

Agenda Item No:	10	
Committee:	Planning Committee	
Date:	20 August 2025	
Report Title:	Update on Planning Application F/YR24/1000/F and Relevant Statutory Duties	

1 Purpose / Summary

- 1.1 This report is presented to provide Members with a formal update in respect of planning application F/YR24/1000/F, which was considered by the Planning Committee on 28 May 2025. At that meeting, Members resolved to grant planning permission, subject to conditions, contrary to the Officer recommendation as set out in the published committee report (reproduced at Appendix 1).
- 1.2 The purpose of this report is to addresses recent legal correspondence received on behalf of a third party which raises a formal pre-action indication of potential judicial review proceedings in relation to the Committee's resolution. As part of this a transcript of the debate was provided (provided at Appendix 2).
- 1.3 Given the seriousness of the matters raised and the potential legal and procedural consequences of proceeding to issue a decision notice the Council has not issued the decision notice.
- 1.4 Where a resolution to grant planning permission has been made by a Committee but no formal decision notice has yet been issued, the Council has not, in law, determined the application. Until the decision notice is issued, the authority retains jurisdiction to reconsider the matter. The Courts have confirmed that, in such circumstances, if there is a material change in circumstances, Officers must consider whether it remains lawful and appropriate to proceed to issue the decision or whether the matter should be referred back to Committee. This principle was clearly established in *R (Kides) v South Cambridgeshire DC* [2003] 1 P&CR 19.
- 1.5 The Committee is invited to consider whether, in light of the issues now set out, it would be appropriate to revisit the resolution to grant planning permission in order to

ensure that the Council's position is legally robust, clearly reasoned, and compliant with its statutory duties as the Local Planning Authority.

2 Key issues

- Members resolved to grant planning permission contrary to Officer recommendation due to identified heritage impacts.
- The planning application affects the setting of a Grade II listed building, engaging statutory duties under Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990. The statutory duty requires "special regard" to preserving the setting of listed buildings, creating a strong presumption against granting permission where harm is identified.
- The Council has received formal legal correspondence challenging the lawfulness of the Committee's resolution to grant planning permission contrary to Officer recommendation.
- Independent legal advice has been sought, which raises concerns about the robustness of the Committee's reasons and the risk of judicial review if the decision is not revisited.
- The Committee may still lawfully conclude that planning permission should be granted, provided that any such decision is underpinned by clear, well-reasoned, and publicly defensible justifications that fully address the relevant legal requirements, development plan policies, and material considerations.
- Failure to address these legal and policy requirements risks significant financial costs to the Council if the decision is subject to judicial review, costs ultimately borne by the local community through Council Tax.
- The Committee is invited to reconsider the application, applying the relevant statutory duties, policies, and material considerations, to ensure a lawful and robust decision.

3 Recommendations

- 3.1 The recommendation is to refuse planning permission for the reason set out in section 11 of this report.

Wards Affected	All
Forward Plan Reference	N/A
Portfolio Holder(s)	Cllr Mrs D Laws
Report Originator(s)	Matthew Leigh
Contact Officer(s)	Matthew Leigh - Head of Planning mleigh@fenland.gov.uk
Background Paper(s)	N/A

4 Decision-Making Framework and Member Responsibilities

- 4.1 In determining planning applications, the Planning Committee exercises the Council's functions as the Local Planning Authority under the Town and Country Planning Act 1990 (as amended), together with any relevant subordinate legislation. In doing so, Members are legally obliged to operate within the statutory framework that governs all planning decisions.
- 4.2 In particular, Members of the Committee:
- Must determine planning applications in accordance with the development plan for the area (in this case, the Fenland Local Plan (2014) the Cambridgeshire and Peterborough Minerals and Waste Local Plan (2021) and the Wimblington and Stonea Neighbourhood Plan (Pre-Submission Draft October 2024)), unless material considerations indicate otherwise, as required by section 38(6) of the Planning and Compulsory Purchase Act 2004.
 - Are required to have proper regard to the Officer's report, including its assessment of the development plan policies and all other relevant material considerations. This includes giving due weight to matters of planning

judgement, technical advice from consultees, and any legal context or implications referred to in the report.

