Landmark CHAMBERS

Neighbourhood planning: Localism in action

Lessons from the case-law

Heather Sargent

29 June 2015

Introduction

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

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

Introduction

Focus of the debate: what may neighbourhood plans legitimately do?

Also: the requirements of strategic environmental assessment ("**SEA**") in relation to neighbourhood plans

Daws Hill

R (o.a.o. Daws Hill Neighbourhood Forum) v Wycombe DC

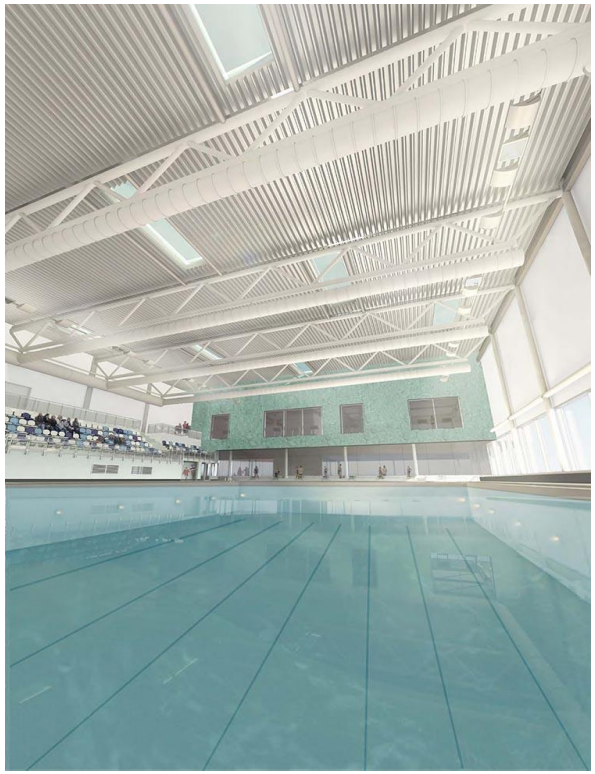
[2013] EWHC 513 (Admin) [2013] PTSR 970 – 13 March 2013;

[2014] EWCA Civ 228 [2014] 1 WLR 1362 – 6 March 2014

Application by Daws Hill Residents' Association ("**DHRA**") to Wycombe DC for designation as a neighbourhood forum with regards to a neighbourhood area

Daws Hill

Handy Cross Sports Centre



RAF Daws Hill

Daws Hill

Daws Hill “strategic development sites”:

Handy Cross:

- Outline planning permission granted: May 2011
- Position statement: July 2011
- DHRA application for designation: April 2012
- Revised application for outline planning permission: May 2012
- LPA decision on DHRA’s application: September 2012
- LPA resolves to grant planning permission on revised application: December 2012
- Planning permission on revised application granted: February 2013

Daws Hill

RAF Daws Hill:

- Purchased by Taylor Wimpey: 2011
- Position statement: July 2011
- DHRA application for designation: April 2012
- Draft development brief: June 2012
- LPA decision on DHRA's application: September 2012
- Adoption of development brief: December 2012

Daws Hill

LPA designates DHRA as a neighbourhood forum but excludes both Handy Cross and RAF Daws Hill from the neighbourhood area

Reasons for refusal of the neighbourhood area as applied for:

(1) "Any development of the key strategic sites (RAF Daws Hill and Wycombe Sports Centre [otherwise known as Handy Cross Sports Centre]) 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'."

Daws Hill

(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’.”

(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.”

Daws Hill

(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

Daws Hill

Was the exclusion of the strategic development sites from the neighbourhood area lawful?

High Court: Supperstone J: yes

[2013] EWHC 513 (Admin) [2013] PTSR 970 – 13 March 2013

S.61G(5) TCPA 1990:

If—

(a) a valid application is made to the authority,

(b) some or all of the specified area has not been designated as a neighbourhood area, and

(c) the authority refuse the application because they consider that the specified area is not an appropriate area to be designated as a neighbourhood area…

Daws Hill

…the authority must exercise their power of designation so as to secure that some or all of the specified area forms part of one or more areas designated (or to be designated) as neighbourhood areas.

Supperstone J:

s.61G(5) does give the LPA a "broad discretion" when considering whether the specified area is an appropriate area to be designated as a neighbourhood area.

In exercising that discretion the LPA should have regard to "the particular circumstances existing at the time the decision is made" ([42]).

