

## Local Plans in Northern Ireland: Legal challenges to Plans

**Scott Lyness**  
**Landmark Chambers**

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### Introduction



- Purpose of talk: sweep up main issues that may arise
  - Statutory context:
    - New NI system based on structure of PCPA 2004 and TCP (Local Planning) (England) Regulations 2012
    - Both similarities and differences in legislative regimes
    - Check England and Wales cases apply here
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## Scope for challenges



- **Detailed legislative scheme**
  - Planning Act (Northern Ireland) 2011 Part 2 of 2011 Act (PA 2011)
  - Planning (Local Development Plan) Regulations (Northern Ireland) 2015 (LDP Regs 2015)(timetable, preferred options, form and content of DPDs, procedure)
  - Environmental Assessment of Plans and Programmes Regulations (Northern Ireland) 2004
  - Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995
  - NB too
    - Planning (Statement Community Involvement) Regulations (NI) 2015
    - Northern Ireland Act 1998 s. 75
    - Wildlife and Natural Environment Act (Northern Ireland) 2011 s. 1
    - Marine Act (Northern Ireland) s. 8
- **Importance**
  - PA 2011 s. 6(4): determination under Planning Act must be made in accordance with plan unless material considerations indicate otherwise
  - 12,933 planning applications made in NI during 2017/18
  - 11 separate authorities following transfer of powers have to prepare development plan documents
- **Process**
  - Potentially protracted nature of preparation and examination

## SEA (DEQC)



- **Reasonable alternatives**
  - [St Albans](#) [2010] JPL 70
  - [Save Historic Newmarket](#) [2011] JPL 1233 at [40]
  - [Heard](#) [2012] Env 23 at [67] and [71]
  - [HS2](#) [2013] EWHC 481 at [162], [165] and [169]; [2013] PTSR 1194 at [72] and [183]-[185]
  - [Chalfont](#) [2013] EWHC 1877 (Admin)
  - [DB Schenker](#) [2013] EWHC 2865 (Admin) at [68]-[70]
  - [West Kensington Estates](#) [2013] EWHC 2834
  - [FoE](#) [2015] EWHC 776 (Admin) at [88]
  - [Holiday Extras](#) [2016] EWHC 3247 (Admin) at [32]
- **Distinction with Habs Regs**
  - [Ashdown Forest](#) [2016] PTSR 78 at [45]-[47]
- **Timing and curing defects**
  - [Seaport](#) [2008] Env LR 23 at [47] and [49]
  - [Cogent](#) [2012] EWHC 2542 (Admin);
  - [No Adastral](#) [2015] Env LR 28 at [57]-[59]

## Habs Regs (AM)



- Content
  - People over Wind Case C-323/17
- “Safeguarding” provisions providing for future assessment
  - Feeney [2011] EWHC 2699 (Admin) at [88]-[93]
  - Cairngorms Campaign [2013] CSIH 65 at [47]-[49] and [61]
  - Abbotskerswell [2014] EWHC 4166 at [65]-[67]
  - Forest of Dean [2013] EWHC 1567 (Admin) at [37]-[47]
- Cumulative effects
  - Wealden [2017] EWHC 351 (Admin)
- Timing of objections
  - Bogais [2009] EWCA Civ 1061; Newry [2015] NIQB 65 at [76]



## Soundness (LW, JL) – general



- PA2011 s. 10(60(b): independent examination = whether DPD “sound”
- “Soundness” not statutorily defined; see DPPN06
- No presumption of soundness: Persimmon Homes v Blyth Valley BC [2008] EWCA Civ 861 at [40]; Capel Parish Council v Surrey CC [2009] EWHC 350 (Admin)



## Soundness – reports



- To be read fairly as whole, without excessive legalism: Gladman Developments Ltd v Stafford BC [2015] EWHC 444 (Admin); Gallagher Homes Ltd v Solihull MBC [2014] EWCA Civ 1610
- Need only deal with principal controversial issues: KGL (Estates) Ltd v South Staffordshire District Council [2013] EWHC 3744 (Admin)
- See too Barratt Developments Plc v The City of Wakefield Metropolitan District Council & Anr [2010] EWCA Civ 897 at [37]: failure if recommend “policy...irretrievably incompatible with...reasoning.... However, that is not a conclusion to which the court would readily be driven, if there is a realistic alternative”.

