

RECENT HIGH COURT DECISIONS ON HOUSING LAND SUPPLY

Rupert Warren Q.C.

Landmark Chambers

14 September 2015

Overview



- The FOAN – even after the CA’s clarification in *Gallagher Homes Ltd* [2014] EWCA Civ 1610 - continues to cause problems
 - Recent cases focus on the interaction between market need and other relevant needs, eg, affordable, student accommodation.
 - They show that as long as there is an evidence base of some kind, enabling judgments to be reached about the first (FOAN) stage of the housing requirement, then the decision is unlikely to be quashed.
-

The FOAN



Borough of Kings Lynn & West Norfolk v SSCLG [2015] EWHC 2464 (Admin)

- Section 288 challenge to an appeal decision
- FOAN issue arose over whether the Inspector had correctly included second homes and vacancies in his assessment of the FOAN
- The Claimant characterised this as a matter of policy – ie, whether the existing quantum of second homes should be perpetuated or not
- Dove J at [40] rejected this formulation and found that the Inspector was entitled to conclude on the evidence that such issues were to be included in the FOAN

Kings Lynn – general principles



- “The FOAN is not the figure for housing requirement following the application of the policies in the Framework. It is the figure for the assessment of housing needs prior to the application of policy” [30]
- “Whilst Sir David Keene [in *Hunston*] referred to a ‘constrained’ figure ... when a housing figure passes through the lens of policy it may increase as well as decrease” [31]
- “It is important to read the Framework’s paragraph 47, requiring the local plan to meet ‘the full objectively assessed needs for market and affordable housing in the housing market area’ alongside paragraph 159 of the Framework which describes the means of identifying the FOAN, namely the SHMA” [32]

Kings Lynn – General Principles 2



- “In terms of ... meeting household and population projections, taking account of migration and demographic change, the PPG [ID2a-001 to 029] illustrates that this is a statistical exercise involving a range of relevant data for which there is no one set methodology, but which will involve elements of judgment about trends and the interpretation of the empirical material available” [34]



Kings Lynn – General Principles 3



- “The Framework makes it clear that these [affordable housing] needs should be addressed in determining the FOAN, but neither the Framework nor the PPG suggest that they have to be met in full when determining the FOAN. This is no doubt because in practice very often the calculation of unmet affordable housing need will produce a figure which the planning authority has little or no prospect of delivering in practice” [35]
- “Insofar as Hickinbottom J in the case of *Oadby & Wigston Borough Council v SSCLG* [2015] EWHC 1879 might be taken ... to be suggesting that in determining the FOAN, the total need for affordable housing must be met in full by its inclusion in the FOAN I would respectfully disagree. Such a suggestion is not warranted by the Framework or by the PPG”



Oadby & Wigston



- [2015] EWHC 1879
 - When can the SHMA be relied on as 'policy off' guidance on the FOAN?
 - The Inspector correctly treated the SHMA as to some extent 'policy on', and decided that even adopting a conservative figure ('no less than 149'), no 5 year HLS could be demonstrated.
 - Upheld –
- (1) The Inspector's assessment of the requirement was a matter of planning judgment [42(i)]
 - (2) It is unnecessary to fix a precise figure for requirement on a s.78 appeal [42(ii)]
 - (3) Part of the difficulty for the Inspector was that the background included a SHMA which was in part 'policy on' due to its incorporating figures based on not accommodating in migration for economic purposes [34(i)] and [25]

Oadby & Wigston 2



- Did Hickinbottom J in *Oadby* say that FOAN must include 100% of the affordable housing need?
- Probably – [34(ii)] – refers to the “justification for keeping the true affordable housing requirements *out of account*” (not = 100%) but later says “it becomes policy on as soon as the Council takes a course of not providing sufficient affordable housing to satisfy the FOAN” (ie, by strong inference, 100%)
- However, the argument actually put by the developer was not that 100% needed to be put into the FOAN but that the economic and affordable housing figures should be “taken into account” (see [31]), so Hickinbottom J was proceeding on a false account of the case before the Inspector in any event.

Satnam Millennium Ltd v Warrington Borough Council



- An application under s.113 PCPA 2004 to quash the part of the Warrington plan.
- Succeeded on two points: (a) failure to assess the full AH need as part of the FOAN, and (b) failure of SEA in relation to an later stages in the plan making process.
- There was no identification of the AH need figure at all in the assessment of FOAN – very clearly a breach of the Framework/PPG [43]
- However, it is interesting that Stewart J appears to say in terms that, having identified the full AH need, and applied it to whether the market FOAN should be increased to help deliver it, “the local plan should then meet the OAN for affordable housing, subject only to the constraints referred to in NPPF, paragraphs 14 and 47”
- That approach seems preferable to that of Dove J in *Kings Lynn*

‘Requirement’ or ‘Target’



- *Phides Estates (Overseas) Ltd v SSCLG* [2015] EWHC 827 (Admin), Lindblom J
- A s.288 challenge to the interpretation of a housing policy which set a ‘minimum’ of 350 dpa, and also referred to a ‘target’ some 17% greater.
- The Inspector was right that the minimum figure was the housing requirement, not the target.

Student accommodation: *Exeter*



- In *Exeter City Council v SSCLG* [2015] EWHC 1663 (Admin), Hickinbottom J upheld an Inspector who found that student accommodation should not be included as part of the housing supply (not even as 'releasing' market housing).
- The decision was challenged on the basis that there should have been an allowance within the 5 year HLS exercise for supply as student accommodation.
- This was rejected largely on the evidence: the housing requirement reflected some demographic information about rising student housing need but there was no hard evidence as to quantum: [37].
- However, as a general point it was accepted that "it would be irrational to include student accommodation in housing supply as meeting an adopted housing requirement, where such accommodation does not feature in the requirement"

Miscellaneous



- *Old Hunstanton Parish Council v SSCLG* [2015] EWHC 1958 – "local needs": not necessarily limited to the needs of the settlement in which the proposed development is situated.
- *R(Central Bedfordshire Council) v SSCLG* [2015] EWHC 2167: meeting housing need across an HMA in circumstances where the neighbouring urban authority is heavily constrained.
- *Gladman Devts Ltd v Staffordshire BC* [2015] EWHC 444: having regard to market signals.
- *R(Smech Properties Ltd) v Runnymede BC* [2015] EWHC 823: discretion not to quash where a serious error made in relation to 5 year HLS, given that result would have been the same in any event.
- *Milwood Land v SSCLG* [2015] EWHC 1836: Challenge based on an alleged failure to consider up to date housing information rejected on the facts