

Workshop 3
**Designation and management of the archaeological resource in the context of a changing
planning system**

Background briefing

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Introduction

In England heritage assets with archaeological interest may be protected by designation as (or inclusion within) world heritage sites, scheduled monuments, listed buildings, protected wrecks, registered parks and gardens, battlefields and conservation areas under a range of different legislations. The planning system provides additional policies and consent processes to manage the potential impact of development on these designated assets; for those without designation it is the only means of protecting them from the adverse effects of development. Particularly in the rural environment, where the greatest management challenges may come from activities other than development, many heritage assets have been managed successfully through inclusion within environmental land management agreements during the last 15 + years.

These background papers concentrate on archaeological sites and areas rather than buildings, other structures and places that may have archaeological interest but are protected through non-archaeological designations. The Heritage Protection Reform programme, which culminated in a draft Heritage Protection Bill in 2008, sought to bring together the legislation across the historic environment into a single act but the bill did not proceed through Parliament. As a consequence legislation remains diverse, (with varying terminology and concepts in law and policy including ‘importance’, ‘interest’ and ‘significance’), although planning policy and guidance has now been brought together (see below), and some of the proposals of the 2008 Act have since been enacted as parts of other legislative programmes (e.g. the Enterprise and Regulatory Reform Act 2013).

Scheduling (see Appendix 1)

Scheduling under the Ancient Monuments and Archaeological Areas Act 1979 is discretionary and a powerful, restrictive designation with the ability to control ‘all works’ affecting the scheduled monument through a consent process. The proportion of known archaeological sites that are scheduled is low at c 20,000 monuments (about 2-5 %), distribution being very uneven and ranging from over 1000 to less than 50 monuments per county. In the 1990s the Monuments Protection Programme sought comprehensively to update the schedule and to ensure that all of those sites of national importance were included. Its eventual coverage was incomplete and there has been no recent assessment of the content and coverage of the

schedule. The different and non-discretionary legislation covering the built historic environment has led to a much higher proportion of the resource being protected through listing; listing is also used nowadays to protect and manage sites that in the past might have been scheduled, given the greater flexibility of the legislation.

The planning system (see Appendix 2)

Planning Policy Guidance 16 *Archaeology and Planning* in 1990 introduced new government policies facilitating the consideration of archaeology in the preparation of local authority strategic plans and in the development management process. Most of the core elements of the current approach to archaeology and development were introduced at this time: the assessment of the impact of proposed development before or at the planning application stage, a presumption in favour of the preservation of nationally important archaeological remains whether scheduled or not, a model planning condition to facilitate archaeological recording in advance of development, and the transfer of the responsibility for mitigating impact to the developer. This replaced the previous state funding for 'rescue archaeology', and voluntary co-operation and contributions from developers, and had far reaching effects on the structure of the sector as well as the management of archaeology itself. In parallel, Sites and Monuments Records (now Historic Environment Records) and teams of specialist advisers were developed in local authorities, with the support of Historic England's predecessors, to deliver this system.

With changes in emphasis and in terminology this approach was carried through the successors to PPG 16: Planning Policy Statement 5 *Planning for the Historic Environment* in 2010 which brought together archaeology and the built historic environment into a single policy framework for the first time, and the current *National Planning Policy Framework* (NPPF) in 2012.

Despite the generally successful management of archaeology through the planning system there have been long standing concerns about the adequacy of protection (in the context of the small proportion of the resource that is scheduled). A recognition that the undesignated resource also includes many sites of national importance (NI) is reflected in the NPPF paragraph 139 that applies the policies for designated heritage assets to heritage assets with archaeological interest that are of equivalent significance to scheduled monuments. The 2013 DCMS guidance on scheduled monuments and nationally important but non-scheduled monuments also reflects this policy position.

