

Challenges based on prematurity, housing numbers & localism

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SCOPE OF PAPER

- What role can ‘localism’ be expected to have in planning decisions in the next few years?
- What themes emerge from recent housing-related challenges?

Fox Strategic Land & Property Ltd v Secretary of State for Communities and Local Government [2012] EWHC 444 (Admin); ([2012] EWCA Civ 1198)] and *Wainhomes (South West) Holdings Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 914 (Admin). *Tewkesbury BC v SSCLG* [2013] EWHC 286 (Admin); *Cheshire East v SSCLG* (29/4/13); *University of Bristol v North Somerset Council* [2013] EWHC 231.

The context - NPPF



“Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should: be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency.”

“Early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is essential. A wide section of the community should be proactively engaged, so that Local Plans, as far as possible, reflect a collective vision and a set of agreed priorities for the sustainable development of the area, including those contained in any neighbourhood plans that have been made.”

NPPF – the presumption



For **decision-taking** this means:

Approving development proposals that accord with the development plan without delay; and where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless: any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this framework taken as a whole; or specific policies in this framework indicate development should be restricted”.

Planning System – General Principles



“PREMATURITY

17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale, location or phasing of new development which are being addressed in the policy in the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example: Where a DPD is at the consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.

Where a DPD has been submitted for examination but no representations have been made in respect of relevant policies, then considerable weight may be attached to those policies because of the strong possibility that they will be adopted. The converse may apply if there have been representations which oppose the policy. However, much will depend on the nature of those representations and whether there are representations in support of particular policies.

19. Where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process.”

Localism



On 6 December 2010, Greg Clark said this:

“ Most people love where they live, yet the planning system has given them almost no say on how their neighbourhood develops. The Coalition Government will revolutionise the planning process by taking power away from officials and putting it into the hands of those who know most about their neighbourhood - local people themselves. This will be a huge opportunity for communities to exercise genuine influence over what their home town should look like in the future. It will create the freedom and the incentives for those places that want to grow, to do so, and to reap the benefits. It’s a reason to say yes.”

Fox Strategic Land

25. Overall Conclusions



“The appeal proposal would accord with the RSS in terms of numerical Provision. It would also accord with PPS3 in contributing towards meeting the shortfall resulting from the Council’s failure to demonstrate a five-year supply of housing land across Cheshire East, in achieving a good mix of housing on a sustainable site and in helping to meet the affordable housing shortfall in the area. However, these matters have to be considered against the proposal’s conflict with saved development plan policies with regard to settlement boundaries and the restriction on development in the countryside, and the need to avoid the permanent loss of BMV land unless absolutely unavoidable. Having weighed all these considerations in the planning balance, it is the Secretary of State’s opinion that the scales are tipped against the proposal in terms of its overall conformity with the development plan. In particular he considers that allowing the appeal in advance of establishing the appropriate level of future housing provision across the Cheshire East would pre-empt decisions on revised settlement boundaries before current uncertainties with regard to population growth and distribution can be settled in a statutory planning context. The Secretary of State also considers that the delivery of this Greenfield site for housing would increase the risk of PDL sites not being delivered.”

Ground of challenge



The SSCLG has endorsed the Inspector's reference to the "localism agenda." Mr Tucker points out that while there is now a new Localism Act 2011, there is no policy issued which deals with this in the planning context. He points out that there is no policy which sets out anything called a "localism agenda," and contends that therefore the SSCLG has taken into account an immaterial consideration.

He points out that the prematurity argument relied on by the SSCLG (i.e. the effect on the LDF process) was not relied on by CEL, who argued that the site conflicted with the spatial vision for the area. While it is open to the SSCLG to depart from his own policy, if he does so he must give adequate reasons for his departure. By his conclusions at paragraph 25, he has elected to treat the proposal as preempting decisions on revised settlement boundaries before current uncertainties with regard to population growth and distribution can be settled in a statutory planning context. In doing so, he has not followed his own policy on prematurity, and has either not understood it, or has given no adequate reasons for his departure from it.

The consistency ground



He then referred to the Richborough decision letter. He contended that the unchallenged conclusions reached by the SSCLG in that decision (which, as was accepted by the SSCLG was actually written by the same person on his behalf) could not be reconciled with the conclusions in this decision. In particular, he referred to the conclusions of the SSCLG at paragraph 17 of the Richborough decision letter that greenfield development of a very similar number of houses would be consistent with the spatial objectives of the Local Plan, and to the absence in the decision letter in that case of any suggestion that approval was premature or otherwise affect the LDF process, or that there was any tension with the principles of “Localism.” He also argued that the subsequent dealing with the Richborough issues by the SSCLG shows that he intends to stand by that inconsistent set of conclusions. He argued that, following *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137 the SSCLG was bound to give reasons why he was reaching a different conclusion. He drew attention to the fact that Fox had argued on a number of occasions that the two appeals should be determined together, because they had so many issues in common.

