

## Planning High Court Challenges 2017

### Judging housing supply: the latest case law on housing supply



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**The Law Society**



### A year in housing caselaw

- 1) Hopkins Homes: 14/49 NPPF.
- 2) Barwood Strategic: Scope of “presumption in favour”.
- 3) St Modwen Developments: delivery vs. deliverability.
- 4) Wokingham BC: Lapse rate v. Buffer.
- 5) Wet Finishing Works: Scope of section 73 applications.
- 6) Shropshire: Need to grapple with 5yhls in s.78 appeals.
- 7) Gladman: Need to seek further reps on updated housing #s.
- 8) Ones to watch...



## 1) Hopkins Homes

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*Suffolk Coastal DC v Hopkins Homes Ltd &  
Richborough Estates Partnership LLP v Cheshire East BC*  
[2017] UKSC 37; [2017] 1 W.L.R. 1865

- Great expectations.
- The key findings? Narrow meaning of “relevant policies for the supply of housing”.
- But what next? Further litigation? Stemming the flood of ***Tesco v Dundee***? Amendments to the NPPF?



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National Planning Policy Framework

49. Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.



## National Planning Policy Framework

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### for

/fɔː, unstressed fə/

preposition, conjunction, & noun. OE.

[ORIGIN: Old English *for* = Old Frisian, Old Saxon *for*, Gothic *faur*, prob. reduced form of Germanic preposition meaning 'before (of place and time)', repr. by Old English *fore* preposition = Old Frisian, Old Saxon, Old High German *fora*, beside Old Saxon, Old High German forms with *-i*, viz. *furi* (German *für*) and Old Norse *fyrir*.]

#### A. preposition.

†I. Before. Cf. *fore* preposition.

1. In front of, in or into the presence of; (in oaths) before. OE-LME.
2. Before in time. OE-ME.
3. In preference to. OE-E16.

II. Of representation, substitution, or exchange.

4. Representing, as a representative of. OE.

I. Murdoch A fear not exactly of James but of something that James stood for

## The Supreme Court's Judgments

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### 2 key issues:

- Interpreting v Applying policy.
- § 14 / § 49 NPPF.



### Interpreting v applying policy

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- Re-stated **Tesco v Dundee**, i.e. policy should be interpreted objectively. But noted “over-legalisation of planning process”
- So Lord Carnwath added 4 points (every little helps):
  - **Tesco** was about “suitable”.
  - Policies are not statutes. Interpretation points may not be decisive.
  - Presumption in favour of planning inspectors.
  - Applicants to “distinguish clearly” between interpretation and application.



§ 14 / § 49 NPPF [1/2]

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- “Relevant policies for the supply of housing” = **narrow definition**, i.e. policies dealing only with the numbers and distribution of new housing.
  - But the “important question” is not defining individual policies, but whether LPA has a **5 year housing land supply**.
  - If not, § 14 is triggered.
  - Restrictive non-housing policies (e.g. Green Belt / countryside) to be weighed against need for development in the tilted balance.
  - Matter of planning judgment.
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§ 14 / § 49 NPPF [2/2]

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- E.g. weighing policies in each appeal:
    - Inspector entitled to give countryside protection / green gap policies reduced weight to the extent that they derived from “settlement boundaries that in turn reflect out-of-date housing requirements” (**Cheshire East**).
    - Settlement boundary was, to an extent at least, no more than the counterpart of the housing policies, and that, under the paragraph 14 balance, its weight might need to be reduced if the housing objectives were to be fulfilled (**Suffolk Coastal**).
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## CLM's 6 headlines from *Hopkins*

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1. Weight to be given to restrictive policies in the development plan (specific or not) will need to be judged against the need for development, especially housing [56].
2. The important question is not how to define individual policies, but whether the result is a 5 year supply. The shortfall is enough to trigger the tilted balance of paragraph 14.
3. Policies for the supply of housing in paragraph 49 of the NPPF means policies for the “numbers and distribution” of new housing [48, 57-59].
4. The weight to be given to restrictive policies may be reduced to the extent that they derive from settlement boundaries that in turn reflect out-of-date housing requirements [63].
5. A settlement hierarchy policy “may” be a policy for the supply of housing [64]
6. A settlement boundary/hierarchy policy may be a “counterpart of the housing policies”, and its weight in the paragraph 14 balance might need to be reduced if the housing objectives are to be fulfilled [66].

