

NPPF2: housing delivery & supply and other aspects affecting residential development



Charles Banner - September 2018

TOP 10



(1) Gateways to the ‘tilted balance’ for residential $\frac{L}{C}$ applications/appeals

- NPPF 11(d) & footnote 7 – the circumstances where “*the policies which are most important for determining the application are **out of date***”
include:
 - Where the LPA can’t demonstrate a **5YHLS**;
 - Where (from Nov 2020) the **Housing Delivery Test** indicates that delivery was below 75% of housing required over the previous 3 years (25% from Nov 2018; 45% from Nov 2019).
 - How much of a difference will this make in practice?
- The “**absent**” and “**silent**” limbs of NPPF1 para. 14 have been replaced with “*where there are **no relevant development plan policies***”.
 - Cf **Barker Mill** [2017] P.T.S.R. 408: “Essentially “*silence*” is concerned with whether the development plan contains a policy or body of policy relevant to the proposal under consideration and sufficient to enable the acceptability of the proposal to be judged in principle.”
 - Practical implications in the residential context? ... see next 2 slides



APP/Q3115/W/16/3165351 (CAB International, Wallingford) - Inspector Christina Downes at para. 7:

“The development plan includes the *South Oxfordshire Core Strategy* (CS) adopted in 2012 and the saved policies in the *South Oxfordshire Local Plan 2011* (LP) adopted in 2006. The CS was to be followed by a *Site Allocations Development Plan Document* (DPD) to identify development sites in the district. The latter has never been produced and so the development plan is silent on where non-strategic housing is to be located.”

- If the proper analysis of this is that the DP didn't purport to be the last word on these issues and therefore wasn't 'sufficient' to inform their determination – would a different result now apply?

APP/C1570/A/14/2223280 (Land East of St Edmunds Lane, Great Dunmow) –
Inspector Karen Baker:

“83. The proposed development would include the provision of 22 custom/self build dwellings on the appeal site. ...**The Local Plan does not make any provision for meeting the needs of people wishing to build their own homes, contrary to the guidance in Paragraph 50 of The Framework. Indeed, the Council accepted at the Inquiry that the Local Plan is absent or silent on this issue.**

88. In addition, **I have found that the development plan is silent and absent in respect of the provision of custom/self build housing. Given these factors,** having regard to Paragraph 14 of The Framework, planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in The Framework taken as a whole. “

(2) No more consideration of what are “*relevant policies for the supply of housing*”



- NPPF1 para. 49 provided that “relevant policies for the supply of housing should not be considered up-to-date” where the LPA can’t demonstrate there is a 5YHLS.
- ***Hopkins Homes v. SSCLG*** [2017] 1 W.L.R. 1865: debate between ‘broad approach’ (all policies affecting housing proposals) vs. the ‘narrow approach’ (policies expressly dealing with housing supply)
- Supreme Court:
 - Narrow approach more consistent with the language of NPPF 49
 - But where no 5YHLS, tilted balance applies in any event – and that is the context in which the weight to be given to relevant DP policies should be assessed
 - So question of what are ‘housing supply policies’ is no longer central
- NPPF2 footnote 7 now automatically applies tilted balance where no 5YHLS with no separate consideration of housing supply policies

(3) The requirement figure for assessing 5YHLS



- NPPF2 para. 73: requirement for LPAs to demonstrate a 5YHLS is a ***“against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old”*** (FN37: unless SPs have been reviewed & found not to require updating).
- What if DP requirement figure is more than 5 years old, but in the context of an emerging plan the LPA is promoting a higher figure than under the standard methodology, relying on NPPF2 para. 60: ***“exceptional circumstances [which] justify an alternative approach which also reflects current and future demographic trends and market signals”*** and/or includes ***“any needs that cannot be met within neighbouring areas”***?
 - At issue at ongoing inquiry into two conjoined appeals by CALA and Persimmon re. proposed developments in Chinnor, S. Oxfordshire
 - NB definition of ***“Local Housing Need”*** in the Glossary = SM ***“or a justified alternative approach”***
- Note also DL re. Land off Bridle Road, Preston (31 Aug 18) para. 44: ***“Government guidance indicates that the new methodology for assessing the housing needs is incomplete and so it would be premature to make and rely upon such an assessment.”***

(4) Buffers to be added to the requirement figure $\frac{L}{C}$

- NPPF1 para 47: standard 5% buffer; 20% where “*persistent under-delivery*” (evaluative judgment)
- NPPF2 para 73 standard 5%, or
 - 10% where the LPA wishes to demonstrate 5YHLS through an Annual Position Statement (see further below) or a recently adopted plan (defined in FN38) “*to account for any fluctuations in the market during that year*”
 - Note that in marginal cases this may mean that even where the LP EiP Inspector has found there to be a 5YHLS (applying the 5% buffer) the LPA cannot now show a 5YHLS: cf. pending Longdene House inquiry, Waverley District (Oct 2018).
 - 20% where there has been “*significant under delivery of housing over the previous three years*” i.e <85% measured (from Nov 2018) against the HDT.
 - So now objective rather than subjective..

(5) The modified definition of “*deliverable*”

- **NPPF1 footnote 11:**

“To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years...”

- **St Modwen v. SSCLG** [2017] EWCA Civ 1643 para. 38:

“This does not mean that for a site properly to be regarded as “deliverable” it must necessarily be certain or probable that housing will in fact be delivered upon it, or delivered to the fullest extent possible, within five years.”