The judge's findings - prematurity



While, somewhat surprisingly, it is true that those passages seem to receive no explicit consideration by either the Inspector or the Secretary of State, the fact is that the SSCLG expressly considered the effect of a grant of permission of a proposal of this size on decisions that would be made in the context of the LDF process, by reasons of its “sending the wrong message to other developers” (paragraph 16) and by its pre-empting decisions on revised settlement boundaries before current uncertainties with regard to population growth and distribution can be settled in a statutory planning context (paragraph 25). Such a conclusion, which he was entitled to reach on the evidence before him, involves no departure from the policy. It also does not involve a refusal solely on the grounds of prematurity, and therefore involves no departure from paragraph 72 of PPS 3.

In my judgement, the Inspector’s reference to “jumping the gun” (paragraph 92 and 105), which Mr Tucker submits was followed through in paragraph 16 of the Decision Letter is in truth no more than another way of saying that the making of a decision at this stage would pre-empt the decisions referred to above. It takes Mr Tucker’s argument no further. In any event, I consider that in a case of this kind, the Secretary of State is perfectly entitled to hold that a grant of permission to develop a greenfield site may make it more difficult to resist applications relating to others, provided that the grant of some or all such permissions could be harmful. In my judgement, he has given reasons why he regarded that as harmful. I therefore reject these grounds argued by Mr Tucker.

Findings - Localism



- This is a concept which caught the interest of the Inspector (see her paragraph 106), although it is noteworthy that her report contains nothing which explains what it is, nor how it is alleged that it the proposal would breach it. Mr Tucker describes it as an “inchoate and unarticulated” policy. Mr Warren did not seek to direct me to any statement of policy which could explain its relevance to the issues before the SSCLG. His case was instead that, notwithstanding the statement in paragraph 3 of the Decision Letter “ For the reasons given below, the Secretary of State agrees with the Inspector’s conclusion and her recommendations” the SSCLG did not in fact endorse the Inspector’s paragraph 106. It is worth noting that the Inspector there expressed her views on her overall balance when weighing harm against benefit.
- I can well understand why it is that Mr Tucker draws my attention to this matter. The Inspector had based a very important part of her conclusions on a principle which at this stage has nothing about it against which one can measure a proposal. The Decision Letter is not one which was written with as much care as it should have been, but in my judgement, Mr Warren’s argument is correct. When one looks at the decision letter of the SSCLG as a whole, it plays no part in it, and none in particular in his overall conclusions at paragraph 25.

Key points from Fox



- PSGP prematurity guidance was found to have supplemented the old advice in PPS3 that permission should not be refused solely on the grounds of prematurity (reasoning here perhaps a little difficult to follow?); the PSGP is a full-weight free-standing document.
- PPS3 paragraph 69 (not repeated in the NPPF) did not apply here on the facts because there was other harm leading to the refusal than solely prematurity.
- Prematurity can be identified with, or found in, a wide range of planning effects – the pre-empting of the local plan decisions to come, and even in sending “the wrong message to developers”.
- Identifying where the Government’s Localism policy may lie is not easy. Luckily for the Secretary of State in *Fox*, he had not relied on it in the full-blooded way suggested by his Inspector, or indeed relied on it at all.
- There may be a relationship between the absence of a 5 year housing land supply and the willingness of the Secretary of State to grant permission notwithstanding that the decision may pre-empt development plan decisions.

Wainhomes (1) – the DL



18. The Secretary of State agrees with the Inspector's reasoning and conclusions as set out at IR 10.28 – 10.36 on whether the release of this large site would be premature in advance of the Council's core strategy. He agrees that all that can be reasonably said (sic) at this stage is that the appeal site is one of a number of potential candidates which may be required to deliver the housing needs of the town (IR 10.30). He agrees that, consequently, the grant of planning permission would inevitably reduce the choices otherwise available to the forthcoming LDF site selection process, and could prejudice future decisions (IR 10.31). He further agrees that the grant of planning permission now would deny the local community the opportunity of determining its preferred choice of housing sites for St Austell and that, without full public consultation on all potential options, a complete representation of local opinion would not emerge (IR 10.36).