Daws Hill

Court of Appeal: Sullivan LJ (Dyson MR and Briggs LJ agreeing)

[2014] EWCA Civ 228 [2014] 1 WLR 1362 – 6 March 2014

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

Daws Hill

- The language of s.61G does not support the existence of the limitation contended for by the claimants ([7])

- Parliament clearly envisaged that a LPA might exercise the power so as to designate a smaller area as a neighbourhood area leaving part or parts of the specified area outwith any neighbourhood area ([8])

"Salami slicing" argument also rejected: s.61F and s.61G must be read together ([14]) – LPA not <u>required</u> to designate an organisation / body as a neighbourhood forum ([17])

Daws Hill

Claimants' 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" rejected: conflicts with the express terms of s.61G TCPA ([18]).

CA upholds Supperstone J's view that LPA is entitled to have regard to the "policy and factual matrix" in considering designation of a neighbourhood area

- In ***Daws Hill***: not simply the "larger than local" impact of including the strategic development sites – also, the planning process in respect of those two sites "well advanced" by the time of the designation decision ([20]).

Daws Hill

Finally: whilst the reference to the "character of [the] area" in s.61F(7)(a)(iii) TCPA 1990 does not "transfer" or "translate through" to s.61G(5) TCPA 1990, the character of an area proposed for designation as a neighbourhood area is "bound to be a relevant consideration when the [LPA] is deciding whether its designation as a neighbourhood area is appropriate" ([23])

BDW Trading ("Barratt Homes") – Tattenhall NP

BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC

[2014] EWHC 1470 (Admin) - 9 May 2014

BDW Trading ("Barratt Homes") – Tattenhall NP

Challenge to the 4 September 2013 decision of the Council to agree that the Tattenhall Neighbourhood Plan ("**TNP**") should be put to a referendum

Policy position:

- Chester District Local Plan: 2006. Policy HO1 (housing land requirement) not "saved" in 2009
- "Publication draft" of replacement Cheshire West and Chester Local Plan (Part One – Strategic Policies) ("**CWLP**") published for consultation on 6 September 2013

BDW Trading ("Barratt Homes") – Tattenhall NP

Facts:

- June 2013: Barratt Homes, Wainhomes and Taylor Wimpey appeal against the Council's refusal of planning permission in respect of three green-field sites on the edge of Tattenhall (within the area of the TNP)
- Appeal schemes are for up to 68, 137 and 110 dwellings respectively

- The TNP introduces ("Policy 1") a 30 dwelling limit for housing schemes "within or immediately adjacent to the built up part of Tattenhall village"

BDW Trading ("Barratt Homes") – Tattenhall NP

Grounds of challenge :

(1) Failure properly to comply with the SEA Directive

(2) Breach of the Council's duty to ensure that the TNP meets the "Basic Conditions"

(3) Apparent bias

(4) Inadequate evidence base for Policy 1 and inadequate reasoning on the part of the TNP examiner

BDW Trading ("Barratt Homes") – Tattenhall NP

The "Basic Conditions": Schedule 4B TCPA 1990, paragraph 8(2)

So far as relevant:

(a) It is appropriate to make the NP having regard to national policies and advice contained in guidance issued by the SoS;

(d) The making of the NP contributes to the achievement of sustainable development;

(e) The making of the NP is in general conformity with the strategic policies contained in the development plan for the area;

(f) The making of the NP does not breach and is otherwise compatible with EU obligations

BDW Trading ("Barratt Homes") – Tattenhall NP

Submissions:

- Because the TNP seeks to control the delivery of housing, it cannot be progressed in advance of the (emerging) CWLP, because (a) and (e) cannot be met;

- The TNP examiner failed to address (a), in failing to consider whether a constraint mechanism such as Policy 1 was appropriate to delivery the objectives of the NPPF, particularly [47]; also failed to address (d).

BDW Trading ("Barratt Homes") – Tattenhall NP

Submissions rejected by Supperstone J

- Criticisms "fail to appreciate the limited role of the Examiner" ([81]);
- The only statutory requirement which Condition (e) imposes "is that the Neighbourhood Plan as a whole should be in general conformity with the adopted Development Plan as a whole". Whether or not there was any tension between one policy in the Neighbourhood Plan and one element of the emerging Local Plan was not a matter for the Examiner to determine ([82]);
- [83] – [86]: distinction between the approach required of a Local Plan Inspector and that required of a Neighbourhood Plan Examiner explained.

BDW Trading ("Barratt Homes") – Tattenhall NP

Strategic Environmental Assessment ("**SEA**"):

- Essence of the complaint: the Sustainability Appraisal and the SEA undertaken both failed to consider reasonable alternatives to those promoted in the TNP, in breach of the SEA Directive / SEA Regulations.
- Council argues that two strategic alternatives were considered: (i) having the TNP in place and (ii) a "do nothing" scenario.
- Supperstone J: the level of consideration of alternatives was sufficient – no other options testing was reasonably required ([75]).