## Soundness and planning judgment



- Grand Union Investments v. Dacorum BC [2014] EWHC 1894 at [56] and [59]:
  - “Testing soundness not a task for the court....The court’s jurisdiction... is limited to review on traditional public law grounds (see the judgment of Keene L.J. in Persimmon Homes [2008] EWCA Civ 861 at [8])”
  - “The guidance as to “soundness” in the NPPF is policy, not law.... As Carnwath L.J., as he then was, said in Barratt Developments Plc v The City of Wakefield Metropolitan District Council [2010] EWCA Civ 897...so long as the inspector and the local planning authority reach a conclusion on soundness which is not ‘irrational (meaning perverse)’, their decision cannot be questioned in the courts, and the mere fact that they have not followed relevant guidance in national policy in every respect does not make their conclusion unlawful. Soundness...was ‘a matter to be judged by the inspector and the local planning authority, and raises no issue of law, unless their decision is shown to have been ‘irrational’, or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law’”
- See too Trustees of the Barker Mill Estates v. Test Valley Borough Council [2016] EWHC 3028 (Admin) at [21]-[26], noting at [26] that “irrationality challenges are not confined to the relatively rare example of a ‘decision which simply defies comprehension’. They also include a decision which proceeds from flawed logic”

## Soundness and interpretation of policy

- Where allegation is that other policy has been misinterpreted, that question of interpretation is a matter of law: Tesco Stores Limited v. Dundee City Council [2012] PTSR 983
- And where a policy is neither obscure nor ambiguous it is not necessary or appropriate to resort to other documents outside the local plan to help with the interpretation of policy: Phides Estates Overseas Limited v Secretary of State for Communities and Local Government [2015] EWHC 827 (Admin) at [56].

## Soundness – specific issues

- **Reliance on review of plan**
  - Grand Union Investments v. Dacorum BC [2014] EWHC 1894: not irrational to adopt plan with commitment to early review where Inspector had found failure to (i) properly assess housing needs of its area in accordance with government policy; (ii) establish how much of those needs could be met
- **Relationship between development management policies and strategic policies**
  - NB PA 2011 s. 9(1): local policies plan to be prepared “after the plan strategy for its district has been adopted”
  - Oxted Residential Limited v Tandridge District Council [2016] EWCA Civ 414: lawful for a local planning authority to adopt a development management policies document to support a core strategy which had been prepared under housing land supply policy since superseded by national policy
- **Relationship with previous plans**
  - NB LDP Regs Schedule para. 4: on adoption of local policies plan by council, so much of departmental development plan as relates to that area shall cease to have effect
  - Cannot use challenge to new plan process to impugn policies deriving from older plans: Hundal v. South Bucks DC [2012] EWHC 791 (Admin) at [85]-[87]; see too Kendall (infra) (at [97]-[100])

## Soundness – examples of successful non-SEA/Habs Regs challenges (1)

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- **Failure to take policy into account**
  - NB PA 2011 s. 8(5): in preparing plan strategy, council “must take account of” RDS; council's current community plan; any policy or advice in Department guidance; and other matters it prescribes/directs
  - Blyth Valley BC v. Persimmon Homes [2008] EWHC 1258 (Admin): adoption based on failure to consider economic viability of an affordable housing target, as required by new planning policy guidance
  - Cf Barratt Developments plc v City of Wakefield Metropolitan District Council [2009] EWHC 3208 (Admin) where affordable housing policy was identified as being sufficiently flexible to accord with national policy on affordable housing



## Soundness – examples of successful non-SEA/Habs Regs challenges (2)

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- **Failure to understand or address evidence**
  - Linden Homes v. Bromley LBC [2011] EWHC 3430: evidence that development plan not financially viable made it impossible to understand the Inspector’s conclusions that it was sound
  - University of Bristol v. North Somerset Council [2013] EWHC 231: Inspector misunderstood evidence of objector at EIP – and reasons did not disclose why council figures allowed for latent housing demand having regard to differing assessments