19. The Government has made it clear that its intention is to return decision-making powers in housing and planning to local authorities. This is a key planning priority for the Government, and the Secretary of State considers that in this particular case it is important to give Cornwall the opportunity to complete its Core Strategy process. Taking all the factors referred to by the Inspector into account, the Secretary of State agrees that there is a strong argument that the appeal is of such a scale that to permit it now would prejudice decisions that ought properly to be taken as part of the LDF process (IR 10.37). For these reasons, and with respect to the considerations set out in paragraph 69 of PPS 3, the Secretary of State considers that granting permission for the appeal scheme now would undermine wider policy objectives in Cornwall, and that the appeal scheme would not accord with PPS 3.

DL (2)



26. The Secretary of State concludes that it is probable that a five year supply of housing land does not exist in Cornwall and that, on this basis, the PPS 3 paragraph 71 presumption in favour of the grant of planning permission applies, subject to the considerations set out at paragraph 69 of PPS 3. However, he also concludes that the appeal proposal is of such a scale that to permit it now would prejudice decisions that ought properly to be taken locally as part of the LDF process, and that the appeal scheme would not accord with PPS 3 on account of it undermining wider policy objectives in Cornwall. The Secretary of State considers that allowing the appeal in advance of establishing the appropriate level of future housing provision across Cornwall would pre-empt decisions that should properly be taken locally.

27. [The Secretary of State] concludes that the loss of part of the countryside setting to St Austell and the loss of good quality agricultural land are matters that weight against the proposal.”

The Bude appeal



- In view of the submissions about Binhamy Farm, Bude, I summarise the material features of that appeal. It was also recovered for the Secretary of State's determination. The proposal was for 351 dwellings. The County Council had refused permission *inter alia* on the ground of lack of need, because the newly created unitary authority was engaged in the exercise of producing a county-wide Core Strategy, and because the extent to which Bude should contribute to that was a matter for the Council to consider, i.e. a localism point.
- In March 2010 the Inspector recommended that the appeal be allowed and planning permission be granted subject to conditions. He concluded (IR, 6.54 – 6.55) that the need had been clearly shown and that the site was clearly suitable. On the middle core strategy option of medium growth there was a supply of 4.3 years. The Secretary of State issued his decision in August 2010. He rejected the Inspector's recommendation and dismissed the appeal because he considered that the Council should be given the opportunity to address housing needs through the Local Development Framework process. He stated that he considered to allow the appeal would be premature in view of "the large scale of the proposal" and the significant weight he placed on the LDF process.

Inconsistency



26. The starting point is whether the Binhamy No. 2 decision is a material consideration. As Mann LJ recognised in the *North Wiltshire* case, the statement that like cases should be decided alike presupposes that the earlier case “was alike and was not distinguishable in some relevant respect”. He stated that, if it was distinguishable, then it usually would lack materiality by reference to consistency, although it might be material in some other way: see [1992] JPL at 959.

27. On this issue, I first consider the position without taking into account Mr Elvin’s submission that the Secretary of State accepted the materiality of the Binhamy Farm appeal in his decision letter because he incorporated the Inspector’s reasoning by reference in his decision letter. As to whether, apart from this “incorporation by reference” point, the decisions were alike and were not distinguishable in some relevant respect, I accept Mr Warren’s submission that there were material differences between them. The proposed development in this case is nearly four times the size of the proposal for development on the Binhamy Farm site. I have referred to the fact that the application before me was found by the Inspector to be “one of the largest housing applications ever made in Cornwall”. He stated that it would increase the housing stock of the St Austell area by about 10%, and would equate to between 25 and 40% of all the housing units likely to be needed in that part of Cornwall in the period ending in 2030. He found that the St Austell application would be likely to be phased, and that its likely first phase might not be best related to the town (IR, paragraph 10.33, see appendix.) The two proposals concern two different towns, and propose to extend those towns in different ways. In the light of the submissions, made on behalf of the claimant at the inquiry, that the two cases were different, the centrality of the Binhamy Farm appeal to the present proceedings is striking, although understandable in view of Mr Elvin’s “incorporation by reference” point.

Localism



30. It is important to look closely at what the Inspector in this case said about “Binhamy No. 1”. The first sentence of paragraph 10.36 of his report is primarily concerned with the localism principle. In my judgment, the thrust of the remainder of the paragraph is also focussed on local decision-making rather than the specifics of the planning decisions made in the appeal decisions at St Anne’s and Bude which are referred to. The Inspector did not examine the Binhamy Farm decision at all, let alone in any detail. The structure of paragraph 19 of the decision letter shows that the Secretary of State was stressing the same point as the Inspector stressed, that is the localism agenda. To read the decision letter in the way Mr Elvin invited me to do is to read it with an excessively legalistic eye in the way which the authorities (see *Clark Homes v Secretary of State* (1993) 66 P & C.R. 263 and *South Somerset DC v Secretary of State* (1993) 66 P & C.R. 83 at 85) direct should not be done. I accept Mr Warren’s submission that, reading the decision letter in good faith and in the context of the general thrust of the Secretary of State’s reasoning, paragraph 10.36 of the Inspector’s report is primarily concerned with the localism principle.

