

Neighbourhood Plans and their future:

Friend or foe?

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For reference: case-law citations

R (o.a.o. Daws Hill Neighbourhood Forum) v Wycombe DC [2013] EWHC 513 (Admin) [2013] PTSR 970 – 13 March 2013; [2014] EWCA Civ 228 [2014] 1 WLR 1362 – 6 March 2014

BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC [2014] EWHC 1470 (Admin) - 9 May 2014

R (o.a.o. Gladman Developments Ltd) v Aylesbury Vale DC [2014] EWHC 4323 (Admin) [2015] JPL 656 - 18 December 2014

Crane v SSCLG [2015] EWHC 425 (Admin) – 23 February 2015

Woodcock Holdings Ltd v SSCLG [2015] EWHC 1173 (Admin) – 1 May 2015

For reference: case-law citations

R (o.a.o. Larkfleet Homes Ltd) v Rutland CC [2014] EWHC 4095 (Admin)
[2015] PTSR 589 – 8 December 2014; [2015] EWCA Civ 597 - 17 June 2015

R (o.a.o. DLA Delivery Ltd) v Lewes DC [2015] EWHC 2311 (Admin) – 31 July 2015

R (o.a.o. Maynard) v Chiltern DC [2015] EWHC 3817 (Admin) – 16 November 2015

R (Crownhall Estates Limited) v Chichester DC ("Loxwood") [2016] EWHC 73 (Admin) – 21 January 2016

Cherwell DC v SSCLG – 4 August 2016 (Singh J)

(1) The local community's perspective

Scope of Neighbourhood Plans

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What may a Neighbourhood Plan do?

- ***Larkfleet***: rejection of the argument that the Neighbourhood Plan legislation does not allow Neighbourhood Plans to include site allocation policies

What doesn't a Neighbourhood Plan need to do?

- No requirement of soundness, therefore (***Loxwood***, [29]):
 - Need not be based upon a strategy to meet objectively assessed development and infrastructure requirements
 - Does not have to be "the most appropriate strategy, when considered against the reasonable alternatives"

Scope of Neighbourhood Plans

- Does not have to be based on a proportionate evidence base (*Maynard*)
- It is the Neighbourhood Plan as a whole that is required to be in general conformity with the strategic policies of the adopted Local Plan (in so far as it exists) as a whole: *Loxwood* at [29]
 - *Maynard* at [61]: the requirement of “general conformity” does not allow a LPA to decide, as a matter of judgement, that a very tight degree of conformity is justifiable (so as to avoid conflict with a Local Plan policy)

Timing of Neighbourhood Plans

Timing of Neighbourhood Plans



- ***BDW Trading, Gladman, DLA Delivery*** (on appeal)
- ***Woodcock*** ([131]):
 - The absence of a Local Plan does not preclude the preparation and formal approval of a Neighbourhood Plan
 - Where a Neighbourhood Plan is progressed in advance of the adoption of any Local Plan, the requirements (i) of “general conformity” with strategic Local Plan policies and (ii) that the Neighbourhood Plan should not provide for less development than is promoted by the Local Plan (NPPF para. 184) do not apply

Timing of Neighbourhood Plans



DLA Delivery [138] “In the broadest sense, the fact that in a particular area there is no up-to-date Local Plan with which a "made" NDP can be "in general conformity" (because the latter has been made in advance of the former) may, as it seems to me, arguably be a material consideration in determining a planning application which conflicts with the made NDP. The weight to be attached to it will, of course, be a matter of planning judgment when the issue arises and will doubtless depend, at least in part, on the likely prospect of the emerging Local Plan being adopted and the extent to which there is a divergence between the made NDP and the emerging Local Plan. But this, in my view, offers some, albeit perhaps limited, prospect of unlocking for development a site that has general planning merit and otherwise meets the requirements of the NPPF, but which is currently not allocated for housing within the NDP”.

A few words of caution...

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- Procedural requirements: ensure that the screening procedure for Strategic Environmental Assessment (“SEA”) is adequate
 - ***Loxwood***
 - If SEA is required (i.e. outcome of screening procedure is positive), the prospects of successful legal challenge on the ground that the SEA itself was flawed appear to be low

A few words of caution...

- Substance of Neighbourhood Plans: not *carte blanche*!
 - Basic conditions (a) and (e):
 - General conformity with strategic policies in Local Plan: (e)
 - Appropriate to make the plan, having regard to national policies (including the NPPF): (a)
 - **Woodcock** [126]: *“the Secretary of State should have appreciated from the **BDW** case ... that policy H4 would not satisfy the requirement in the “basic condition” to have regard to the NPPF, and in particular the need for “flexibility” and “to plan positively for growth”, unless it was amended so as to remove the cap limiting new housing in the village to 30-40 dwellings”*

A few words of caution...