- Are entitled to form a different conclusion from Officers, provided their reasons are rational, evidence-based, and capable of withstanding scrutiny. Members may give differing weight to material considerations, but must ensure that the reasons for doing so are clearly explained, relevant, and defensible.
- Must also have regard to all other relevant statutory duties beyond the planning acts. This may include, where applicable, obligations under the Planning (Listed Buildings and Conservation Areas) Act 1990, the Environment Act 2021 and the Natural Environment and Rural Communities Act 2006. These place additional legal duties on the decision-maker and must be read alongside the planning legislation.

4.3 The law is clear that failure to have regard to these legal requirements, or a failure to articulate robust and lawful planning reasons for departing from policy or technical advice, may render a decision unlawful and liable to legal challenge.

5 Application History

5.1 On 28 May 2025, the Planning Committee considered planning application reference F/YR24/1000/F for the erection of five dwellings and associated works on land to the rear of 31 Norfolk Street, a Grade II listed building. The Officer's Report, which set out the relevant planning policy context, detailed assessment, and recommendation, is attached at Appendix 1 to this report.

5.2 The planning application was recommended for refusal for the following reason:

“The application would result in development within the setting of a Grade II listed building, 31 Norfolk Street, and would result in less than substantial harm to this setting, by virtue of introducing built form into currently undeveloped open land forming the historic context to the listed building, without adequate justification, and without any public benefits outweighing this harm. As such, if permitted, the development would be contrary to Policy LP18 of the Fenland Local Plan (2014) as well as Paragraphs 213 and 215 of the National Planning Policy Framework.”

- 5.3 Despite the Officer's recommendation, Members resolved to approve the proposal. While Members are of course entitled to depart from Officer advice, any such decision must be based on sound planning grounds, supported by evidence, and capable of clear articulation. This is particularly important where such a decision engages policies of recognised importance, such as those relating to heritage assets.
- 5.4 It is well established in case law that, in such circumstances, a general common law duty to give reasons will arise—particularly where permission is granted in the face of substantial public opposition, contrary to Officer recommendation, and involving a significant departure from the development plan or other policies of national importance.
- 5.5 Following the Committee's resolution, legal representatives acting on behalf of an interested third party wrote to the Council on 5 June 2025. Their correspondence alleged that the Council had failed to lawfully assess and apply the statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, and had not properly addressed the relevant policies within the National Planning Policy Framework or the local development plan, specifically Policy LP18.
- 5.6 In light of the serious nature of the issues raised, and given the legal and procedural sensitivities surrounding the determination of applications affecting designated heritage assets, the Council sought independent legal advice. That advice addresses the legal robustness of the Committee's decision and whether the resolution to grant permission was lawfully made, particularly in light of the concerns raised by the Council's Heritage Officer and the Officer Report. The advice is appended at Appendix 3 to this report.
- 5.7 The independent legal advice concludes that there are concerns regarding the robustness of the Committee's debate and the reasoning that underpinned the resolution to grant planning permission. The proposal would result in harm to the setting of a Grade II listed building and therefore, the statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 is engaged. This duty requires decision-makers to have special regard to the desirability of preserving the setting of listed buildings, and case law confirms that this creates a strong

presumption against the grant of planning permission; this statutory duty must be given considerable importance and weight in the planning balance.

- 5.8 The advice goes on to state that the public benefits put forward in support of the development are limited. The provision of five additional dwellings carries only modest weight in circumstances where the Council can demonstrate a healthy and deliverable five-year housing land supply. No other compelling countervailing public benefits have been identified that would clearly and convincingly outweigh the harm to the designated heritage asset. In such circumstances, the legal opinion advises that the justification for approving the development is weak and legally vulnerable unless it is revisited and properly articulated.
- 5.9 The independent legal advice obtained by the Council concludes that the most appropriate and legally robust course of action would be for Officers to refer the application back to the Planning Committee for further consideration. This recommendation does not imply that the Committee is incapable of reaching a lawful decision to approve the development; rather, it reflects the legal adviser's view that the reasons articulated during the debate were insufficiently clear or detailed to support the current resolution. The advice highlights that, as presently recorded in the transcript, the justification for granting permission lacks the necessary robustness and is therefore vulnerable to legal challenge.

