

Legal challenges following adoption

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S.113 PCPA 2004



- (2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.
- (3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—
 - (a) the document is not within the appropriate power;
 - (b) a procedural requirement has not been complied with.
- (3A) An application may not be made under subsection (3) without the leave of the High Court.
- (3B) An application for leave for the purposes of subsection (3A) must be made before the end of the period of six weeks beginning with the day after the relevant date.

Relevant document?



- (a) a revision of the regional strategy;
 - (b) the Wales Spatial Plan;
 - (c) a development plan document;
 - (d) a local development plan;
 - (e) a revision of a document mentioned in paragraph (b), (c) or (d);
 - (f) the Mayor of London's spatial development strategy;
 - (g) an alteration or replacement of the spatial development strategy,
- Does not include neighbourhood plans

Relevant document?

- ‘General rule’: document becomes a “relevant document” when submitted for examination: ***R (IM) v Lichfield*** [2014] PTSR 1484
- A document (or decision) may be challenged before it becomes a relevant document – e.g. pre-submission draft core strategy about to be published for consultation: ***Manydown Co Ltd v Basingstoke and Deane BC*** [2012] EWHC 977 (Admin)

Which relevant document?



- Proceedings may not be brought in respect of a relevant document (D1) which forms part of the consideration of a further relevant document (D2) where the time for challenging D1 has passed :
 - E.g. a challenge to an allocations plan process which is influenced by a previously adopted core strategy cannot be used to challenge the core strategy: ***Kendall v Rochford District Council*** [2015] Env LR 21 per Lindblom J at paras 96-102.

Time limits

- s. 113(3B) application must be made before the end of the period of six weeks beginning with the day after the '*relevant date*'
- The '*relevant date*' for each '*relevant document*' is set out in s. 113(11).
- Time limits are absolute and the court has no discretion to extend them: ***Wealden DC v SSCLG*** [2017] EWHC 351 (Admin)
- If the 6 week period ends on a non-working day it will be taken to expire on the following working day: ***Nottingham CC v Claverton PC*** [2015] PTSR 1130

Time limits



- Joint local development documents are *adopted* at the time that they are adopted by each planning authority and the time for challenge runs from then.
 - So, if LPA 1 adopted 6 weeks + 1 day ago and LPA 2 adopted the same plan 6 weeks - 1 day ago, LPA 1's adoption may not be challenged, but LPA 2's adoption may – although the plan may only be quashed insofar as it applies to LPA 2;
Wealdon (paras 82-3)

Grounds of challenge



S.113:

(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—

(a) the document is not within the appropriate power;

(b) a procedural requirement has not been complied with.

...

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.

Grounds of challenge (2)

- For a challenge under s.113(3)(b), C must also demonstrate that its interests have been “substantially prejudiced” by a failure to comply with a procedural requirement (s.113(7)(b))
 - Applies even where failure relied upon relates to SEA – see ***Abbotskerswell Parish Council v Teignbridge District Council*** [2015] Env L.R. 20

Grounds of challenge (3)

- Standard grounds for statutory challenge - usual principles of administrative law apply
- No more intrusive standard of review than *Wednesbury* unreasonableness is appropriate: ***Trustees of Barker Mills Estates v Test Valley*** [2017] PTSR 408 (Holgate J, para 21)
- The question of whether a development plan complies with national policy and guidance is largely a matter of planning judgment with which the court will be slow to interfere: ***Calverton PC v Nottingham CC*** [2015] EWHC 1078 (Admin) (Jay J para 11)

“Soundness”

- Challenges based on ‘*soundness*’ will ‘*seldom succeed*’ since this is a matter of planning judgment: ***Oxted Residential v Tandridge DC*** [2016] EWCA Civ 414, per Dove J at para 27
- Challenges relating to ‘*soundness*’ of the plan should be raised during the examination process.
- A challenge based on soundness is likely to fail if the point could have been brought during examination: ***Trustees of Barker Mills Estates v Test Valley BC*** [2017] PTSR 408 paras 78-80

“Soundness” (2)



