Landmark CHAMBERS

NEIGHBOURHOOD PLANNING IN THE HIGH COURT

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Landmark Chambers

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THE ORIGINS OF THE NEIGHBOURHOOD PLANNING (NP) REGIME

- NP been with us in England since **Localism Act 2011** (ss. 116-121 & Schedule 9) came into force on 15 November 2011.
- The Act amended the **TCPA 1990** and the **PCPA 2004** and also enabled the making of regulations, including The Neighbourhood Planning (General) Regulations 2012 (2012 No 637)
- The introduction of the NP regime was a manifestation of the shift **away from top down planning**, as seen in the "**regional apparatus**", and the imposition of targets tending to exclude local people and communities – see the Foreword to the NPPF.
- As also said in Greg Clarke's Foreword to the NPPF - "*Dismantling the unaccountable regional apparatus and introducing neighborhood planning addresses this.*"

LEGISLATIVE FRAMEWORK

The relevant legal framework for the preparation and making of Neighbourhood Development Plans ("NDPs") is provided by the **Localism Act 2011**, which amended existing legislation as follows:

- **Town and Country Planning Act 1990** ("TCPA 1990"):

  ss. 61F, 61I, 61M-P and Schedule 4B (as modified by s.38A(5) of the PCPA 2004 in relation to NDPs)
- **Planning and Compulsory Purchase Act 2004** ("PCPA 2004): ss. 38A-C
- **Neighbourhood Planning (General) Regulations 2012** (2012 No.637) (As Amended)
- **Neighbourhood Planning (Referendums) Regulations 2012** (2012 No.2031)

NPPF

Paras. 183 & 184 of the NPPF:

- Gives **communities direct power** to develop a shared vision for their neighbourhood and **deliver the sustainable development** they need.
- A **powerful set of tools** for local people to ensure that they get the **right types of development** for their community.
- The **ambition of the neighbourhood** should be aligned with the **strategic needs and priorities** of the wider local area.

THREE MAIN THEMES FROM THE CASE LAW

(1) Plan making:

- More flexible approach than for a local plan, both of which are part of the development plan and have the special status under section 38(6) of the PCPA 2004.
- Tensions between local plan and an NDP given that flexibility, in particular the requirement only for general conformity with strategic polices of the LP as a whole.

(2) Decision making:

- It is often difficult to predict the outcome even where there is a conflict with an NDP. Even more so than for many planning decisions, there appears to be a very "political" dimension to decisions.
- Role of the NDP; opportunity for innovation

(3) The future: policy response to issues arising

THE BASIC CONDITIONS: Schedule 4B of the TCPA 1990, para. 8(2)

(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, **it is appropriate to make the order**, ……

(d) the making of the order contributes to the **achievement of sustainable development**,

(e) the making of the order is in **general conformity with the strategic policies contained in the development plan for the area of the authority** (or any part of that area),

(f) the making of the order does not breach, and is otherwise compatible with, **EU obligations**, and

(g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order.

THEME 1: FLEXIBLE APPROACH TO NDP MAKING (1)

- The NDP has to be in **general conformity** with the strategic policies of the adopted Development Plan as a whole – Court's interpretation and the application of basic condition 8(2)(e): see *Kebbell Developments Ltd v* Leeds City Council [2016] EWHC 2664 (Admin)
- A LP has to be consistent with national policy – a NDP can proceed **if it is appropriate "having regard to"** national policy and guidance (basic condition 8(2)(a)) (cf. LPs which have to be "consistent with national policy" – NPPF[182]).
- A NDP can be adopted even where there is **no up-to-date Local Plan.** This has caused tension where developers consider that the NDP is not properly reflecting housing needs. Most of the challenges are underpinned by this issue.

THEME 1: FLEXIBLE APPROACH TO NDP MAKING (2)

- The Judgment of Holgate J in the *R* (*Crownhall Estates Ltd) v Chichester DC* [2016] EWHC 73 (21 January 2016) is still often referred as it summarsies the principles in respect of the making a NDP are set out (see para. [29]). In that case:

  - Scoring of alternative sites, including, the Claimant's was imperfect. However, as the two chose sites were backed by local support, the Judge saw no legal flaw in that (see para. [86]).

  - The Loxwood NP was found to have been validly made.
- *Bewley Homes v Waverley BC* [2017] EWHC 1776 (Admin), Lang J - Duty of NDP Examiner to give reasons not same as in *South Bucks DC v Porter* (No.2) [2004] UKHL 33. Also, general conformity does not require conformity with every policy (applying *Crownhall* & following *R (oao DLA Delivery Ltd.) v Lewes DC* [201] EWCA Civ 58).

