The five year housing land supply and the "primacy of the development plan" - *in 25 minutes*

What happens when the plan is out of date?

What do the cases say about the primacy of the plan compared with other material considerations?

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The government's commitment to the plan-led system

- The localism agenda: "to place significantly more influence in the hands of local people over issues that make a big difference to their lives"
- Paragraph 17(1) of the Framework. The first of the 12 "core land-use planning principles that should underpin decision-making is that planning should:-

  > "be genuinely plan-led, empowering local people to shape their surroundings with succinct local and neighbourhood plans….Plans should be kept up to date….They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency;"

- So approve development that accords with a plan without delay
- Refuse that which doesn't?……Not quite!

The catch - paragraph 14 of Framework

If a plan is absent, silent or relevant policies are out of date then grant permission unless:-

- Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework taken as a whole; or
- Specific policies in the Framework, such as those in footnote 11, indicate development should be restricted.

What does absent, silent or relevant policies out of date mean?

- See *Bloor Homes East Midlands v SSCLG and Hinckley and Bosworth BC* [2014] EWHC 754 per Lindblom J at [44] – [58]
- Absent = none adopted for relevant period = fact
- Silent = lacks a policy relevant to the project under consideration = fact or law (statutory interpretation)
- Out of date = change on the ground, change of national policy, or "some other reason" = fact or fact and judgment

Paragraph 49 of the Framework

- “Relevant policies for the supply of housing should not be considered up to date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites”
- Thus it operates as “some other reason” by which HLS policies are deemed to be out of date
- 6 key issues that bear on weight placed on the Plan:-
  - What is the point of the deeming provision in para 49?
  - What is a policy for the supply of housing?
  - Does para 49 apply to draft policies?
  - Is weight affected by the amount of a shortfall?
  - How is this consideration to be reconciled with the statutory primacy of the development plan and Framework para 17(1)?
  - When there is no five year supply, how do LPAs still win appeals?

What is the point of the deeming provision in para 49?

- “Plainly the object is to increase the likelihood of planning permission being granted for a housing proposal where a 5 year supply does not exist by applying a presumption in favour of development, subject to taking account of other material considerations in a particular case, whether they tell in favour of or against the grant of planning permission, or are neutral.” per Holgate J in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) at para 101

Does *increase likelihood of planning permission being granted* mean the weight attached to HLS policies in the development plan **must** be reduced?

- The short answer is “no”
- “it will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out of date. That is not a matter of law; it is a matter of planning judgment”. Per Lindblom LJ in *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2016] EWCA Civ 168 at para 47

So when is it likely will weight be reduced?

- Planning appeals suggest it depends on:-

  - the nature of the housing land supply policy that is deemed to be out of date (and the importance that is generally attributed to it by the NPPF)
  - The particular context
  - The performance of the LPA in tackling a shortfall in the supply of land for housing

So what is a policy for the supply of land for housing?

- "Our interpretation of the policy [of para 49] does not confine the concept of 'policies for the supply of housing' merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognises that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed – including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks….." per Lindblom LJ in *Richborough* at para 33
- Whether a policy is a HLS policy is a matter for the decision maker in a particular case, subject only to the high bar of irrationality – see *Richborough* para 45

So there is the definition of policy for the supply of land for housing: now apply common sense

- Since the weight to be given to an out of date policy for the supply of land for housing is a matter for the decision maker
- And the Framework attaches great importance to the protection of the Green Belt, AONBs, National Parks and other circumstances falling within "footnote 9" (of para 14)
- Inspectors will often continue to attach great weight to the objects of "special environmental policies" (which restrict HLS). That will often result in appeals being dismissed
- They might do this by continuing to attach a lot of weight to those development plan policies (even though they remain out of date notwithstanding footnote 9) and/or by attaching great weight to the relevant policies of the Framework for the Green Belt, AONBs etc

Does para 49 apply to draft policies?

- Yes: see Woodcock Holdings at para 101
- Generally that will be a matter of little practical significance unless, perhaps, a plan is on the cusp of adoption – See Framework para 216

Is weight affected by the amount of a shortfall?

