

THE PRACTICAL USE OF THE NPPF AT APPEALS

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Using the NPPF at appeals - topics

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1. Role of the NPPF at appeal

- SoS's press release announcing NPPF2, called it a 'rule book', but it is a material consideration under s.38(6) PCPA
- Alistair's talk has already covered:
 - The Interpretation & Application of policy.
 - The post *Hopkins Homes* approach of the courts to interpretation arguments in recent cases, such as *Barwood Strategic*, *Mansell v Tonbridge* and *Samuel Smith*.
- Cross-examination of the meaning of NPPF (or LP policy).



2. Approach to Decision-making

- LPAs should approach decisions on proposed development in a positive and creative way & work pro-actively with developers to secure developments that will improve economic, social and environmental conditions [38].
- Planning conditions should be kept to a minimum. Pre-commencement conditions should be avoided, unless clear justification [55].
- Nb. Regs made under the Neighbourhood Planning Act 2017 mean that from 1 Oct 2018, applicants are required to provide their written consent to pre-commencement conditions (unless exclusion applies), on a pp granted, or modified, after that date.

Approach to Decision-making (cont'd)

- Design is a topic that has been given increased emphasis in NPPF2 [124-132].
- The creation of high quality buildings & places is fundamental & good design is a key aspect of SD [124].
- Design quality should be considered throughout the evolution & assessment of proposals. Emphasis on involving local community – early discussions about design and style encouraged [128].
- Applications that demonstrate early, proactive and effective engagement with local community should be looked on more favourably than those that cannot [128].



3. The Revised Presumption

- Purpose of the planning system is to contribute to the achievement of sustainable development [7]
- So that sustainable development is pursued in a positive way, at the heart of the NPPF is a presumption in favour of sustainable development [10]



The Revised Presumption (cont'd)

- For decision-taking [11], the presumption means:
 - Approving development proposals that accord with an up to date DP without delay [11c]; &
 - [11d] Where there are no relevant DP policies, or the policies which are most important for determining the application are out of date, granting pp unless:
 - (i) The application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
 - (ii) Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

4. Housing

- To determine the minimum number of homes needed, strategic policies should be informed by a LHN assessment, conducted using the standard method in national planning guidance, unless exceptional circumstances justify an alternative approach [60].
- Consultation now published on revisions to standard methodology for assessing housing need (in light of new household projection figures), but
- NPPF policies are material for decision-making from the date of publication [212]

Housing (cont'd)

- The tilted balance & residential applications/appeals.
- The provision in NPPF1 [49]: “Relevant policies for the supply of housing should not be considered up-to-date if the LPA cannot demonstrate a 5yr supply of deliverable housing sites” - does not feature in NPPF2.
- The debate about the narrow approach (housing supply policies) or the broad approach (policies affecting housing devp), was put to rest in *Hopkins Homes*, but NPPF2 removes need to define housing supply policies, because where there is no 5yr HLS, the tilted balance applies in any event [Fn 7] – & the decision-maker has to decide the weight to be given to the relevant DP policies.

Housing (cont'd)

- Note the modified definition of deliverable: NPPF1 @ Fn11, then NPPF2 Glossary & now the proposed 'clarification' in MHCLG's Oct consultation document.
- Fn11: "realistic prospect" of housing being delivered within 5 years, had been considered by the courts, in particular:
 - **Wainhomes** [2013] (HC) – no reason why the fact that sites are included in an emerging LP may not be taken as sufficient evidence that they are deliverable, in the absence of evidence they are not.
 - **St Modwen** [2017] (CA) – 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 5 years.

Housing (cont'd)

- LPAs should consider imposing a condition to secure delivery on a shorter timescale than the relevant default period – where this would expedite development, without threatening deliverability or viability [76].
- For major development involving housing, LPAs should assess why any earlier grant of pp for similar development on the same site did not start [76].



5. Local Plans

- Plans submitted for Examination on or before 24 Jan 19 are to be assessed applying the policies in NPPF1 [214].
- So, a relevant factor in preparation of an appeal is that the soundness of the policies in such plans will be assessed against NPPF1, but the policies in NPPF2 are material considerations from the date of publication [212]
- Plus NPPF2 makes clear Plans may need to be revised to reflect policy changes in NPPF2 (to be progressed asap).
- Application of the Std Methodology in Plans – mixed messages over the summer – instances of Insps endorsing std methodology, or not doing so, because of consultation.

Local Plans (cont'd)

- Note that in relation to Soundness, approach in NPPF2 retains much of NPPF1 – but a key change is that to be justified, the Plan no longer has to be the most appropriate, but an appropriate strategy [36].

6. Neighbourhood Plans

- NPPF2 makes clear Govt's enthusiasm for NPs continues, as does their importance.
- Policies for non-strategic matters can be included in NPs, as well as LPs [18].
- NPs should not promote less development than set out in strategic policies for the area [29]. There is more emphasis on meeting housing needs [65-66].
- Once a NP in force, its policies take precedence over non-strategic policies in a LP covering the neighbourhood area, where they are in conflict – unless superseded by strategic/non-strategic policies adopted subsequently [30].