6 Considerations

- 6.1 In light of the matters raised in this report, Members are required to reconsider whether, having regard to the statutory and policy framework, the resolution to grant planning permission remains appropriate and lawful. Specifically, Members must consider whether the development would give rise to harm to the setting of the Grade II listed building, and if so, whether such harm has been properly identified, weighed, and justified. This assessment must include consideration of whether the proposal would conflict with Policy LP18 of the Fenland Local Plan (2014), and, by extension, whether the application is in accordance with the development plan when read as a whole, as required by section 38(6) of the Planning and Compulsory Purchase Act 2004.

- 6.2 To assist Members in undertaking this reassessment, this section sets out a summary of the relevant statutory duties and policy requirements, including the statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, the provisions of Policy LP18 (including criteria (a) to (c)), and the relevant paragraphs of the National Planning Policy Framework (Chapter 16: paragraphs 212 to 221, and in particular paragraphs 213 and 215). These provisions collectively establish the legal and policy framework for assessing the impact of development on designated heritage assets and must be applied rigorously when determining applications where heritage considerations are engaged.

Section 66 Duty

- 6.3 Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 imposes a statutory duty on local planning authorities when considering applications that affect listed buildings or their settings. It states:

“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

- 6.4 This statutory duty is not merely procedural; it has substantive weight in the decision-making process. Its significance was underlined in *East Northamptonshire DC & Barnwell Manor Wind Energy Ltd v Secretary of State for Communities and Local Government* [2015] 1 WLR 45, where the Court of Appeal made clear that when the section 66 duty is engaged, decision-makers must give considerable importance and weight” to the desirability of preserving the setting of listed buildings. It is not a simple planning balance but a presumption in favour of preservation that must materially influence the outcome unless outweighed by sufficiently powerful countervailing considerations.
- 6.5 While the Courts have also clarified that some degree of harm to the setting of a listed building does not automatically render a decision unlawful, provided the statutory duty is properly applied and appropriately weighed (as in *Safe Rottingdean Ltd v Brighton and Hove City Council* [2019] EWHC 2632 (Admin)), the duty remains stringent.

- 6.6 The Planning Encyclopaedia (Commentary to L66.01) summarises the established position as follows:

“It follows that it is clearly established that a decision which engages the duties in either s.66(1) or 72(1) will be legally flawed if it does not give effect to those duties, the strong presumption they create, and fails to accord them ‘considerable importance and weight’ when weighing up any harm against any benefits or countervailing factors”.

LP18 – The Historic Environment

- 6.7 Policy LP18 of the Fenland Local Plan (2014) sets out the Council’s approach to conserving and enhancing the historic environment. The policy seeks to ensure that development proposals affecting designated or non-designated heritage assets are appropriately assessed, justified, and, where necessary, mitigated. Its overarching aim is to safeguard the historic environment as a key component of the district’s character, distinctiveness, and cultural value, while allowing for sustainable development that respects heritage significance.

- 6.8 The policy is explicit in its requirements. It states that:

“All development proposals that would affect any designated or undesignated heritage asset will be required to:

(a) describe and assess the significance of the asset and/or its setting to determine its architectural, historic or archaeological interest; and

(b) identify the impact of the proposed works on the special character of the asset; and

(c) provide a clear justification for the works, especially if these would harm the asset or its setting, so that the harm can be weighed against public benefits.”

The NPPF

- 6.9 Chapter 16 of the National Planning Policy Framework (NPPF) sets out the Government’s national planning policies for conserving and enhancing the historic environment. Paragraphs 212 to 221 emphasise the importance of heritage assets as an irreplaceable resource and require that they be conserved in a manner appropriate to their significance. Local planning authorities must ensure that decisions reflect the

desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation.

6.10 Paragraph 213 is particularly relevant in this case. It states:

“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.”

6.11 This paragraph reinforces the principle that any harm to the significance of a designated heritage asset, including harm to its setting, must be treated with great weight in the planning balance. It is not sufficient to simply acknowledge harm; the weight attached to that harm must be proportionate and substantial, even if the level of harm is categorised as *“less than substantial.”*

6.12 Paragraph 215 further sets out the balancing exercise required in such cases:

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

6.13 This paragraph does allow for harm to be outweighed by public benefits, but it requires a demonstrably clear and convincing case to be made. The language of both paragraphs is consistent with the statutory duty under section 66(1) and national case law, reaffirming the need for decision-makers to apply considerable importance and weight to any harm and to ensure that any countervailing benefits are sufficiently compelling.