Gladman – Winslow NP

R (o.a.o. Gladman Developments Ltd) v Aylesbury Vale DC

[2014] EWHC 4323 (Admin) [2015] JPL 656 - 18 December 2014

Gladman – Winslow NP

Claim for judicial review of the decision of Aylesbury Vale DC (10 September 2014) making the Winslow Neighbourhood Plan ("**WNP**")

- Policy 2 of the WNP establishes a settlement boundary and provides that development outside the settlement boundary will only be permitted in exceptional circumstances;

- Policy 3 of the WNP allocates land for sites within the settlement boundary for an indicative number of 455 new dwellings.

Gladman – Winslow NP

- Aylesbury Vale District Local Plan (January 2004) has expired; "saved" policies do not include any policies relating to the identification of the housing needs for the district, or for Winslow, and do not contain any strategic housing policies
- Draft Vale of Aylesbury Plan fails its examination

Principal complaint: it is not permissible for the WNP to include policies relating to a settlement boundary or the allocation of sites for housing at a time when the local planning authority had not yet adopted a development plan document containing strategic policies for meeting the objectively assessed housing needs of the district.

Gladman – Winslow NP

Complaint rejected by Lewis J: a neighbourhood development plan may include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there is no DPD setting out strategic polices for housing ([58]).

- More particularly: a NP examiner is not prevented from concluding that Basic Condition (e) is met where there is no DPD containing strategic policies on an issue of land use / development such as housing. Basic Condition (e) will only not be met if there is a DPD which does contain strategic policies and the NP is not in general conformity with those.

Gladman – Winslow NP

The SEA challenge

- Assessment of reasonable alternatives criticised as “vague”
- Criticism rejected ([92]):

“The claimant may be critical of the level of detail and may wish for more detail, particularly, on why the settlement boundary was drawn as it was and why sites outside the settlement boundary were not allocated for housing. The examiner was entitled to conclude, however, that this Neighbourhood Plan, dealing with the allocation of 455 new houses, did include a sufficient level of detail explaining that the allocation was based on the current form of the town whereas an alternative strategy, based on expansion in other directions, would have greater environmental impact”.

Larkfleet – Uppingham NP

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

Larkfleet – Uppingham NP

Uppingham:
Second largest settlement in the LPA's area

Larkfleet – Uppingham NP

Policy context:

- 2011 Core Strategy: provides that the location and details of future housing development will be determined through the Site Allocations and Policies DPD ("**SAPDPD**")
- Initial "Issues and Options" version of the SAPDPD makes provision in respect of Uppingham and identifies the Claimant's site as a potential allocation; that provision is continued in the "Preferred Options" version of the SAPDPD
- Uppingham Town Council's application to designate a neighbourhood area in order to facilitate the preparation of the Uppingham Neighbourhood Plan ("**UNP**") is then approved (November 2012)

Larkfleet – Uppingham NP

- The "Proposed Submission" version of the SAPDPD does not carry forward the provision made in relation to Uppingham in the preceding versions of the SAPDPD
- The "Referendum Edition" of the UNP subsequently allocates three sites for housing

Grounds of challenge (in the Court of Appeal):

(1) A neighbourhood plan may not contain site allocation policies

(2) The decision not to carry out SEA of the UNP was vitiated by a failure to consider whether the UNP was likely to have significant positive effects on the environment

Larkfleet – Uppingham NP

The "site allocation policy" argument: Claimant's submissions

- S.17(7)(za) PCPA 2004 allows the Secretary of State to prescribe what documents must be prepared as "local development documents" i.e. by a LPA
- Pursuant to s.17(7)(za): regulation 5(2) of the Town and Country (Local Planning) (England) Regulations 2012: prescribes the documents that, if prepared, must be prepared as LDDs: extends to any document which includes a site allocation policy
- Regulation 5(2) <u>not</u> limited to documents prepared by LPAs (cf. regulation 5(1))

Larkfleet – Uppingham NP

Argument rejected by the Court of Appeal:

- S.17 PCPA 2004 and regulation 5 of the Local Planning Regulations concerned with which LPA documents must be prepared as LDDs
  - Rejection of the regulation 5(1) / regulation 5(2) distinction
- Neighbourhood plans may, therefore, contain site allocation policies

- Note: NPPF and PPG "not a permissible aid to construction of the statute or the regulations" ([23])

Conclusions

- All challenges to the neighbourhood planning process unsuccessful so far

- Criticisms in relation to SEA are popular but have not fared well before the courts

- Attempts to limit the reach of neighbourhood plans have not found favour – neighbourhood plans “surprisingly effective”?

- The timing of a legal challenge: ***Gladman*** vs ***Barratt Homes*** and ***Larkfleet***

hsargent@landmarkchambers.co.uk

Landmark
CHAMBERS