Neighbourhood Plans (cont'd)

- Design – NPs can play an important role in identifying the special qualities of each area and explaining how this should be reflected in development [125].
- In relation to the presumption in favour of SD, in addition to [11], para 14 provides that in situations where the presumption (at 11(d)) applies to housing applications, the adverse impact of allowing development that conflicts with the NP is likely to significantly and demonstrably outweigh the benefits, provided:

Neighbourhood Plans (cont'd)

- The NP became part of the DP two years or less before the date on which the decision is made.
- The NP contains policies & allocations to meet its identified housing requirement.
- The LPA has at least a 3 year supply of deliverable housing sites against the 5 year supply requirement (including the appropriate buffer – set out in [73]) and
- The LPA's housing delivery was at least 45% of that required over the previous 3 years.

7. Green Belt

- Much remains as before –
 - The importance placed on the GB.
 - The aims, characteristics, purposes of the GB & the general extent of GBs already established.
- There are changes in relation to how GB boundaries are reviewed – only in exceptional circumstances (outside scope of this talk).
- In context of appeals & sites within the GB – probably the most interesting change is the return (within the list of ‘not inappropriate’ development) of allowing material changes in the use of land – provided they preserve GB openness and purposes [146].



Green Belt (cont'd)

- Any harm to openness or GB purposes means the exception does not apply – *R (Boot) v Elmbridge*.
- Inappropriate development. NPPF2 [143-144] makes clear that, as before, inappropriate development is by definition harmful and requires vsocs to justify.
- Substantial weight given to any harm to the GB.
- In considering proposed development, the balance required is that other considerations must clearly outweigh potential harm to GB by reason of inappropriateness, and any other harm resulting from the proposal.
- Tilted balance in para 11 is not engaged (unless appropriate development).

8. Natural Environment

- Much remains as before
 - Main objectives of policy on the NE are set out at 170.
 - Protection & enhancement of valued landscapes, sites of biodiversity or geological value & soils – commensurate with their identified status. (Nb. NPPF1 sought to “minimise impact” on biodiversity.)
 - Recognition of intrinsic character & beauty of the countryside.
 - Maintaining the character of undeveloped coasts, while improving access, where appropriate.
 - Plans should distinguish between the hierarchy of international, national & locally designated sites [171] & protection should be commensurate with status, or identified quality in the DP [170].

Natural Environment (cont'd)

- Some strengthening of the language used to protect the environment [172-174] e.g:
 - In relation to the limitations on the scale of development in National Parks, AONBs & the Broads.
 - The presumption against major development within Heritage Coasts.
 - The loss of ‘irreplaceable habitat’, such as ancient woodland, requires wholly exceptional reasons. (Is the “wholly exceptional reasons” test met by showing that public benefit would clearly outweigh the loss/deterioration of habitat (the e.g. given in Fn58 re infrastructure projects?)



Natural Environment (cont'd)

- The issue whether a site forms part of a Valued Landscape has been the subject of dispute at many appeals.
- ***Stroud DC v Gladman*** provided some certainty – in particular that ‘valued’ is not the same as ‘designation’ & to be ‘valued’ a site had to show some demonstrable physical attribute.
- The matter was revisited by Ouseley J in ***CEG v SSCLG*** [2018]:
 - A site’s role in the wider landscape does not depend on ‘demonstrable physical attributes’ of a particular site.

“It would be bizarre if the way in which the red line was drawn, defining the site on whatever basis was appropriate, and which need have nothing to do with landscape issues, crucially affected landscape evaluation. It would be equally bizarre to adopt a wholly artificial approach to landscape evaluation where, in most cases, a development site is but part of a wider landscape.”

Natural Environment (cont'd)

- Appropriate Assessment. In the *People over Wind* [April 2018] and *Grace & Sweetman* [July 2018], the CJEU decided that Art 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an AA of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.
- So, AA of habitats impact is required in plan-making & decision-taking whenever there is a potential impact on a habitats site, regardless of any mitigation measures proposed.

Natural Environment (cont'd)

- NPPF2 [177] states that the presumption in favour of SD does not apply where development requiring AA because of its potential impact on a habitats site, is being planned or determined.
- MCLG has made clear in its Oct consultation document that the policy was not intended to exclude sites with suitable mitigation from the application of the presumption.
 - So, proposed revised 177 disapplies the presumption where the plan/project is likely to have a significant effect on a habitats site (alone or in combination with other plans/projects), unless an AA has concluded that there will be no adverse effect from the plan/project on the integrity of the habitats site.

9. Heritage

- Much the same as before.
- Main point to note is para 193 which makes clear (following the post NPPF1 litigation in cases such as *Barnwell Manor, Mordue* etc) that when considering impact on the significance of a DHA, great weight should be given to the asset's conservation (the more important the asset, the greater the weight) – irrespective of whether any potential harm amounts to substantial harm, total loss, or less than substantial harm to its significance.



Watch this Space

- MHCLG's consultation on the standard methodology for housing need assessment, the definition of deliverability and revisions to para 177 on habitats – runs to 7 Dec.
- Expect to see plenty of cases in HC as 2018 & 19 progress as the construction of the NPPF is explored.