- **Wainhomes v SSCLG** [2013] EWHC 597 (Admin) para. 54:

“there is no reason in principle or on the proper interpretation of Footnote 11 why the fact that sites are included [in an emerging local plan] may not be taken as sufficient evidence that they are deliverable in the absence of evidence (specific or otherwise) that they are not.”

The effect of *St Modwen* and *Wainhomes* combined:

- APP/E2001/W/16/3165930 - Land north and east of Mayfields, The Balk, Pocklington (2 Nov 2017) Inspector Geroge Baird at para. 16:

“neither the absence of: delivery in the past, planning activity and developer/landowner commitment indicates that the disputed sites are undeliverable and should not be included within the 5-year supply”
- Costs awarded against Gladman on the 5YHLS issue (as they were in a similar appeal decision in the same District on 17 August 2017: see APP/E2001/W/16/3165880 Land South of Back Lane, Holme-on-Spalding Moor, Inspector Olivia Spencer)
- Post *St Modwen* many other LPAs revised their HLS assessment upwards

- NPPF2 Glossary now defines deliverable thus:

“To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. Sites that are not major development, and sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (e.g. they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans). **Sites with outline planning permission, permission in principle, allocated in the development plan or identified on a brownfield register should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.**”

- At least partially undoes the effect of *St Modwen and Wainhomes*.

(6) The 5YHLS Position Statement

- NPPF2 para. 75: a LPA may demonstrate 5YHLS through an “*annual position statement*” which:
 - “*(a) has been produced through engagement with developers and others who have an impact on delivery, and been considered by the Secretary of State; and*
 - “*(b) incorporates all the recommendation of the Secretary of State, where the position on specific sites could not be agreed during the engagement process*”
- The ‘price’ of this option is a 10% rather than 5% buffer: para. 73(b).
- Consultation Draft PPG p.19 re engagement process & resolution of disputes by PINS who “*will consider the evidence provided by both the local authority in the engagement statement*”
 - Scope for making reps to PINS?
 - Judicial review where inadequate opportunity to put case?
 - Not yet followed through into adopted PPG – watch this space

(7) Practical consequences of the increased emphasis on delivery



- NPPF para. 76:

“To help ensure that proposals for housing development are implemented in a timely manner, local planning authorities should consider imposing a planning condition providing that development must begin within a timescale shorter than the relevant default period, where this would expedite the development without threatening its deliverability or viability. For major development involving the provision of housing, local planning authorities should also assess why any earlier grant of planning permission for a similar development on the same site did not start.”

- Applicants/appellants should be proactive to show commitment to delivery (and LPAs should scrutinise):
 - Volunteer the para. 76 condition where possible (NB alternative formulation for land promoters / land owners with outline application)
 - Evidence of track record of delivery (or in the case of land promoters) facilitating delivery in the area
 - Provide clear timeline

(8) Neighbourhood Plans and housing

Greater steer to NPs to meeting housing requirements

- NPPF2 para 65: *“strategic policies should... set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations.”*
- Para 66: where this is not possible, e.g. because a NP area has been designated late in the strategic plan-making process, or the strategic plan has already been adopted, *“the local planning authority should provide an indicative figure if requested to do so by the neighbourhood planning body”*.
- Harder but not quite impossible for NP set its own unilateral figure (c.f. Chinnor NP said by the LPA at current inquiry to set the figure at zero).

Consequence of conflict with a NP

- NPPF2 para. 14: even where tilted balance applies, refusal is likely where there is a conflict with a NP which is less than yrs old and contains policies and allocations to meet its identified housing requirement unless:
 - there is less than a 3YHLS; or
 - applying the HDT the LPA’s housing delivery was less than 45% over the previous 3 years.

(9) Custom and self build housing

- NPPF2 para. 61: the needs of those “wishing to build their own homes” (i.e. self build and custom build) “*should be assessed and reflected in planning policies*”.
- A beefed-up formulation compared to the equivalent paragraph of NPPF1 (para. 50 “*plan for*”).
- Coupled with the statutory duties under the Self Build and Custom Housebuilding Act 2015 and the regulations passed under it, scope for tilted balance being engaged (irrespective of 5YHLS) on basis that DP is “*out of date*” or has “*no relevant policies*” where it does not make provision for self build or custom build to an extent that reflects an assessment of local need.
- Exempted from minimum requirement of 10% Affordable Housing: NPPF2 para. 64(c)

(10) Appropriate assessment and the disengagement of the tilted balance

- NPPF2 para. 177 (in substance identical to para. 119 in NPPF1):

“The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined”

- The recent CJEU judgment in ***People over Wind*** means that mitigation can't be relied upon to rule out the need for AA.
- Mitigation can be relied upon at the AA stage to reach a conclusion that the development would not adversely effect the integrity of the EU habitat and can therefore be authorised consistently with the Habitats Directive and Regulations.
- HOWEVER, in such a situation, the effect of para. 177 is that even though there is no legal bar to granting permission, the tilted balance still doesn't apply.
- Obvious gold plating / legally unnecessary. Govt response to consultation indicates it is still being considered.
- Practical consequences: ecological evidence may be necessary to show likely significant effects can be ruled out without reliance on mitigation.