## Soundness and consistency



- DPPN06 - includes under “soundness” test a sub-heading of “consistency” test, but this only requires that plan has taken into account RDS, community plan, Departmental policy/guidance, other plans etc
- Only legal requirement for consistency = PA 2011 s. 9(5): local policies plan must be consistent with plan strategy
- Persimmon v Stevenage BC [2005] EWCA Civ 1365 at [30]: matter of judgment which “should rest firmly in the hands of the statutory policy-makers themselves”
- See too R (DLA Delivery Ltd) v Lewes District Council [2017] EWCA Civ 58 at [23] (NB also “general conformity” not consistency)

## Procedural issues



- **Including site at examination stage without consultation**
  - R (Barrow BC) v Cumbria CC [2011] EWHC 2051: minerals plan submitted for examination could not lawfully add new site without either consultation or an opportunity for objectors to make representations
- **Failure to follow SCI?**
  - Question is not whether SCI valid, but whether plan-making carried out in accordance with it
  - “It is not a duty to do anything more” and challenge of rationality to conclusion that it had been complied with will often face a “daunting and difficult task”: Kendall v. Rochford District Council at [55]-[56]
- **Effective consultation?**
  - Kendall: SA on draft allocations DPD: council never directly notified any individual members of the public or placed details of consultation in local newspaper
  - When it did consult the general public it relied solely on its website
  - Local Planning (England) Regs 2012: submission version had to be made available for inspection at offices and online
  - But challenge mounted on failure to consult effectively under SEA Regs
  - Held: website alone not effective consultation (at [93]-[94]); but relief refused because plan-making process as a whole gave public a sufficient opportunity to reflect upon and respond to policies in light of SA (at [120])
  - Cf LPD Regs 2015 reg. 15(d): newspaper notice required
  - NB Not every change requires reconsultation: Performance Retail Limited Partnership v Eastbourne Borough Council [2014] EWHC 102 (Admin) at [47] and [51]: modification which makes no substantive difference to policy does not have to be subject of SA and consultation

## Modifications



- Section 20(7C) PCPA2004: if asked, Insp must recommend mods to make DPD meet legal requirements and be sound
- IM Properties Development Limited v Lichfield District Council [2015] EWHC 2077 (Admin): no limitation in the statutory language which allows for modifications to a plan to make it sound, so nothing preventing a “rewrite” of the local plan; and any differing guidance from the Planning Inspectorate had to give way to the legislative intention
- Cf PA 2011 s. 12(1): Department must consider recommendations of PAC under s. 10(8) and direct council to adopt as submitted, adopt with modifications or withdraw

## NI Act 1998 issues? (1)



- Minister of Enterprise Trade and Investment’s Application for Judicial Review [2016] NIQB 26
  - Challenge to decision of then Minister for the Environment to authorise and direct Department to adopt Belfast Metropolitan Area Plan
  - Sections 20(3) NIA 1998/para. 19 Strand One of the Belfast Agreement: Executive Committee will provide forum for “...agreement on, issues cutting across the responsibility of two or more ministers”
  - S. 20(4): Committee shall discuss and agree upon (a) significant or controversial matters clearly outside the scope of the agreed programme (para 20 of Strand One); (b) significant or controversial matters that the FM and DFM determined should be considered by Committee
  - DoE Minister: restriction on expansion of Sprucefield regional shopping centre to bulky goods only in BMAP strategy
  - FM and DFM: BMAP retail strategy significant and controversial
  - Minister directed adoption of BMAP
  - Ultra vires section 20(4) given determination of FM and DFM, but also both strands of section 20(3)
  - “Wider context” of BMAP, a policy dealing with economic and social activity throughout a large part of NI, engages the responsibilities of various Ministers” [45]