THEME 1: FLEXIBLE APPROACH TO NDP MAKING (3)

- In *R (oao DLA Delivery Ltd.) v Lewes DC* [2017] EWCA Civ 58, this was dealing again with a spurned developer – in this case it had failed to get its site allocated in the Newick NDP.
- In the Judgment of LJ Lindblom the background and purpose of NDPs is set out (see e.g. paras. 4 & 5 and 11 & 12).
- It is pointed out that the Examiner's remit is **relatively limited** (par. [5]). That is a reflection of the basic conditions.
- The making of an NDP **did not have to await** the adoption of any other development plan document. It did not prevent an NDP from addressing housing needs unless or until there was an adopted development plan in place setting a housing requirement for a period coinciding with the NDP.

R (oao DLA Delivery Ltd.) v Lewes DC [2017] EWCA Civ 58 (Cont.)

- There was also a ground alleging "**apparent bias**" based on the fact that the arrangements by which lpas and PCs "actively select the examiners they want" are incompatible with the requirement that the examiner should be truly "independent" and that they give rise to apparent bias.
- The CA held that this ground had to be rejected. The selection of the Examiner had been in accordance with the primary legislation which had not been challenged.
- The performance of an Examiner is subject to the Court's supervision in proceedings for JR.
- The Judge saw no relevance and nothing remarkable in the fact that a particular examiner has previously found all, or nearly all, of the NDPs he had examined complied with the "basic conditions" and the CA agreed.

LIMITS TO FLEXIBILITY: Stonegate Homes Ltd v Horesham DC [2016] EWHC 2512 and reasons to worry

(1) A developer applied under s.61N of the TCPA 1990 for JR of a decision by the local planning authority to make the Henfield NDP. The developer had been promoting a site on the western side of Henfield. The SA/SEA dismissed that location because "*any further significant development …would place unsustainable pressure on the local road system.*"

(2) Permission was refused (contrary to officer's advice) for that site and the developer appealed to the SoS, whose decision remained pending at the date of the instant hearing. However, it was agreed that the proposals should not be refused for traffic or transport reasons.

(3) The development contended that the local authority had failed to assess reasonable alternatives to the spatial strategy as established by the NDP and, in particular, the alternative of permitting development on the western edge of Henfield.

Stonegate Homes Ltd v Horesham DC [2016] EWHC 2512 (2)

(4) The developer also claimed that the lpa had failed to consider alternatives to the Built-Up Area Boundary (BUAB) as established in the plan, to act rationally in the selection of the BUAB, and to give adequate reasons as to why the plan met EU obligations.

(5) Like in *Crownhall*, the community did not support the developer's proposals.

(6) According to the local authority, the option of developing land to the west of Henfield, and of including within the BUAB of Henfield a site which had been the subject of a successful planning appeal (the Barratt site), had been adequately dealt with. However, the **highway objection had been withdrawn** as a result of agreement between HA and Barratt.

(7) It was held that here was **no evidential basis** for the claim in the NDP that sites on the western boundary would place unsustainable pressure on the local road system.

Stonegate Homes Ltd. (3)

(8) Accordingly, the **obligation under Directive 2001/42** to ensure that the consideration of alternatives was based on an accurate picture of the **reasonable alternatives had not been satisfied**. It followed that the making of the NDP was incompatible with EU obligations.

(9) There did not appear to have been any assessment of the environmental impact of the BUAB, which appeared inextricably linked with the chosen spatial strategy, and there had been **no explanation as to why the proposed delineation was preferred to any alternatives**. Accordingly, that approach was also in breach of EU obligations.

(10) Both the independent examiner and the local authority were proceeding on a **false basis**. In any event, **neither had explained with appropriate particularity** how they had reached their conclusions on the manner in which the assessment of reasonable alternatives was purportedly compliant with EU obligations.

(11) Also, there was a **pre-determined** view on development on the western edge of Henfield.

THE TENSIONS THAT ARISE FROM THAT PLAN MAKING FLEXIBLITY

- The approach accepted in *Crownhall* [para. 29(ii)] and followed in other cases is that the basic condition in para. 8(2)(e) of Schedule 4B to the TCPA 1990 only requires that the draft NDP *as a whole* be in "general conformity" with the strategic policies of the adopted development plan *as a whole.*
- As mentioned above, the implications of applying that criterion in that way and without qualification are clearly illustrated by the Judgment of Mr J Kerr in the *Kebbell* case.
- This case illustrates the tensions that can arise between an NDP and LP, given the broad nature of the basic conditions applicable to the preparation of an NDP.