Across 2014 and 2015 English Heritage (now Historic England) commissioned seven pilot projects analysing aspects of national importance on archaeological sites, undertaken by teams from Oxford Archaeology, Solstice Heritage and Wessex Archaeology in partnership with local authority archaeology officers. The results from each project fed into an overarching review of national importance undertaken by HE, and also to a session on this topic at the Chartered Institute for Archaeologists (CIfA) annual conference in April 2015. The conference session can be viewed at:

<https://www.youtube.com/playlist?list=PLBjeGwwG0rtSDSNE9y9Qk7RY6J7hdwJLb>

The main documentation for the project is available online at <https://www.historicengland.org.uk/listing/what-is-designation/scheduled-monuments/national-importance-programme/>

The ability to evaluate and record in advance of development, and the consequent the huge increase in the number archaeological excavations since 1990, has transformed understanding of the extent of the surviving evidence of past human activity in the landscape. A first wave of synthesis projects to use the post-PPG16 data (such as the Roman Rural Settlement research project and EngLaid) is now demonstrating its value and its potential as a basis for the re-interpretation of our past, as well as a route to informing a more strategic approach to scheduling.

The rural landscape

In the late 1990s the *Monuments at Risk Survey* provided evidence of the extent of the damage occurring to all archaeological sites, both scheduled and unscheduled from agriculture, especially ploughing, erosion and other processes; the advances in protection from development gained by PPG16 had not been matched in the rural environment. Accordingly the development of environmental management schemes through the Common Agricultural policy allowed the protection and active management of the historic environment to be built into schemes with resultant significant and beneficial impacts in the preservation of rural archaeological sites.

The Marine Zone

With the advent of marine spatial planning in UK waters in recent years, development in the marine zone is belatedly edging towards a system comparable to that on land. However, in England reluctance to schedule heritage assets below the mean low water mark, together with Government's failure to embrace the concept of historic marine protected areas in the Marine and Coastal Access Act 2008 has raised question marks as to the effective management and protection of heritage assets at sea.

Changes and challenges

Legislation

Immediate prospects for legislative change – whether fundamental (such as revisiting the principles of Heritage Protection Reform) or specific and limited (such as remedying deficiencies in the Ancient Monuments and Archaeological Areas 1979) – seem remote, particularly in the light of the potential legislative demands of Brexit. However, recent experience in Wales provides an example of a successful programme of historic environment legislation and policy revision, and Historic England has been successful in getting elements of reform included in other legislation since the loss of the 2008 Heritage Protection Bill. It is

conceivable that opportunities for change will arise during the post-Brexit legislative programme.

The planning system

Change in the planning system is being driven by a strong deregulation agenda from government. Elements of the system are perceived as barriers to development, especially to the achievement of government house building targets. Changes in legislation include extending permitted development rights, introducing Permission in Principle for sites listed in a 'qualifying document' such as a Local Plan or a Brownfield Register, and restricting the use of pre-commencement conditions, while a review of the NPPF itself is in progress. Although the implications of these actual and proposed changes are not yet fully apparent they may weaken the requirements for information to be provided before the principle of development is agreed, and the mechanisms for securing archaeological investigation in advance of or during development i.e. key elements of the post-PPG 16 system. Government has repeatedly stated that there will be no lessening of protection of the historic environment, and has responded positively to representations; however it is not clear at present how levels of protection will be maintained in the light of the above changes.

Delivery mechanisms

The delivery of essential information and advice in local authority plan making, development management, and input to land management agreements, relies on specialist archaeology staff: HER Officers, planning advisers and countryside advisers. Severe budget cuts across the whole of local authorities, together with an increase in demand for expenditure on other services, have led to a 33% reduction in numbers of these staff over the last 10 years, leaving some authorities with no specialist staff for periods of time and a general reduction in capacity.

Since 2010 Historic England has experienced an effective cut of c 50% to its resources (both to its core budget and also to its grant-giving budgets), and similar levels of cuts have been experienced by other UK Home Nations' national heritage bodies. This has inevitably placed pressure on staff undertaking designation assessment, post-designation site management, and giving advice on non-designated heritage. Further cuts have to be anticipated in the future.

Brexit

The impact of Britain leaving the European Union on legislation and policy for the protection and management of the historic environment is unknown but at present areas of concern include the future of Environmental Impact Assessment (especially coupled with the changes in the planning system already underway), and agricultural policy, in particular the fate of agri-environment schemes. Conversely, opportunities may arise to effect beneficial change during legislative programmes.