## NI Act 1998 issues? (2)



- Referred to Re Central Craigavon Ltd' Application [2010] NIQB 73 (challenge to adoption of draft PPS5) :
  - on issue of “significant or controversial” in absence of agreed programme for government “it cannot be said that it was clearly outside any agreed programme” and not of itself significant or controversial” because had raised no interest at Executive level: “whether or not something is controversial or significant in this context must refer to those matters which members of the Executive might believe to be so” [26]
  - cross-cutting: “one sees within the document reference to the requirements of targeting social need and the guide to rural proofing. That tends to suggest that this policy has a wider context which involves the responsibilities of the ministers who must cater for those matters at least.... I consider, therefore, that the...policy should have been brought to the Executive for its approval” [28].
  - But, breach technical because Executive at all times informed of steps Ministers intended to take and no objection taken [29]
  - On appeal [2011] NICA 17, finding that not significant or controversial not challenged ([17]) and issue of cross-cutting academic (Department decided not to give draft PPS5 any weight Executive approval). CoA added (at [19]): “Where...policy is uncontentious so far as concerns another Department with an interest in the outcome of the formulation of that policy, it is not self-evident that it is a matter giving rise, in fact, to any cross-cutting of departmental responsibilities. That issue is one of some difficulty and complexity and may require closer examination and analysis at some future time”.
- Development plans under PA2011: adoption by Councils but power of direction to adopt given to Department, including modifications – section 12(1)
- NB Application by Colin Buick for Judicial Review: appeal being heard today

## Challenges - timing



- NB section 113 of the Planning and Compulsory Purchase Act 2004 significant case law on preclusive provisions and effect on challenges being made to plans during preparation
- Not necessarily reflected in NI regime where **normal jr rules apply**
- Rules of the Court of Judicature (Northern Ireland) (Amendment) 2017: **remove promptitude requirement** from time limit for making leave application
- Time limit = **3 months** from the date grounds for the application first arose, unless otherwise extended by the Court
- Will **generally be on adoption, but not exclusively so**
- Examples of Courts in England being prepared to hear challenges before examination:
  - The Manydown Company Limited v Basingstoke & Deane Borough Council [2012] EWHC 977 (Admin): challenge to lawfulness of a council's failure to promote the development of land it had earlier acquired in draft plan
  - R. (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council [2010] EWHC 535 (Admin): challenge to council endorsement of draft preferred strategy claim based on insufficient or misleading information in officer report; predetermination/appearance of bias

## Parties - standing



- O53, Rule 3(5) – applicant requires “**sufficient interest**” in the matter to which the application relates
- Walton v. Scottish Ministers [2012] UKSC 44 at [86]-[87] (person aggrieved formulation):
- Appellants making representations to public inquiry “entitled to expect that the Secretary of State, in considering their representations, would act within the powers conferred upon him by the statute”
- Authorities also demonstrate that person who has not participated in the process may nonetheless be “aggrieved”: eg inadequate advertisement may misled
- Applicant “not a mere busybody interfering in things which do not concern him”
- “The courts may properly accept as...having a “sufficient interest” those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests, such as the protection of the environment” ([102])

## Parties – Interested Parties



- O53 r. 9(1): “proper person to be heard”
- Application by Belfast City Council for Judicial Review [2018] NIQB 17: wider principles applying to other challenges, including those by participants (or non-participants?) at examination (see [5]-[7])
- Court is “arbiter of the mode of participation” and “no hard and fast rules” eg:
  - may be appropriate to permit the developer to make a contribution by written argument, oral argument, affidavit evidence or “pure” documentary evidence at leave stage
  - in others, particularly where the Court is satisfied that leave should be granted on papers, none of these steps required
  - Where leave granted, the final decision on mode of participation of developer likely postponed to when all evidence and arguments to be considered have been assembled
  - quintessentially case management decisions entailing “evaluative judgement” informed mainly by “threefold factors of fairness, the overriding objective with its multiple and multi-layered ingredients and the self-evidently important objective that the Court’s substantive decision is as fully informed as possible”
  - ancillary principles: participation should not result in the generation of additional costs eg by unnecessarily prolonged hearing; active co-operation between parties required; costs recovery by non-party rare; “where a restricted participation approach might stimulate a burning sense of injustice or grievance, the court may wish to take this into account”; participation orders will be subject to reconsideration; and being “heard” does not invariably entail an oral hearing or a right to make oral representations.