- It can be

"….the weight to be given to such [HLS] policies is not dictated by government policy in the NPPF. Nor is it, or could it be, fixed in the case law of the Planning Court. It will vary according to the circumstances, including, for example, the extent to which the policies actually fall short of providing for the required five-year supply, and the prospect of development soon coming forward to make up the shortfall." per Lindblom J in *Ivan Crane v Secretary of State for Communities and Local Government, Harborough District Council* [2015] EWHC 425 (Admin) at para 72

But experience shows this point is generally not worth pressing unless the LPA claims it has a 5 year supply and is having some success in bringing sites forward, or a local plan has just been adopted and is "settling in" (see e.g. the Ashflats inspector's decision in Stafford)

Reconciling NPPF paras 14 and 49 with the primacy of the development plan and s.38(6) P&CPA 2004

- “This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise….” NPPF para 12
- So where relevant policies in a plan are out of date by virtue of para 49, the objects of it and para 14 will be a material consideration and has to be applied and weighed in the balance against those policies, and will often (but not always) “trump” the plan

So how do LPAs without a 5 year supply continue to win appeals in a plan-led system?

- By the application of good, “old fashioned”, development control principles identifying demonstrable and substantial harm to e.g.:-
  - Listed buildings or conservation areas and their settings
  - Attractive landscape - it does not have to be valued or designated, although it helps if is. But you will not defend an average, flat, green field on the edge of a sustainable settlement.
  - Green Belt and other highly restrictive designations (notwithstanding *Hopkins Homes*)
  - Highway safety,
  - Residential amenity by virtue of noise etc

5 final thoughts

- Framework compliant plan and five year supply = Appellants are liable to lose
- Plan but no 5 year supply = relevant policies out of date, Framework paras 14 and 49 kick in. Appellant liable to win
- 5 year supply but no plan or no relevant policies = Plan “absent” or “silent”. Framework paras 14 and 49 kick in. Appellant liable to win
- So work hard to put a plan in place, never stop feeding the 5 year supply with sensible sites, and keep the plan up to date
- A 5 year supply on its own is <u>never</u>, in itself, a good reason for refusal

Judge rules on application of NPPF's presumption in favour of sustainable development

22 November 2016 by Court reporter , Be the First to Comment

A High Court judge has ruled that approvals of developments which are contrary to a local plan, made under the National Planning Policy Framework's (NPPF) presumption in favour of sustainable development, should be the 'exception rather than the norm'.

In a guideline decision on the correct interpretation of paragraph 14 of the NPPF, which sets out the presumption in favour of sustainable development, the High Court has blocked plans for 150 new homes on the edge of Burton upon Trent.

Planning permission for the development at Red House Farm, Lower Outwoods Road, was granted by a planning inspector in April.

The inspector found that the development would be inconsistent with the local plan, which was designed to focus development within existing boundaries of the town and certain strategic villages.

However, he went on to rule that the development would nevertheless be "sustainable" within the meaning of the NPPF.

The harm, in terms of loss of countryside and the impact on the area's character and appearance, would be "limited", he said.

Those "cons", he said in his decision, were outweighed by the social and economic benefits of the proposals, including the provision of much needed affordable homes.

In his ruling on East Staffordshire Borough Council's challenge to the inspector's ruling, Mr Justice Green acknowledged that there were conflicting legal opinions on the correct interpretation of paragraph 14 of the NPPF.

He acknowledged that there was a residual discretion for inspectors to find developments sustainable, even if they conflict with local plans.

However, he ruled that the inconsistency between the proposals and the local plan - which was partly made up of neighbourhood plans approved by local residents - was a potentially weighty and substantial matter that militated in favour of planning permission being refused.

Granting permission in cases of conflict with local plans should be "the exception rather than the norm" and the inspector had misdirected himself in principle, the judge ruled.

The inspector's decision, and the planning permission he granted, were quashed.

Keith Fenwick, director at consultancy WYG in Birmingham said: "With more local authorities getting local plans over the adoption line, this will become an increasingly important area of interpretation for developers of speculative sites in future.

"If Mr Justice Green’s judgment remains intact following any challenge in the Court of Appeal, then in all but ‘exceptional’ cases, development outside of a local plan strategy will not (it is tempting to add, ‘by definition’) be sustainable and ought to be refused."

East Staffordshire Borough Council v Secretary of State for Communities and Local Government & Anr. Case Number: CO/2856/2016

Questions?

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