Kebbell Developments Ltd v Leeds City Council [2016] EWHC 2664 (Admin) – more reasons to worry

- The Linton NDP included text which suggested that the Ridge at Linton near Weatherby should not have dwellings on it and should be **returned to the green belt**.
- The Leeds LP left open the possibility of the site being developed for housing. It was a "**Protected Area of Search**" to provide for longer term development needs. There was no suggestion of the site being returned to the green belt. As the Kerr J put it, **it was "earmarked" for housing in 2006** (in the Leeds UDP Review).
- The LNP explained in the narrative text the Ridge's status as a PAS site. Various reasons (countryside impact; impact on views; opportunity to return to the Green Belt etc.) were given for not following that. Policy B2 stated that it should continue to be protected from development until its longer term allocation had been determine via the city council's site's allocation plan, following a Green Belt review but with a vision to return the site to the Green Belt and a proposed project to consider that.

Kebbell Developments Ltd v Leeds City Council [2016] EWHC 2664 (Admin) (2)

- The Examiner recommended **deletion of Policy B2 and "all associated text"** (but not the project itself) saying that it was a matter for the City Council, because a Green Belt review is a strategic matter rather than a NP one.
- The City Council accepted the majority of the Examiner's recommendations but **rejected the Examiner's recommendation (M23)** dealing with the Ridge-Specific Policy B2 in part. Policy B2 was deleted but **the project list retained**, including the Ridge. Further, **a description of the land**, which the Claimant contended explained why the Ridge should remain undeveloped contrary to the Leeds LP, was included. The developer sought to JR the Council's decision to allow the NDP to proceed to a local referendum.
- However, it was held that inconsistency was **not of itself sufficient to compel a finding of general disconformity** between the two plans as the basic condition in **Sch.4B para.8(2)(e)** only required that the draft neighbourhood plan as a whole be in "general conformity" with the strategic policies of the adopted development plan as a whole.

Kebbell Developments Ltd v Leeds City Council [2016] EWHC 2664 (Admin) (2)

- While the Linton NDP in its final form included mention of the PC's opposition to development of the Ridge, that did **not** mean that planning permission for future housing development would **necessarily have to be refused**.
- A developer could argue that the material plan for the purposes of s.70(2) of the 1990 Act and the PCPA 2004 s.38(6) was the Leeds Local Plan, and that even if the grant of planning permission would be out of tune with the Linton NDP, **planning permission should not be refused, because "material considerations indicate otherwise".**
- A developer applying for planning permission to build dwellings on the Ridge could argue that the references in the Linton NDP to the PC's opposition to that course should be disregarded or given little weight because they were not statements of policy, that the NDP should not be allowed to "promote less development than set out in the Local Plan or undermine its strategic policies" and that, for the same reason, a planning application to build dwellings on the Ridge would **not be one that "conflicts with a neighbourhood plan**" (see paras. 48, 56, 60-62 of judgment).

The Problem with that approach

- The Judge's suggested approach to any determination of a planning application is notwithstanding that an NDP has the full force of s.38(6) being part of the development plan.
- What about s.38(5) of the PCPA 2004? - "*If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.*"
- That is also notwithstanding para. 198 which states "*…Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."*
- This decision is being appealed.

THEME 2: DECISION MAKING PREDICTING THE OUTCOME OF AN APPLICATION OR APPEAL

- Localism v meeting housing need; is there an election soon?
- Given the particular concern the Government has to nurture neighbourhood planning, the application of the tilted balance in paragraph 14 of the NPPF can cause dilemmas for decision makers.
- WMS December 2016 – changing the HLS period in NPPF[49] from 5 years to 3 years where proposal in conflict with a NDP (See HWP 2.11).
- Recovery of applications/ appeals by the Secretary of State
- Where there has been a shortage of housing land, this has often led to Inspector's granting or recommending the granting of permission. There are several examples of the SoSCLG taking a different view. An important example of this is *Langmead v SSCLG* [2017] EWHC 788 (Admin).

Langmead v SSCLG [2017] EWHC 788 (Admin)

- Planning permission was refused for up to 100 dwellings on land at Yapton, West Sussex in Arun. The developer appealed.
- It was not dipsuted that there was no 5 year HLS and paras. 49 and 14 were engaged so as to apply the tilted balance.
- The experienced Inspector recommended that the appeal should be allowed. However, the SoS disagreed.
- The SoS gave significant weight to the benefits of the provision of housing, and further significant weight to the provision of affordable housing.
- Hoiwever, he gave very significant weight to the conflict with the Yapton NDP. He concluded that the development did not comply with the social element of sustainability.