Key points from Wainhomes

- The court is increasingly focused on the need for consistency between decisions, including as between findings on policy interpretation or factual findings within the decisions.
- In some contexts, Localism is a “principle” (perhaps inconsistent with the way Localism was ignored in the *Fox* decision, albeit not the subject of any express comment by the court).
- The application of the prematurity guidance in PSGP is fluid – in Bude, for instance, the Secretary of State found that a pre-empting of the plan by a scheme for 351 units was acceptable, whereas a similar scale of development in Sandbach was objectionable. Absent a consistency point or a lack of reasons, the court is unlikely to intervene to require a more uniform approach.
- There is an interrelationship between the presence of a 5 year housing land supply and the weight given to a prematurity objection, and between the idea of localism and the thrust of the prematurity guidance in PSGP.

Other cases (1) *Murphy*

90. Mr Maurici contends that prematurity is not a legal concept, but a matter of planning judgment and planning policy which is essentially a matter for the decision maker. The concept of prematurity in the planning context, he submits, allows a decision maker in effect to postpone a decision relating to the grant of permission for a proposed development until what is otherwise a relevant emerging local planning policy has been settled. That, in my view, expresses the approach to the issue accurately.

91. He submits that the essential issue in Mrs Doran's appeal was whether the possible grant of a permanent permission for a gypsy caravan site on the Appeal Site was better determined via the emerging Core Strategy process in which the local planning authority was committed to allocate sites rather than through an individual application for planning permission made at the stage it was being considered. The Inspector and Secretary of State took different views on that and he submits (a) that was a judgment to which the Secretary of State was entitled to come (and it was, incidentally, was also, the judgment of the local planning authority) which no-one could seriously suggest was *Wednesbury* unreasonable (and indeed Mr Rudd does not so argue) and (b) read as a whole the decision letter easily meets the standard of reasoning required in law in relation to this issue.

5 year supply not relevant to gypsies

- *Taylor v Secretary of State for Communities and Local Government* [2012] EWHC 684 (Admin) and *Smith v Secretary of State for Community and Local Government* [2012] EWHC 963 (Admin). That is relevant going forward to the NPPF advice on 5 year housing land supply.

CALA (3)



- Sole reason for refusal the prematurity of 2000 houses before the Winchester local planning study (the “Blueprint”) completed
- Challenged as inconsistent with PPS3 and draft NPPF
- Judgment consented to on basis of error of law on application of policy
- Permission then (finally) granted

The NPPF



- NPPF does not affect the guidance in PSGP at all. It is not inconsistent with it, as it stresses the plan-led system. A prematurity objection may be the only reason for refusal, if it is founded on a proper application of the guidance in paragraphs 17-19 of PSGP, since there is no equivalent of the PPS3 guidance in the NPPF.
- A prematurity objection would constitute a material consideration which might weigh against the grant of permission, and in NPPF terms constitute an “adverse effect” for the purposes of the paragraph 14 presumption.
- On the other hand, the failure of the NPPF to refer to ‘localism’ is likely to make it more difficult to rely on it coherently when making planning decisions. As in the *Fox* case, it is likely to be lost within the more capacious prematurity/plan led system point.

The *Cheshire East* challenge

- Richborough Estates – another Cheshire housing saga
- Council challenged on basis of prematurity being misunderstood/misapplied
- Judge rejected challenge – SSCLG entitled to give little weight when plan formulation many months away
- Housing figures at regional level not determinative either way of prematurity issue

Tewkesbury



- Localism argument an “Aunt Sally”?
- No “radical change”, but does localism in policy underline the need for care with regard to prematurity questions and the weight of local views?

Wainhomes (2)

- [2013] EWHC 597 (Admin)
- The saga continues – consistency this time did lead to the quashing of the decision – Calne DLs were not taken into account despite having been drawn to the attention of the Inspector

Daws Hill



- *R (Daws Hill Neighbourhood Forum) v Wycombe DC* [2013] EWHC 573 (Admin)
- Planning judgments in relation to the designation of the relevant area for neighbourhood planning

Bristol University



- *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin)
- A reasons challenge to the CS inspector's acceptance of housing requirement figures.
- Detailed critique by judge – reflects professional dissatisfaction with development plan hearings and Irs
- See also (now withdrawn) *West Berks CS* challenge