## Interim relief



- Judicature (NI) Act 1978 s. 19; O53 r 3(13): may grant such interim relief as considers appropriate
- General principles: Courts apply modified American Cyanamid principles from private litigation eg Re Eurostock Meat Marketing Ltd's Application [1999] NI 13: court had to decide where balance of convenience lies
- Terry Adams v. Bolton (1996) P&CR 446 at 451
  - Challenge to waste policy in development plan
  - Court considered whether arguable case; whether a real prospect that relief should be granted; and balance of convenience, in particular that impugned policy was of interest to the general public (at 451)
  - Rejected: chances poor and due to "potential consequences not merely in Bolton but in the area of other authorities if, between now and trial, this policy were deleted from the Unitary Development Plan" ([457])
- Lisle-Mainwaring v Kensington and Chelsea RLBC [2015] EWHC 1814:
  - Court refused to grant an interim injunction suspending a local authority's planning policy for basement developments: public interest strongly favoured permitting the local authority to continue to apply the policy pending the substantive hearing as to its lawfulness (at [28]-[29])

## Discretion



- Domestic law challenges: courts possess a residual discretion not to quash a decision where there has been no prejudice or detriment to the claimant and to refuse relief in exceptional circumstances (Walton at [111])
- "If the court is to exercise its discretion not to grant relief where unlawfulness has been found, it must be satisfied that the decision-maker would necessarily have reached the same decision but for the legal error. That is, of course, a stringent test": SSCLG v. South Gloucestershire Council [2016] EWCA Civ 74 at [22]-[25]
- See too Omagh District Council's application [2007] NIQB 61: Draft PPS14 ultra vires DRD but Court declined to quash, granting declaration of unlawfulness instead: order would "immediately nullify or render useless those earlier steps prior to the ministerial announcement"
- European law: R (Champion) v North Norfolk District Council [2015] UKSC 52 at [58]: it is "open to the court to take the view, by relying 'on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court' that the contested decision 'would not have been different without the procedural defect invoked by that applicant'. In making that assessment it should take account of 'the seriousness of the defect invoked' and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making..."

## Remedies



- Courts in NI may adopt more restrictive approach to fashioning remedies where adoption unlawful
- Belfast City Council v. Minister of Enterprise, Trade and Investment [2017] NICA 28
  - Treacy J in DETI case on BMAP (above) - issue arose on remedy
  - Executive accepted a joint proposal from DoE and DETI that an amended BMAP should be adopted, omitting the still disputed bulky goods requirement (but did not rely on potentially available power to resurrect ultra vires decision under Ministerial Code
  - Treacy J reflected this in final order
  - Order stated that decision to “authorise and direct the Department... to adopt retail policy was unlawful (para. 1) but went on to say that in light of retrospective Executive approval (a) declines to make any order in relation to the remainder of the adopted BMAP; and (b) further declares that the entirety of the [remainder of the] adopted BMAP...may continue to be taken into account in informing planning decisions”
  - CoA at [17]: “impermissible.. All that the judge should have been asked to do in order to give effect to his decision was to make a declaration in a form such as that contained in paragraph 1. The remaining paragraphs were included with the intention of giving effect to political policy decisions about the content of BMAP that had played no part in the matters argued before or decided by the judge...[I]t would be for government to decide how to proceed should it wish to revisit the adoption of BMAP, with or without amendment”.
- Cf JJ Gallagher Ltd v Cherwell District Council, Secretary of State for Communities and Local Government [2016] EWHC 290 (Admin): order requiring remission and adoption of policy

## Conclusion



- Most problems seem to be made before examination, even if challenges most likely after adoption
- Councils useful to prepare checklist of both soundness and legal compliance at each stage before examination: see App. 1 to DPPN6 (see too Planning Advisory Service Checklists in E&W): record what is done
- SEA, Habs Regs and procedural requirements including consultation remain main candidates for challenge – but should be alive to range of other issues that may arise; and risk of no ultimate success