Acts such as the 1979 and 1990 scheduling and listing legislation are core UK legislation that should be uninfluenced by the UK exit from the EU, although as noted above, indirect impacts

may occur in terms of both funding to arms-length organisations like Historic England and also gaining parliamentary time for any revisions to heritage legislation.

Increase in knowledge

New archaeological sites, including ones of national importance, continue to be identified routinely through the development management process, through ground survey, aerial photography, the use of techniques such as Lidar, and the analysis of existing aerial photographs as part of the National Mapping Programme. Does the sector have the appropriate protection, management and delivery systems in place to respond to this continuing flow of new discoveries?

Appendix 1

The Management of Nationally Important Archaeology and Historic England: Summary May 2017

Joe Flatman, Head of Listing Programmes, Historic England

Scheduling and Archaeology

Historic England takes its statutory responsibilities to recommend sites for scheduling very seriously. Scheduling (through the deployment of the Ancient Monuments and Archaeological Areas Act (1979)) is intended to help ensure that a careful selection of monuments of national importance receive statutory protection and close supervision so that they can be handed on to future generations in as intact a state as is possible. From its beginnings in 1882, the schedule presently includes circa 20,000 entries, ranging in date from before the last ice age to the second half of the Twentieth Century. New entries continue to be included, and existing ones revised, on a regular basis.

Unlike sites listed under the Planning (Listed Buildings and Conservation Areas) Act (1990), the Secretary of State for Culture, as advised by Historic England, exercises discretion to choose the most suitable legal tool for the conservation and future management of monuments on a case-by-case basis. They may choose not to include a monument on the schedule where – notwithstanding a monument’s acknowledged national importance – it is not felt to be in the best interests (including management interests) of the monument to add it to the schedule.

In exercising discretion not to designate nationally important sites as scheduled monuments, the Secretary of State has regard to the fact that some sites can be effectively protected and managed by other forms of statutory heritage designation (including listing and, in the case of certain marine sites, as protected wrecks); through the regulation of potentially harmful activities through the planning system (both terrestrial and marine), the marine licensing regime or other regulatory controls; or by promoting beneficial stewardship by land managers (including through the provision of grant aid). Other monuments enjoy protection by being located in places that have legal protection for other reasons (such as their landscape, biodiversity or geodiversity value), provided that the prevailing management regime is conducive to this.

Scheduling casework, including both strategic and reactive work, remains a core commitment of Historic England. An important element of this is regular discussion with individual Local Authority Historic Environment Services, many of whom submit cases to Historic England for reactive (usually threat-driven) assessment, but who also have a history of proposing strategic, thematic scheduling projects. When Historic England receives applications, these are always dealt with promptly, and a high proportion of scheduling applications received go forward to full assessment. Mechanisms such as identifying the top sites within specific areas that could be assessed for scheduling which Local Authorities are aware of or concerned about, and identifying areas coming under increased development or farming pressure which Historic England might focus work on, are useful to this process, helping to prioritise

workloads.

Recent scheduling casework figures in England

Financial Year	New sites	Amended sites	Total
2011-12	10	6	16
2012-13	51	17	68
2013-14	53	18	71
2014-15	28	57	85
2015-16	40	22	62
2016-17	25	30	55

While numbers of new or amended scheduled sites have been lower over the last few years' than was the case in the 1990s and early 2000s (especially under the Monuments Protection Programme), a modest number of newly scheduled sites, and a larger number of amendments of such sites, are added annually to the National Heritage List for England. Historic England is in active discussion with the archaeological sector about the prioritisation of scheduling on the basis of evident significance, threat and research priority, as laid out in Historic England's Corporate Plan. This includes dedicated projects exploring the following topics:

- The use of Historic England's National Mapping Programme to inform thematic and geographical priorities for scheduling;
- The use of large-scale national research projects on archaeology (for example, the recently concluded Rural Settlement of Roman Britain Project) to inform strategic scheduling prioritisation;
- Planning for changes to the DEFRA-led Environmental Stewardship Scheme and the prioritisation of rural sites for possible scheduling as these come out of stewardship protection;
- The development of new approaches to marine heritage data, including the better flagging of sites of National Importance in such data-sets in partnership with Local Planning Authorities and other arms-length public bodies;
- Opportunities for public contributions to National Heritage List for England entries as part of Historic England's 'Enriching the List' Project;
- An on-going project to update the oldest scheduling entries on the National Heritage List for England (the so-called 'Old County Numbers', many of which date back to the early or mid-20th century), in order to help the understanding and thus management of such sites, especially those identified as being a priority within Historic England's Heritage at Risk Programme;

Historic England actively discusses its overarching corporate responsibilities for archaeology with the Historic England Advisory Committee (HEAC) and Expert Advisory Group (EAG). A series of discussion papers were circulated to members of HEAC across 2016 and 2017 that included discussion of many of the issues touched upon in this update.

Archaeology in the Context of National Planning

The National Planning Policy Framework (March 2012) states that in order to conserve and enhance the historic environment 'non-designated heritage assets of archaeological interest

that are demonstrably of equivalent significance to scheduled monuments, should be considered subject to the policies for designated heritage assets’.

Given the desire for as much clarity as possible about significance, there is a need for a better understanding of how such sites are identified, who identifies them, where they are recorded and how such information is accessed. This clarifying role is important for local communities, landowners and developers alike, and is a crucial part of Historic England’s core function and legal responsibility to help manage, protect and understand archaeological sites across the country.

During 2014 and 2015, Historic England commissioned seven pilot projects analysing aspects of national importance on archaeological sites, undertaken by teams from Oxford Archaeology, Solstice Heritage and Wessex Archaeology in partnership with Local Authority archaeology officers. The results from each project fed into an overarching review of National Importance undertaken by Historic England, and also to a session on this topic at the Chartered Institute for Archaeologists annual conference in April 2015. Since that time, Historic England has continued to work on this issue with partners across the sector.

The main documentation for the original National Importance Project is available online, and the draft report’s headline conclusions were as follows:

- Heritage assets of national importance can be recognised, assessed and defined. All of the pilot projects advocated a proactive path to identifying such assets;
- There is a desire for such areas to be recorded on HERs combined with GIS and therefore into planning alert mapping, SHINE and Magic, rather than set up as another standalone non-statutory register;
- The project identified Local Authority Historic Environment Services as lacking a standardised protocol to identify and justify non-scheduled nationally important heritage assets against consistent criteria. The production of a protocol which sets out the NI ‘Principles of Selection’ – and methodology, issues, examples and case studies – would be welcomed;
- There is the need for such a protocol to be agreed between Historic England, government departments (with DCMS in the lead, but other departments such as DCLG involved) and local planning authorities, clarifying how Local Authority Historic Environment Services can seek confirmation of national importance via NPPF para 139 from Historic England within planning-related timescales. The one major concern regarding lack of resources to carry out such work within Local Authority Historic Environment Services was flagged by all pilots.

Since the first phase of the National Importance Project concluded in the summer of 2015, Historic England has been undertaking a series of activities relating to National Importance. This includes the better referencing of National Importance in revisions of Historic England guidance documents, especially the Scheduling Selection Guides, and in the DCMS policy statement on scheduling, which is also currently under review.

Historic England is also in the process of initiating a second phase of the National Importance Project in discussion with government and the sector, which aims to:

- Produce a draft protocol which would set out agreed Principles of Selection – plus

methodology, issues, examples and case studies – for National Importance in England, including agreeing how Local Authority Historic Environment Services would seek confirmation of National Importance via NPPF para 139 from Historic England within planning-related timescales;

- Test the draft protocol with a series of different partner LPAs with different historic environment and planning priorities (e.g. urban; suburban; lowland rural; upland rural; coastal; wetland);
- Provide associated training provision on all of the above.

Appendix 2

Changes in the Planning System

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Planning and Archaeology

1. The planning system is central to the management and protection of the historic environment and provides the only effective protection for many heritage assets with archaeological interest. Much of the archaeological resource is undesignated and its precise nature and extent (and in some cases, even its existence) can be unknown prior to the consideration of development proposals.