“It is therefore very difficult to see why, in general, a factual or policy issue affecting the “soundness” of a plan should be allowed to be raised for the first time in a section 113 challenge, *a fortiori* when it could have been raised in the correct forum, the Examination, and there is either no justification for the failure to do so, or not one sufficient to outweigh the disadvantages of allowing a new “soundness” point to be raised after the adoption of the plan. The process of preparing a local plan is costly and time-consuming not only for the LPA but also the many stakeholders and interests involved. In addition, the NPPF emphasises the importance in the public interest of having up to date local plans. The use of a section 113 challenge to pursue new points in this manner should firmly be resisted.” (Holgate J para 79)

Duty to cooperate



- A matter of planning judgment for the Inspector
- Question for the Inspector: is it “reasonable to conclude” that there has been compliance with the duty: s.20(7)(b)(ii) & (7B) PCPA 2004
- Court role limited to reviewing that decision – did the Inspector act lawfully and rationally in reaching the conclusion he did
- Even less intrusive form of review that considering whether a plan is “sound”

Duty to cooperate (2)



Zurich Assurance v Winchester City Council [2014] EWHC 758
(Admin) per Sales J at 109 – 114:

- Looking at the duty under s.33A, the nature of the decisions to be taken / language used indicates that “*a substantial margin of appreciation or discretion should be allowed*” to the LPA by a court reviewing those decisions (paras 110/111)
- In reviewing the Inspector’s decision: “*It would undermine the review procedures in the Act, and the important function of an inspector on an independent examination, if on a challenge to a plan brought under section 113 the court sought to circumvent this structure by applying any more intrusive form of review in its own assessment of the underlying lawfulness of the conduct of the planning authority itself*” (para 113)

Consultation / public participation



- ***Barrow BC v Cumbria CC*** [2011] EWHC 2051 (Admin), plan quashed where site included at examination stage that had been dropped at an earlier stage, and no opportunity for C to make representations on ‘soundness’ of its inclusion
- Procedural failing not enough if not prejudice in substance – in ***Abbotskerswell PC v Teignbridge DC***, Council conceded it had failed to expressly invite the public to comment on the SEA and Addendum when published. Lang J concluded no substantial prejudice as “highly likely” C aware that SEA published for consultation and accessed at sufficiently early stage to inform its consultation response to the local plan

- S113(7) – (7C) – significant flexibility conferred on Court

(7) The High Court may—

(a) quash the relevant document;

(b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.

(7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.

Relief (2)



- (7B) Directions under subsection (7A) may in particular—
- (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;
 - (b) require specified steps in the process that has resulted in the approval or adoption of the relevant document to be treated (generally or for specified purposes) as having been taken or as not having been taken;
 - (c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);
 - (d) require action to be taken by one person or body to depend on what action has been taken by another person or body.

Relief (3)

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

- Powers conferred on Court are broad in scope, and Court can go as far as to order a plan be remitted with a direction that the Inspector appointed to redetermine recommend adoption subject to a specified modification - and that LPA adopt the plan with such modification: ***Woodfield v Gallagher*** [2016] 1 WLR 5126

Relief (4)

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“[The powers] introduce greater flexibility in the remedies the court may fashion to deal with unlawfulness, having regard to the stage of the process at which it has arisen, and avoiding – when it is possible to do so – uncertainty, expense and delay. They include a broad range of potential requirements in directions given under subsection (7A), all of which go to ‘the action to be taken in relation to the [relevant] document’. The four types of requirement specified in subsection (7B) are stated to be requirements which directions ‘may in particular’ include. None of them, however, would warrant the substitution by the court of its own view as to the issues of substance in a plan-making process, or as to the substantive content of the plan – its policies and text. They do not allow the court to cross the firm boundary separating its proper function in adjudicating on statutory challenges and claims for judicial review in the planning field from the proper exercise of planning judgment by the decision-maker.”

Procedure



- Permission or '*leave*' is now required to bring an application: s. 113(3A)
- Procedure otherwise governed by Practice Direction 8C of the CPR
- Interim relief may be granted: s. 113(5)-(5A).