

Development Plans: Current legal issues

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(With thanks to Richard Turney and Alexander Shattock)

Overview

- Reasons, and the relevance of previous appeal decisions to the examination process
- The timing of challenges to development plans
- When do development plan policies go out of date?
- On the horizon: environmental challenges to local plans

1. Reasons and the relevance of previous appeal decisions to the examination process

- Question: to what extent does an Examining Inspector have to give reasons for departing from a conclusion reached in a planning appeal?
- This issue was considered by Sir Duncan Ouseley in ***Dylon 2 Ltd v Bromley LBC*** [2019] EWHC 2366 (Admin) (6 September 2019).

Dylon 2 Ltd v Bromley LBC (1)

Facts

- On 16 January 2019 Bromley LBC adopted the Bromley Local Plan (BLP).
- The BLP had passed examination in December 2017.
- The Claimant, Dylon 2 Ltd, was a participant at the examination.
- Dylon 2 claimed, under s113 of the PCPA 2004, that the BLP should be quashed because of legal errors in the judgment of the Inspector that the BLP would be sound if modified.
- Essentially, Dylon 2 wanted more provisions in the BLP to revise housing targets upwards and to increase the supply of housing.

Dylon 2 Ltd v Bromley LBC (2)

Law

- The judge dismissed the appeal on all grounds.
- One of the grounds of claim was that the Examination Inspector had failed to take account of a recent appeal decision which had held that Bromley's housing supply figures were speculative.

Dylon 2 Ltd v Bromley LBC (3)

Law

- The judge played down the importance of the previous appeal decision, emphasising that an appeal is a different exercise to an examination [57].
- He provided important further guidance on the application of *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P&CR 137, a case about when a planning decision-maker is required to give reasons for departing from an earlier decision on the same point.

Dylon 2 Ltd v Bromley LBC (4)

Law

- The judge said at [58]

“...properly understood, [*North Wiltshire*] is in line with the higher authorities on the giving of reasons in planning appeals; the appeal Inspector is **obliged to give reasons for her decision on the principal points in controversy**, but is not obliged to give reasons explaining how she dealt with every material consideration. There is **no special rule for earlier decisions, which could be material considerations, nor for earlier decisions which are said to be inconsistent** in some way or to some degree.”

Dylon 2 Ltd v Bromley LBC (5)

Law

- This is a fairly significant gloss on *North Wiltshire* as previously understood
- The consequence of this ruling is that failing to give reasons for departing from a conclusion reached in a previous appeal decision will only introduce legal error to an examination if the conclusion in the appeal decision is an “issue of critical importance” to the Examination Inspector’s conclusions on soundness [60]

Dylon 2 Ltd v Bromley LBC (6)

Law

- At [64] the judge raised the “degree of difference” between a conclusion reached in a previous appeal and an examination decision as a factor as to whether reasons were required for departing from the conclusion reached in the previous appeal.
- This raises a question for future examinations: how stark must the difference be before an Examination Inspector is required to give reasons for departing from an earlier appeal decision?

Dylon 2 Ltd v Bromley LBC (7)

- The judge also provided guidance on the difference between the role of Examination Inspectors and Appeal Inspectors. He said at [57]:
 “The obligation on a local plan Inspector to give reasons focuses on the reasons for her recommendation, here that the plan was sound; her reasons must be the reasons for that decision. **She is performing an inquisitorial role rather than conducting a series of appeals**, giving reasons dealing with the **principal points of controversy**, such as would apply to appeal decisions; see my analysis in *Cooper Estates Strategic Land Ltd v Royal Tunbridge Wells Borough Council* [2017] EWHC 224 (Admin) at 23-29, and *Town End Farm Partnership v Sunderland City Council* [2018] EWHC 2662 (Admin) . It is therefore **misconceived to seek legal error in the reasons of a local plan Inspector otherwise than by reference to the task she had to perform.**”

Reasons generally

- This emphasises the fact that any challenge to the failure to give reasons in an examination must focus on a key point of controversy in the examination itself.
- See also *CPRE (Surrey) v Waverley BC* and forthcoming Guildford challenges
- From a strategic point of view this means identifying key issues for a potential reasons challenge to a plan before the examination takes place and
 - If your client is anticipating a later challenge on that issue, obtaining recognition from the Inspector that the issue is a key point
 - If your client may want to resist a later challenge on that issue, playing down the importance of the issue at the examination.

2. The timing of challenges to neighbourhood plans

- An increasingly important issue in challenges to development plans is the timing of when a challenge is brought.
- E.g. Section 61N of the Town and Country Planning Act 1990 imposes strict time limits on challenges at different stages of the production of a Neighbourhood Plan.
- This was considered in *R. (on the application of Oyston Estates Ltd) v Fylde BC* [2019] EWCA Civ 1152 (5 July 2019).

Oyston (1)

- This case was about the statutory provisions in section 61N of the Town and Country Planning Act 1990 for proceedings to challenge the steps taken by a local planning authority in making a neighbourhood plan.
- The claimant Oyston promoted a site for inclusion within the settlement boundary as part of the neighbourhood plan process without success. Its claim for judicial review sought an order quashing the borough council's decision to make the plan.