- Aim for compliance with any emerging Local Plan as far as possible:
 - S.38(5) Planning and Compulsory Purchase Act 2004: where development plan policies conflict, the conflict is resolved in favour of the policy contained in the last document to become part of the development plan
 - PPG: “*important to minimise any conflicts*” because policies may be “*overridden*” by a new Local Plan
- Remember that it is entirely possible for development to be granted planning permission notwithstanding conflict with a Neighbourhood Plan: ***Cherwell***

(2) The Local Planning Authority's perspective



Retaining control over strategic sites

Retaining control over strategic sites



Daws Hill

- Residents' Association applies to LPA for designation as a neighbourhood forum with regards to a neighbourhood area
- Proposed area included two “strategic” brownfield development sites: Handy Cross Sports Centre and RAF Daws Hill
- LPA designates DHRA as a neighbourhood forum but excludes both Handy Cross and RAF Daws Hill from the neighbourhood area

Retaining control over strategic sites



Reasons for refusal of the neighbourhood area as applied for:

- (1) “Any development of the key strategic sites ... outside the existing ‘immediate’ neighbourhood will have implications that impact upon a wider sphere of influence. Strategic issues come into play with the planning of these sites, including any supporting transport measures. There are larger than local impacts and larger ‘communities of interest’.”
- (2) “It is considered likely that if and when a neighbourhood plan, including one or more of the ‘strategic’ sites, came to examination an inspector would judge ... that the referendum would need to take place over a wide area, reflecting the wider ‘community of interest’.”

Retaining control over strategic sites



- (3) Timeliness: LPA notes “planning matters advancing” on the two key strategic sites: “significant cost is likely to be incurred and it is considered that the investment (not only by the community but also [the council]) in such an exercise would not be timely because of the existing and expected timing of planning applications and associated decisions. Furthermore there are other opportunities for input to decisions under consideration for the key strategic sites.”
- (4) Including the full area sought “could unrealistically raise expectations as to the effectiveness of a neighbourhood plan in relation to the strategic development sites”: “[t]he community and the local planning authority cannot stop the submissions of planning applications and the likelihood is that a neighbourhood plan would be overtaken by events. This could lead to frustration and confusion.”
- (5) Objections from landowners

Retaining control of strategic sites



LPA's exclusion of the strategic development sites from the neighbourhood area is upheld as lawful by Supperstone J in the High Court

In the Court of Appeal: new submission: the discretion conferred by s.61G(5) TCPA 1990 is not a discretion to decide whether a given area should or should not be designated as a neighbourhood area, but is confined to a discretion to decide within which neighbourhood area any given site is to be included

Rejected by the Court of Appeal: C's submission that it was Parliament's intention that "*the whole of England and Wales should, wherever it is the wish of the local community, be covered by a patchwork of neighbourhood areas*" conflicts with the express terms of s.61G TCPA ([18]).

Retaining control of strategic sites

Note s.61G(12) TCPA 1990 (inserted by s.139 of the Housing and Planning Act 2016):

Regulations under s.61G(11) may provide that where an application:

- meets prescribed criteria; or
- has not been determined within the prescribed period

the LPA must (except as prescribed) designate all of the area specified in the application as a neighbourhood area

See Neighbourhood Planning (General) and Development Management Procedure (Amendment) Regulations 2016 (in force 1 October):

- Designation of the whole of the area of a parish council
- Failure to determine the application by the prescribed date

Disagreement with the Examiner's recommendations

Disagreement with the Examiner

Maynard:

- Examiner recommends removal of nightclub from list of protected community facilities
- LPA decides not to accept that recommendation
- Holgate J: LPA has acted unlawfully
 - Examiner had not misinterpreted the Development Plan and the NPPF, as the LPA thought
 - Conversely, the LPA had failed to take into account a material consideration: whether the community benefits / community need were such as to justify protection of the nightclub as a community facility

Decision-making in the Neighbourhood Plan context

Decision-making

Woodcock: key points

- [81]: An absence of any objective assessment of housing needs at the district level is irrelevant to the question of the weight to be given to a draft neighbourhood plan
- [95]: para. 49 NPPF applies to draft development plan policies as well as to those that have been adopted / made
 - N.b. **Crane** ([71]): where para. 49 and the presumption in para. 14 do apply, the NPPF does not stipulate how much weight should be given to “out of date” policies
- See [109]-[111] of **Woodcock** for a detailed explanation of the approach to be taken in each scenario

(3) The developer perspective

The developer perspective

If your site is excluded by a draft Neighbourhood Plan:

- Consider your options for input into the examination
 - Inadequate quantum of development?
 - Your site should be preferred?
 - But, difficulty of establishing that a Basic Condition is not met
- Timing of any legal challenge: s.61N TCPA 1990 (as applied by s.38C PCPA 2004). Might not be necessary to wait until the Neighbourhood Plan is made:

The developer perspective

- s.61N(1): challenge to a decision to make the Neighbourhood Plan must be brought by JR within 6 weeks from the date of the decision
- s.61N(2): re. any decision under paragraph 12 of Schedule 4B to the TCPA 1990 (this includes consideration by the LPA of the Examiner's recommendations, and the decision to hold a referendum): six weeks from the date of the impugned decision to bring JR proceedings
- s.61N(3): "proceedings for questioning anything relating to a referendum under paragraph 14 or 1 of Schedule 4B" must be brought by JR within 6 weeks beginning with the day after the day on which the result of the referendum is declared

The future?



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