2. Archaeology has been recognised as a material consideration in the planning process since the 1970s¹. Building on the foundation provided by *Hoveringham Gravels*, planning policy has been developed over the years to define

- heritage assets² (which are not dependent upon designation)
- significance³ and
- archaeological interest⁴

and to provide decision-makers with a coherent framework for consideration of the impact of development upon the significance of heritage assets with archaeological interest.

Planning Reform

3. That framework generally remains fit for purpose⁵. However, its effective operation is being undermined by changes in the wider planning system. Planning reform is presented in the guise of 'streamlining' and 'simplification'. Nonetheless, it represents a remorseless programme of de-regulation over the last 10 years fuelled by a perception in Whitehall and town hall that planning and environmental regulation are part of the problem and not part of the solution when meeting the challenge of recession.

4. Much (though not all) of the planning reform agenda focuses on removing the need to make an application for planning permission or lessening the requirements to obtain and implement permission. Broadly, this can be achieved in three ways (given that planning

¹ *Hoveringham Gravels v Secretary of State* [1975] Q.B. 754

² 'A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest.' NPPF Glossary

³ 'The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic.' NPPF Glossary

⁴ 'There will be archaeological interest in a heritage asset if it holds, or potentially may hold, evidence of past human activity worthy of expert investigation at some point.' NPPF Glossary

⁵ It must be remembered that the purpose is a planning purpose, i.e. to ensure the appropriate consideration of the historic environment in the regulation of the development of land. It is not intended to, and does not, regulate impacts upon the historic environment which do not involve development.

permission is only required for 'development' as defined within the Planning Acts), namely

- removing the operation or use from the definition of 'development' in the Planning Acts
- altering the Planning Acts so that the operation or use in question, although constituting 'development', no longer needs planning permission
- accepting that the development in question requires permission, but removing the need for a specific application (for instance, by providing a general permission through the operation of permitted development rights) or making permission easier to obtain and implement (for instance, by allowing the principle of development to be established by a less onerous mechanism).

5. The deregulation of planning thus far has predominantly involved the third of these options, but the underlying threat to archaeology remains the same in each case. Many of the safeguards for the historic environment currently enshrined in the National Planning Policy Framework⁶ (NPPF) assume an application for planning permission which will allow the decision-maker to require information and analysis before the application is determined and to impose conditions on any permission granted.

6. Without an application for planning permission the mechanisms legally to impose archaeological safeguards are often lacking and heritage assets are vulnerable to loss and damage. For example, the key policy requirement in paragraph 128 of the NPPF:

'Where a site on which development is proposed includes or has the potential to include heritage assets with archaeological interest, local planning authorities should require developers to submit an appropriate desk-based assessment and, where necessary, a field evaluation'

is unenforceable in the absence of an application for permission.

By-passing the application process

7. The application process is increasingly being by-passed in a variety of ways including

(1) the extension of permitted development rights

The continuing, wholesale, extension of permitted development rights is removing an increasingly large amount of development from the scrutiny that accompanies a planning application. It is fair to acknowledge that much permitted development is small-scale and unobjectionable; that it can be, and often is, subject to general conditions and exclusions and will not override EIA requirements. Nevertheless, there remains real scope for loss or damage to nationally important but undesignated archaeological remains and wider damage to the historic environment generally.

(2) local and neighbourhood development orders

It is intended that concerns about the historic environment would be addressed before the making of such orders, but in most cases archaeological consideration is likely to be less than that accorded to a site-specific application.

(3) the increased use of simplified planning zones

⁶ See paragraphs 128 to 141

Any move towards a zonal system of planning provides a serious challenge for the historic environment in England and would require more extensive 'front-loading' of the planning system.

(4) parliamentary bills for major infrastructure

Care needs to be taken to see that all heritage assets affected by development receive the same consideration that would be accorded to them through the ordinary planning process.