Oyston (2)

- The first instance judge, Kerr J, held that the challenge was brought out of time.
- The issue was that at each separate stage of the neighbourhood plan-making process contained in section 61N, a strict 6-week time limit applies to bring a judicial review challenge.
- The judge held that a claimant could not bring a challenge at the end of the process (the making of the plan) if in reality the challenge related to the lawfulness of a decision made at an earlier stage of the process (the decision to proceed to referendum).

Oyston (3)

- In the Court of Appeal, Lindblom LJ agreed [35]:
 “...to construe section 61N as if claimants were free to choose when to bring a challenge to the decision or action to which each subsection relates, whether within the relevant six-week period or outside it, would be to undo the express time limits for the bringing of claims. It would upset the carefully constructed arrangements for challenges to be brought only within a specific time from a specific decision or action. To read this qualification into section 61N would be to add words Parliament did not insert, and negate the effect of the words it did. The time limits in subsections (2) and (3) would be otiose if a challenge of any kind could be begun within six weeks of the plan being made. There would have been no point in providing those time limits if the only one that was effective was in subsection (1).”

Oyston (4)

Conclusions

- For neighbourhood plans, if aggrieved by a decision made early on in the plan-making process, *challenge the decision as soon as possible*. Do not wait until the plan is almost made, as it may be too late to bring a challenge.
- Note the different approach under s 113 PCPA 2004: time may not start running until adoption- but see *R (oao CK Properties (Theydon Bois) Ltd.) v Epping Forest DC [2018] EWHC 1649 (Admin)*.

3. When does a development plan document go out of date?

- Many development plans have an expiry date. Once that date has passed, does this mean that the policies within it should be treated as out-of-date? And is the question of whether a policy out-of-date a matter of law or planning judgment?
- *Peel Investments (North) Ltd v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2143 (Admin) (2 August 2019) considered this question.

Peel Investments (1)

The facts

- A developer challenged the SoS's decision to uphold the LPA's decision.
- One of the reasons for refusal was that the development was contrary to a policy in the 2004-2016 UDP which prohibited development which would fragment or detract from the openness of a strategically important "green wedge".
- The claimant argued that the policy should be considered out-of-date because it was a constituent policy within a development plan document which, as a whole, had passed its expiry date.

Peel Investments (2)

The law

- Dove J noted that both the 2012 and the 2018 NPPF contained policies dealing with the approach to be taken as to whether or not a policy in the development plan should be considered out-of-date.
- The approach under the old NPPF was considered in *Bloor Homes East Midlands v SSCLG* [2014] EWHC 754 (Lindblom J).
- Dove J adopted the approach set out in *Bloor Homes* held that the Inspector was entitled to conclude as a matter of planning judgment that the policy was not out of date and remained consistent with the NPPF [63].

Peel Investments (3)

- The judge said at [65]
 “a policy may continue to be effective in delivering its original objectives and, moreover, may have been saved as the present policy was, and thus remain part of the development plan to be applied in accordance with the statutory Framework. Thus, the exercise required by paragraph 213 of the Framework and the *Bloor Homes* test is **not one which is dictated simply by the passage of time, but rather an assessment of consistency of the Framework**, and the factual circumstances in which the policy is being applied including, amongst other things, what the Inspector characterised as "results on the ground".

Peel Investments (4)

- He then said at [66]

“It is very far from uncommon to have policies in a plan related to environmental protection whose objectives will, and are intended to, continue well beyond the end of a plan period... The kind of policies to which this might apply are policies such as Green Belt (one of the characteristics of which is its "permanence"), or policies pertaining to environmental assets such as those relating to heritage assets or internationally protected and irreplaceable habitats. It would be both counter-intuitive, and contrary to long standing provisions of national policy, if policies in a development plan protecting these interests were deemed out-of-date at the expiration of a plan period".

Peel Investments (5)

Conclusions

- The judge's analysis suggests that certain kinds of policies are, by their nature, more likely to avoid being considered out-of-date notwithstanding the fact that a plan period has expired. The examples he gave were green belt policies and environmental policies.
- The judge also emphasised the fact that while the passage of time is relevant to a policy being considered out-of-date, the real question was whether the passage of time had resulted in a change of circumstances such that the policy was no longer consistent with the NPPF or delivering "results on the ground." He accepted that both were a matter of planning judgment.
- This case therefore emphasises the difficulty of challenging an Inspector's conclusion that an old policy is not out-of-date.

Legal challenges on the horizon: carbon reduction

- *ClientEarth* recently sent letters to 105 councils in the process of preparing or reviewing their local plans, threatening them with legal action if their strategies do not include "*evidence-based carbon reduction targets*" (PlanningResource)



Legal challenges on the horizon: carbon reduction

- Section 19(1A) of the Planning and Compulsory Purchase Act of 2004 requires that local plans include “*policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change.*”
- Plans might be challenged under this provision on sustainability grounds e.g. poor public transport, site allocations not encouraging sustainable lifestyles etc.
- Note potential link to Airports NPS litigation (*Spurrier*) just been heard by Court of Appeal Watch this space- the focus of environmental campaign groups has so far been central government but this is set to change.

Legal challenges on the horizon: Guildford

- Range of issues including treatment of appeal decision (*Dylon*) and reasons
- Particular point on “exceptional circumstances” for Green Belt release where LPA is planning to meet more than OAN
- Consequences of political change at Council vs being caught by standard method
- Case being heard November 2019