preserving the setting of the nearby listed buildings under section 66.

The weighing of harm to heritage assets was therefore not an issue, in contrast to the position in *R (Lady Hart of Chilton) v Babergh District Council* [2014], which tested the scope for councils to weigh the economic benefits of development against recognised heritage effects.

Instead, the court found a fundamental failure to describe either the duty of special regard in relation to setting under section 66 or the actual significance of the listed assets themselves.

The judgment illuminates some important principles: Firstly, there are limits to the doctrine that members are an informed audience. The existence, mechanics and effect of the duties under sections 66 and 72 should be carefully described and applied. Secondly, decision-takers cannot calculate, let alone weigh, harm for statutory and national policy purposes without assessing listed assets' significance and contribution. The court accepted that the authority's failure to apply its own local list validation requirement for a heritage assessment did not prevent it dealing with the application, but an assessment would probably have avoided this blind spot.

The case also illustrates the care needed on conditions. The committee resolution required additional noise and vibration conditions. The eventual measures imposed were found sufficiently flawed to be both irrational and legally perverse. The court held that changes to the committee resolution's requirements breached a duty to go back to members, even though the resolution did not expressly withdraw the scope allowed to officers to amend conditions. The judgment is perhaps best read as resisting changes that step beyond amendment and become new conditions. The restrictive terms of the standing orders and delegation scheme in this case are worth bearing in mind. The case is a reminder that there is now an onus on decision-makers to join the dots on heritage duties in their reports. Applicants should be careful not to accept lazy technical compromises, unless the risk of legal challenge is not worth the candle.

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[1] R (Obar Camden Ltd) v London Borough of Camden; Date: 8 September 2015; Ref: [2015] EWHC 2475 (Admin)

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