PPG

6.14 The Planning Practice Guidance (PPG) provides further detail on the application of national policy in relation to the historic environment. The guidance under the section *“Conserving and enhancing the historic environment”* supports and expands upon the policies set out in Chapter 16 of the NPPF.

6.15 The PPG advises that:

“In determining applications, local planning authorities should take account of the significance of any heritage asset affected, including any contribution made by its setting.”

6.16 It also notes that the setting of a heritage asset is not fixed and may change over time. While public access to the setting can influence significance, it is not a requirement for the setting to contribute meaningfully to how a heritage asset is experienced or understood.

6.17 The guidance emphasises that:

“Great weight should be given to the conservation of heritage assets.”

6.18 This applies regardless of the scale of harm. The PPG clarifies that this weight should be applied consistently and that decision-makers must give *“clear and convincing justification for any harm or loss.”* It goes on to state that the level of detail required in an application should be proportionate to the asset’s importance but sufficient to understand the potential impact.

6.19 In relation to ‘significance’ and its importance in decision-making the PPG states:

“Heritage assets may be affected by direct physical change or by change in their setting. Being able to properly assess the nature, extent and importance of the significance of a heritage asset, and the contribution of its setting, is very important to understanding the potential impact and acceptability of development proposals.”

Heritage Assessments

6.20 As part of the planning submission, the applicant provided a Heritage Assessment which sought to identify and assess the significance of the affected heritage assets and the likely impact of the proposed development upon that significance. The Council consulted its Conservation Officer, who provided detailed comments on the proposals, identifying specific areas of concern in relation to the level of harm and the justification provided. In response, the applicant submitted further information and clarification,

which was carefully reviewed. The Conservation Officer subsequently provided additional comments.

- 6.21 The Applicant's Heritage Assessment is attached as Appendix 4. The Council's Conservation Officer was formally consulted on the application and provided detailed comments on 13 February 2025. These are attached as Appendix 5.
- 6.22 A Heritage Rebuttal (HR) was received by the Council in response to the Conservation Officers comments. The HR is appended to this report as Appendix 6. A further response was issued on 9 April 2025 following the submission of additional material by the applicant. These additional comments are appended in full at Appendix 7 to this report. The HR concludes that the proposal *"responds to the setting of the asset through a more traditional layout of development, aligned along the western edge of the site and set away from the listed building. Key views will be preserved, and the new homes are appropriate in scale, massing and design details, reflecting the local character"*.
- 6.23 The Conservation Officer concluded that the proposed development would result in *"less than substantial harm"* to the significance of the designated heritage asset and its setting. The level of harm was categorised as *"medium"* within that spectrum. Furthermore, the Conservation Officer advised that the justification provided by the applicant was insufficient to demonstrate that the identified harm was necessary or outweighed by meaningful public benefit. As such, the proposal was considered to be in conflict with Policy LP18 of the Fenland Local Plan (2014) and the relevant provisions of Chapter 16 of the National Planning Policy Framework.

7 Assessment and Application of the Statutory and Policy Tests

- 7.1 Having regard to the legal, policy, and procedural framework set out above, and in light of the heritage advice received, Members should approach the decision-making process by sequentially addressing the following considerations:

Whether the development would result in harm to the setting of the listed building

Members are invited to consider and reach a view, based on the submitted material and professional advice, as to what level of harm, if any, the proposed development

would cause to the significance of the Grade II listed building at 31 Norfolk Street through changes to its setting. The Conservation Officer has advised that the scheme would result in *less than substantial harm (medium)*. It should be noted that at the time of the last application, the transcript evidences that the Committee acknowledged some level of harm as when going against the Officer recommendation it was stated “*to me does not do sufficient harm to warrant a refusal on this application*”.

Whether the statutory and policy duties are properly engaged and applied

Where harm is identified, Members must apply the statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, which requires *special regard* to be given to the desirability of preserving the setting of the listed building. This is not a neutral or procedural exercise, it establishes a strong presumption against granting planning permission where harm is found. That presumption must be given *considerable importance and weight* in the planning balance. Members must also assess the proposal against Policy LP18 of the Fenland Local Plan and the relevant provisions of Chapter 16 of the NPPF, particularly paragraphs 213 and 215.