## 2) Barwood Strategic Land

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*Barwood v East Staffordshire Borough Council* [2017] EWCA Civ 893

- Issue: scope of the "presumption in favour of sustainable development" in the National Planning Policy Framework
- Does 14 NPPF *contain* the “presumption in favour”: see Jay J in *Cheshire East* [2016] EWHC 571 (Admin) + Holgate J in *Barker Mill* [2016] EWHC 3028 (Admin)?
- Or does it set out the *effect* of the presumption: see Coulson J in *Wycharon DC* [2016] EWHC 592 (Admin)?

**BARWOOD**  
LAND

## 2) Barwood Strategic Land

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Lindblom LJ's "5 basic points" from *Hopkins*:

1. Primary purpose of 49 NPPF = to trigger 14 NPPF.
2. Even if 49 engaged, weight to out of date policies is question of judgment.
3. "Narrow" interpretation of 49 was correct. But "doctrinal controversy" of its meaning wasn't decisive in either appeal, and was not "the important question".
4. CoA right to emphasise planning judgment.
5. Message to LPAs "unmistakeable" – without a 5yhs, rigid application of enviro policies could frustrate NPPF.

## 2) Barwood Strategic Land

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Lindblom LJ on 14 NPPF:

- Presumption is solely within 14 NPPF.
- There is no other "golden thread" elsewhere in NPPF.
- Presumption not irrebuttable. Weighing it is a question of planning judgment.
- NB Lindblom LJ's warning against "excessive legalism" at 50, repeated in *Mansell* [2017] EWCA Civ 1314 at 41.



### 3) St Modwen Developments

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*St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643

- Issue: meaning of “deliverable sites” in para 47 NPPF.
- Lindblom LJ: “deliverable” ≠ certain or likely to be delivered.
- Issue is whether sit is *capable* of being delivered in 5 years. Realistic prospect.
- PP not required. Certainty/probability not required.
- **NB** more allegations of excessive legalism!



### 4) Wokingham BC

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*Wokingham BC v Secretary of State for Communities and Local Government* [2017] EWHC 1863 (Admin)

- Issue: proper approach to historic housing shortfall
- Inspector applied 20% buffer **and** 10% lapse rate.
- Inspector must assess + give reasons on risk of **double-counting**.
- NB whether to apply lapse rate + buffer is a question of planning judgment.



**WOKINGHAM**  
BOROUGH COUNCIL





## 5) Wet Finishing Works

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R. (Wet Finishing Works Ltd) v Taunton Deane BC [2017] EWHC 1837 (Admin)

- Issue: scope of section 73 applications
- Could an increase from 84 dwellings to 90 be achieved under section 73? Even though # of dwellings fixed within original description of development.
- **YES** – see Arrowcroft [2001] PLCR 7 (“*fundamental alterations*”)
- A question of fact and degree for decision-maker.



## 6) Shropshire

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Shropshire Council v Secretary of State for Communities and Local Government [2016] EWHC 2733 (Admin)

- Issue: what is required of Inspectors determining 5yhl in s.78 appeals?
- Inspector decided no FOAN = no 5yhl. But no attempt to analyse need vs. supply.
- That was not enough: Inspectors generally required to make judgments about housing needs / supply.
- **Watch out** for Hallam Land v SoSCLG on how Shropshire fits with previous caselaw, including Dartford BC [2016] EWHC 649 (Admin), re no need to fix 5yhl in s.78 appeals.



## 7) Gladman



Gladman Developments v Secretary of State for Communities and Local Government [2017] EWHC 2448 (Admin)

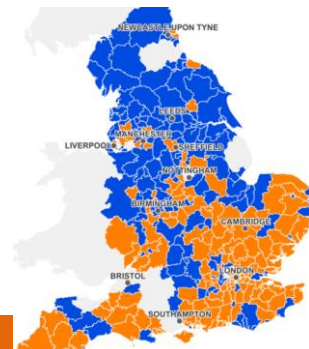
- Issue: was SoS required to allow parties chance to comment on new 5yhl evidence?
- SoS took account of new material on LPA's website, i.e. updated housing land supply note. Relevant to *degree* of shortfall.
- Rule 17(5) of Inquiry Procedure Rules 2000 was activated. Failure to seek further reps breached that rule, and the breach permeated the SoS's DL.



## 8) Ones to watch out for...



- Jelson v SoSCLG in the CoA, 17/18.10.17: approaching FOAN on a “policy-off” basis + relevance of figure for total dwelling need to meet need for affordable housing.
- WMS challenge in High Court, 7/8.11.17: failure to consult on the 12.12.16 WMS on Neighbourhood Planning and 3yhls.
- And TBD how the White Paper + OAN consultation will be reflected in revisions to the NPPF...



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