(5) automatic granting of permission in principle to housing sites allocated in local and neighbourhood plans and on brownfield registers

The granting of permission in principle⁷, itself, is of concern since it envisages the principle of development being established without full information and the ability to impose planning conditions. This concern is even greater in relation to the provisions of the Housing and Planning Act 2016 which automatically confer permission in principle for housing development on sites identified in appropriate registers. Full pre-determination assessment and (where necessary) evaluation is not routinely carried out for the land availability assessments (such as Strategic Housing Land Availability Assessments (SHLAAs)) which inform local and neighbourhood plan allocations and are intended to be used to populate brownfield registers. Consequently, there is a real risk that sites will be granted permission in principle in the absence of appropriate archaeological desk-based assessment and field evaluation⁸.

(6) planning freedoms schemes

Section 154 of the Housing and Planning Act 2016 also empowers a local authority (following appropriate consultation) to disapply or modify '*specified planning provisions in order to facilitate an increase in the amount of housing in the planning area concerned*'. The potential for a local authority by this means to by-pass the need for a planning application in a given area cannot be discounted.

Conditions

8. Planning conditions (or obligations) are crucial to ensure that appropriate and binding archaeological safeguards are in place and public benefit is delivered when development proceeds⁹. Even where an application is required, further limits have now been set upon the ability of local authorities to impose conditions. Section 14 of the Neighbourhood Planning Act 2017 (a) allows the Secretary of State to proscribe conditions of a defined type and (b) prevents a local authority from imposing a pre-commencement condition without the agreement of the developer.

⁷ See section 150 of the Housing and Planning Act 2016

⁸ Although Regulations have been published which require authorities to be satisfied that the impact on heritage assets is acceptable before including a site on a brownfield register, the pressure for local authorities to populate brownfield registers with sites remains intense.

⁹ See paragraph 36 and 37 of Historic England's Historic Environment Good Practice Advice in Planning Note 2: Managing Significance in Decision-Taking in the Historic Environment

9. Given the importance of pre-commencement conditions to the management and protection of the archaeological resource, the sector has focused primarily upon the latter provisions. Although an authority can refuse to grant permission if a developer does not agree to a necessary condition this provides a further 'turn of the screw' for local authorities already under intense pressure to grant permission for housing and other necessary development. Furthermore, the refusal of permission in such circumstances can only serve to undermine local authority decision-making and produce planning by appeal.

10. The Secretary of State's new power to proscribe certain types of condition has received less attention, but also has the potential adversely to impact upon archaeology. It has been suggested that conditions which render a scheme unviable should be prohibited. That is all well and good provided that it is always remembered that, where a condition is necessary to overcome a legitimate planning objection (for instance, where significant archaeological work is required), the planning application should be refused in the absence of such a condition. That, however, is not the intention of this provision, which is to allow development to proceed without having to comply with onerous and 'toxic' conditions (to use the rhetoric of Government in promoting the Bill).

Planning Policy

11. The indications from Government to date are that the historic environment section of the NPPF is unlikely to change significantly in the near future. That is heartening, although with an ever-changing political landscape nothing is guaranteed. What is alarming, however, is the stream of proposals to revise other parts of the NPPF, most notably by increasing the weight to be accorded to policies promoting the provision of housing and other related development. Planning is ultimately an exercise in weighing counter-balancing factors and it would be facile to suggest that greater weight can be given to one side of the equation without affecting the considerations on the other. The direction of travel is inexorably one way.

Brexit

12. Nor can the implications of Brexit be overlooked. The Great Repeal Bill may ironically (given its name) achieve its desired result of maintaining the status quo in the short term, but the United Kingdom's retreat from the European Union makes much of our environmental regulation (particularly those parts relating to environmental impact assessment) vulnerable to change in the longer term.

Resources

13. Inextricably linked to planning reform is the issue of finance. It is the cause of, and rationale for, most if not all of the proposals and any proposed solutions which ignore the realities of public and private finance in the post-recession era are doomed to failure.

Conclusion

14. The agenda for planning reform continues to be de-regulatory and to pose significant threats for the management and protection of the historic environment as it is currently undertaken. If the planning reform agenda does not change, archaeological practices may well have to.