Whether there is clear and convincing justification for the identified harm

If Members accept that there would be *less than substantial harm*, the next step is to determine whether that harm is justified. Paragraph 200 of the NPPF confirms that any harm to a designated heritage asset must require *clear and convincing justification*. Paragraph 215 then requires that the harm be weighed against the public benefits of the proposal. In this case, due to the Council being able to demonstrably a healthy five-year housing land supply the delivery of five dwellings is of limited public benefit. No other public benefits of significance have been identified as part of the planning application process at this time. Members must determine whether the justification and benefits are sufficient to outweigh the identified harm and the significant hurdle placed by S.66.

Whether the proposal complies with the development plan when read as a whole

Finally, applying section 38(6) of the Planning and Compulsory Purchase Act 2004, Members must determine whether the proposal accords with the development plan taken as a whole and, if it does not, whether there are other material considerations that indicate that planning permission should nevertheless be granted. In this case, if

Members conclude that the proposal conflicts with Policy LP18 and the harm to the designated heritage asset is not outweighed by public benefits, then the appropriate and lawful conclusion would be that planning permission should be refused.

8 Effect on corporate objectives

8.1 The granting of planning permission in conflict with guidance within the NPPF, and the potential for resultant legal challenge, would impact of the following corporate objective:

- a) Promote and enable housing growth, economic growth and regeneration across Fenland.

9 Community impact

9.1 Should the Council proceed to issue planning permission on the basis of a resolution that is open to legal challenge, there is a real risk that it may be required to defend those proceedings in the High Court. The legal advice obtained indicates that the current reasoning is insufficiently robust, which exposes the authority to a heightened risk of judicial review. In such circumstances, the Council could incur significant legal costs, both in preparing its defence and, if unsuccessful, in meeting the claimant's costs as well.

9.2 These financial implications would inevitably be borne by the local community, as the Council's activities are ultimately funded by residents through Council Tax. The potential diversion of resources to defend a legally vulnerable decision represents not only a financial risk but also a reputational one. It could erode public trust in the planning system and the Council's decision-making processes.

10 Conclusions

10.1 In making planning decisions, it is essential that Local Planning Authorities adhere not only to the policies of the development plan and the National Planning Policy Framework, but also to the statutory duties imposed by legislation such as the Planning (Listed Buildings and Conservation Areas) Act 1990. Where heritage assets are affected, the legal framework requires decision-makers to give considerable

importance and weight to any harm, and to ensure that any such harm is clearly and convincingly justified.

- 10.2 In this case, the proposal engages section 66(1) of the 1990 Act, and both the case officer and the Council's Conservation Officer have identified less than substantial harm to the setting of a Grade II listed building. The Council must therefore, when determining the planning application undertake a lawful balancing exercise, having full regard to the requirements of Policy LP18 of the Fenland Local Plan and paragraphs 213 and 215 of the NPPF. The Council must be able to demonstrate that it has properly assessed the level of harm, considered whether there is adequate justification, and reached a reasoned conclusion consistent with statute and policy.
- 10.3 The independent legal advice obtained in response to third-party representations confirms that the reasons given by Committee in support of their resolution to grant permission are not currently sufficiently robust to be lawfully relied upon. The opinion makes clear that this does not prevent the Committee from ultimately approving the application, but in order to do so lawfully, it would need to articulate a clear and defensible planning rationale, with proper regard to the statutory heritage duties.
- 10.4 Given the risks identified, including the potential for legal challenge, the appropriate and prudent course of action is to return the application to Committee for further consideration. This will enable Members to revisit the planning balance in light of all relevant legal and policy duties, and to reach a decision that can be lawfully issued and robustly defended.

11 Recommendation

- 11.1 It is recommended that Planning Committee REFUSE the application for the following reason:
1. The application would result in development within the setting of a Grade II listed building, 31 Norfolk Street, and would result in less than substantial harm to this setting, by virtue of introducing built form into currently undeveloped open land forming the historic context to the listed building, without adequate justification, and without any public benefits outweighing this harm. As such, if permitted, the

development would be contrary to Policy LP18 of the Fenland Local Plan (2014) as well as Paragraphs 213 and 215 of the National Planning Policy Framework.