

Site or Property: 20 Malcolm Road, SW19

Date: 04/01/19

Subject: **REPRESENTATIONS ON THE MERTON LOCAL PLAN 2020 STAGE 2 CONSULTATION DRAFT
OCTOBER 2018**

Montagu Evans LLP provides the below response to the proposed modifications to [draft Policy D5.5 – Managing Heritage Assets](#).

Paragraph 35 of the NPPF sets out the requirements for a test to be considered sound. This is a legal requirement as set out in Section 20 (5) (b) of the 2004 Planning and Compulsory Purchase Act. The tests of soundness are set out in paragraph 35 of the NPPF. Most relevant to this representation is the requirement that policies are (criterion (d):

“Consistent with National Policy – enabling the delivery of sustainable development in accordance with the policies in this Framework.”

Criterion (b) is also relevant in that policies should be:

“Justified – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence”

Part (d) of the emerging Policy states that *“The loss of a building that makes a positive contribution to a conservation area or heritage site, should also be treated as substantial harm to a heritage asset.”*

This is inconsistent with the NPPF and not justified for the reasons as set out below.

Our representations:

1. Inconsistency with the NPPF

- 1.1. The policy is incompatible with the principles of proportionality that underpin the application of the NPPF.
- 1.2. The policy equivocates the demolition of a positive contributor to a heritage asset with substantial harm to that heritage asset.
- 1.3. Paragraph 201 of the NPPF (2018) states that:

“Not all elements of a Conservation Area or World Heritage Site will necessarily contribute to its significance. Loss of a building (or other element) which makes a positive contribution to the significance of the Conservation Area or World Heritage Site should be treated either as substantial harm under paragraph 195 or less than substantial harm under

paragraph 196, taking into account the relative significance of the element affected and its contribution to the significance of the Conservation Area or World Heritage Site as a whole" [our emphasis].

- 1.4. Paragraph 189 requires an application to describe the 'significance' of any heritage assets affected by the proposals. Paragraph 193 states that:

"When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."
- 1.5. Thus, that 'significance' can be harmed or loss through alterations or destruction of the heritage assets or development within its setting.
- 1.6. Paragraphs 195 and 196 advise planning authorities on how to address applications that result in 'substantial' harm or 'less than substantial' harm to an asset's significance. Paragraphs 195 and 196 indicate that the harm caused can be outweighed by public benefits essentially to a degree commensurate with the harm caused. This is of course a simplified summary, but it is clear that an ordered approach to the assessment of applications is required; what is the significance of the asset; is that significance harmed; is that harm (either substantial or less than substantial) outweighed by other public benefits. The greater the harm, the greater the countervailing public benefit needs to be.
- 1.7. It is clear from the NPPF that applications for alterations to designated heritage assets (including demolitions within conservation areas) need to be undertaken on a case by case basis. In fact, an 'in-principle' determination as to the level of harm that arises from demolition is entirely incompatible with the approach set out in the NPPF. In some circumstances, such demolition may be substantially harmful to a designated heritage asset, and others it may not be.
- 1.8. The NPPF allows scope for a reasoned judgment to be made regarding the level of harm caused by a Proposed Development to a designated heritage asset on a case-by-case basis. The prescriptive wording of the policy removes this opportunity for judgment on the part of the decision maker.
- 1.9. We consider therefore that the draft policy is not sound, on the basis that it contradicts the NPPF.

2. Determination of substantial versus less-than-substantial harm

- 2.1. The NPPG provides guidance on how to assess whether substantial or less than substantial harm to a heritage asset has occurred:

"Whether a proposal causes substantial harm will be a judgment for the decision taker, having regard to the circumstances of the case and the policy in the National Planning Policy Framework. In general terms, substantial harm is a high test, so it may not arise in many cases. For example, in determining whether works to a listed building constitute substantial harm, an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic interest. It is the degree of harm to the asset's significance rather than the scale of the development that is to be assessed. The harm may arise from works to the asset or from development within its setting.

While the impact of total destruction is obvious, partial destruction is likely to have a considerable impact but, depending on the circumstances, it may still be less than substantial harm or conceivably not harmful at all, for

example, when removing later inappropriate additions to historic buildings which harm their significance. Similarly, works that are moderate or minor in scale are likely to cause less than substantial harm or no harm at all. However, even minor works have the potential to cause substantial harm.” [our emphasis]

Paragraph: 017 Reference ID: 18a-017-20140306

- 2.2. It is thus implied that a reasoned judgment may be made regarding the level of harm caused to a designated heritage asset (such as a Conservation Area) by a Proposed Development. There is no justification set out within the emerging policy for bypassing the requirement to assess the level of harm that may be caused.
- 2.3. The need for a case-by-case analysis of the level of harm caused by proposals is reinforced by a number of recent Court of Appeal and High Court judgments.
- 2.4. Dorothy Bohm & Others v Secretary of State for Communities and Local Government and Others [2017] clarified the distinction set out at paragraphs 123-135 of the (2012) NPPF when considering the loss of a non-designated heritage asset in a Conservation Area. Of particular relevance to the approach to determining this application are the below paragraphs:

“33. However, when considering the impact of the proposal on the CA under S72, it is the impact of the entire proposal which is in issue. In other words the decision maker must consider not merely the removal of the building which made a positive contribution, but also the impact on the CA of the building which replaced it. She must then make a judgment on the overall impact on the CA of the proposal before her.”

“36. In respect of s72, she considered this issue in paras 12-17. She said a para 16 that the existing building made a limited positive contribution to the CA, and the net effect of the new building would at worst be neutral and that the CA would not be harmed. Again in my view, this was an entirely correct approach. Section 72 requires the overall effect on the CA of the proposal to be considered.”

- 2.5. Bedford BC v SSCLG [2013] EWHC 2847 (Admin) clarified the meaning of ‘substantial harm’ - as harm so severe as to practically to remove the rationale for designation. The critical paragraph is 25 –

‘One was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced’.

- 2.6. The judge also held that the clear and convincing justification required in paragraph 194 of the NPPF does not create a freestanding test, and ‘to the extent that there is a test, it is to be found in paragraph 134’ (now 196).
- 2.7. Accordingly, the demolition of an element which makes a positive contribution to a Conservation Area does not automatically and in principle cause substantial harm. The decision maker is empowered by the NPPF to judge the level of harm caused by a proposed development on a case-by-case basis, taking into account the nature of the contribution and the impact on the particular value of an asset.

3. **Internal Inconsistencies within Policy**

- 3.1. We also consider that the policy is internally inconsistent. Criterion (a) of the policy requires development proposals affecting a heritage asset to be assessed according to principle set out within the NPPF. However, for the reasons set out above, criterion (d) of the policy is inconsistent with those NPPF principles. The NPPF requires a reasoned judgement as to the level of harm that arises, but the policy as drafted removes the ability to make that reasoned judgement. It would thus be impossible to comply with criteria (a) and (d) simultaneously.
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3.2. The application of criterion (d) in the case of the demolition of a building making a positive contribution to a conservation area would then activate criterion (c) of the policy. The sets set out in that section of the policy are excessive and inconsistent with the principles of proportionality set out in the NPPF.

4. Conclusion

4.1. We conclude that the policy would in its current form be considered unsound if tested at examination by a Planning Inspector, for the reasons set out above. For this reason the policy should be amended by deleting criterion (d) of the emerging policy.