Langmead v SSCLG [2017] EWHC 788 (Admin) (2)

- He gave very substantial weight to the conflict with YNP policy BB1 (built up area policy), in line with NPPF[198] but limited weight to the adverse impact on the character and appearance of the field and the loss of agricultural land.
- The Claimant developer challenged the decision pursuant to s.288 of the TCPA 1990 claiming *inter alia* misinterpretation and misapplication of the NPPF. That included the SoS's approach to the "*social element of sustainability"* because of its conflict with the the YNP and the NP policies in the NPPF.
- The Judge (Mrs J Lang) applied the approach of Lindblom J (as he then was) in *Crane v SSCLG* [2015] EWHC 425 (Admin) that NPPF[14] does not prevent a decision-maker from giving as much weight as he judges to be right to a proposals conflict with an NDP.

Langmead v SSCLG
[2017] EWHC 788 (Admin) (2)

- The J rejected the contention regarding the social element of sustainable development.
- The SoS concluded (DL16) "*..neighbourhood plans, once made part of the development plan* ***should be upheld*** *as an effective means to shape and direct development in the neighbourhood planning area in question. Consequently in [paras] 198 and 185, and his guidance on neighbourhood planning that this is the case* ***even in the absence of a 5 year*** *[HLS], the [SoS] places* ***a very substantial negative weight on the conflict between the proposal and policy BB1****."* So the mere conflict with the NDP and thus breach of the social element in NPPF[7] is being considered to be sufficient to constitute adverse impacts that *"significantly and demonstrably outweigh the benefits"* under NPPF[14].

DECISION MAKING:
THE ROLE OF AN NDP

- Notwithstanding the approach in *Langmead*, many decisions have led to disillusionment amongst the local community.
- E.g. *Angmering PC* unsuccessfully challenged a grant of planning permission in the same district (Arun) that was contrary to their NDP, relying on *Langmead* and the social element of sustainable development (CO/482/2017).
- See also e.g. *Cherwell DC v SSCLG* [2016] EWHC 2925 (admin) in which it was held that there had been no error in a decision allowing outline planning permission to be granted for a residential development in a village (54 dwellings on the edge of Hook Norton). The Judge held that the SoS had not failed to recognise that a conflict existed between the proposed development and the NDP, but had judged that the conflict was limited.

ROLE OF AN NDP (2)

- The December 2016 WMS (reducing the 5 year HLS trigger to 3-years for judging whether relevant policies for the supply of housing are up-to-date under NPPF[49]) was to address that – to reflect communities concerns that NDPs were being departed from too readily.
- The weight given to the social element in *Langmead* is also a nod to the local communities in terms of the role given to NDPs.
- The problem is that this inevitably can constrain the number of dwellings permitted and delivered. It also leads to an additional element of unpredicatbility in decision making.

THE ROLE OF AN NDP: INNOVATION (3)

- NDPs plans can be "surprisingly effective" & innovative:

  e.g. holiday homes exclusion - policy H2 of the St Ives NDP requiring new open-market housing to be **restricted to occupancy as a principal residence**. The submission of Policy H2 was accompanied by a sustainability appraisal which purported to comply with Directive 2001/42 and the Environmental Assessment of Plans and Programmes Regulations 2004. The Examiner concluded that the draft plan would contribute to sustainable development. A referendum was held and the outcome was in favour of the proposed plan. The Court upheld this:

  R (oao RLT Built Environment Ltd) v Cornwall Council and St Ives Town Council [2016] EWHC 2817 (Admin);

  e.g. stricter **parking standards** requirements in Alton NDP.

THEME 3: THE FUTURE

- Housing White Paper 2.10 – more certainty for those neighbourhoods that have produced plans but are at risk of speculative development because the lpa has failed to maintain a 5 year HLS.
- WMS to be replaced by approach in HWP2.11
- But proposed that lpa shall provide neighbourhood plan area with housing requirement and if not a standard methodology may be applied. Planning Guidance will make clear that authorities may do this by making a **reasoned judgment based on the settlement strategy** and housing allocations in their plan, so long as the local plan provides a sufficiently up-to-date basis to do so (including where an ELP is close to adoption)
- Where the LP is out of date and cannot be relied upon, a **simple formula is proposed**

THE FUTURE (2)

- Housing White Paper proposes that detailed GB boundaries are for NDPs but not the general extent of the GB, which would remain a strategic matter.

- White Paper also proposes greater role of NDPs in design matters – set out clear design expectations/design codes.

SO, IS IT NOW OK TO….