Landmark Chambers

RUPERT WARREN QC

NPPF
2019 CHANGES AND CASE LAW

Ground to be covered

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- Changes to the NPPF in 2019
- Cases relating to the interpretation of paragraph 11
- Cases relating to specific paragraphs: 172, 109/111, 198

Changes

- Changes made in 19 February 2019
- Preceded by consultation on the “Technical Consultation” of October 2018

1. LHN to be used for calculating 5 year supply in applications and appeals where the adopted strategic policies are more than 5 years old (unless reviewed and found not to need updating)

Footnote 37 (February 2019): now has added to it

“Where local housing need is used as the basis for assessing whether a five year supply of specific deliverable housing sites exists, it should be calculated using the standard method set out in national planning guidance”

Changes

2. Annex 2 definition of “deliverable” amended; key new wording underlined: (NB major = 10 or more homes)

a) Sites which do not involve major development and have planning permission, and all 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 (for example because they are no longer viable, there is no longer a demand for the type of units or sites have ling term phasing plans).

So all outline permissions for 9 or fewer are presumed deliverable

Changes

Paragraph 177 amended to deal with the issue caused by *People Over Wind.* In the July 2019 version, the presumption was disapplied if an AA was required.

- It now reads:

The presumption in favour of sustainable development does not apply where the plan or project is likely to have a significant effect on a habitats site (either alone or in combination with other plans or projects), unless an appropriate assessment has concluded that the plan or project will not adversely affect the integrity of the habitats site

Changes

- NB in passing an example of the position which applies when Government policy is changing: *Gladman Devts Ltd v SSHCLG and Medway* [2019] EWHC 2143
- IR completed in March 2018 but reps made after *People Over Wind* in July 2018. Decision in early November 2018 after the Technical Consultation. Dismissed partly on basis of Habitats.
- Gladman argued that NPPF policy had never been (eg in July 2018) to disapply presumption if AA had shown no harm; alternatively that the Technical Consultation should have been treated as in effect in November 2018.
- Court rejected challenge: the policy had not changed as at November 2018

Cases on paragraph 11's 'decision taking' part

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For **decision taking** this means:

c) Approving development proposals that accord with an up-to-date development plan without delay; or

d) Where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission 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.

When are policies “out-of-date”?

- Footnote 7 – where no 5 year HLS, HDT test levels failed (plus transitionals)

- *Wavendon Properties Ltd v SSHCLG* [2019] EWHC 1524
- Disappointed developer argued that if *one policy* which was important was found to be out-of-date, then the presumption was engaged
- Court held that the decision maker must

i. Establish which policies are the most important for determining the case

ii. Examine each one to determine whether they are out-of-date, applying the Framework

iii. Judge whether taken as a whole they are to be regarded as out-of-date

NB also *Gladman v SSHCLG* [2019] EWHC 127 – “acid test” is consistency with Framework (in the context of an inconsistent judgement by an Inspector)

Paragraph 11 cases

- That approach followed in *Paul Newman New Homes Ltd v SSHCLG* [2019] EWHC 2367. The judge also held:
- One relevant development plan policy prevents the presumption being triggered on the basis of no relevant development plan policy
- Relevant means anything more than a fanciful connection
- Relevant does not mean important for determining the application
- A policy is not out-of-date simply because it is time-expired
- A single policy in the set of policies ‘most important’ for determining the application can prevent that trigger from applying
- Paragraph 11 is not the same as paragraph 14 of the 2012 NPPF and should not be approached in the same way or on the basis of 2012 version case law

Paragraph 11- judging whether "out-of-date"

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- *Peel Investments (North) Ltd v SSHCLG* [2019] EWHC 2143 drills further into the exercise if judgement as to whether a policy or policies are out of date
- A policy is not necessarily out of date because the plan period has expired
- Such a conclusion cannot be drawn from the 2012 Development Plan Regs
- Whether a policy is out of date is a judgement
- Question is not one of time but of consistency with the NPPF and potentially, depending on the facts, will turn on other considerations
- These could include changes to other aspects of the Development Plan, or changes on the ground which affected the assumptions underlying some aspect of the policy. See also *Gladman v SSHCLG* [2019]
- See for a recent example in practice APP/D0121/W/18/3212682 Land north of Youngwood Lane Nailsea, 1 November 2019, at [15]-[16].

Footnote 6: disapplying the presumption

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- *Monkhill Ltd v SSHCLG* [2019] EWHC 1993 Holgate J sets out clear guidance on the process which should be followed when judging whether the footnote 6 provisions rule out the presumption under 11(d)(i):

- If 11(d) applies, the next question is whether one or more “Footnote 6” policies are relevant – if not, proceed to the tilted balance in 11(d)(ii)
- If there are, the Footnote 6 policy/policies need to be applied to the facts of the case
- The application of some Footnote 6 policies requires all relevant planning considerations to be weighed (eg Green Belt). If the exercise indicates planning permission should be refused, there is no role for 11(d)(ii)

Monkhill continued

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- In other cases, the application of the Footnote 6 policy may not require all planning considerations to be taken into account (eg para 196); the other material considerations must be taken into account in the ordinary balance (but the Footnote 6 exercise means that the tilted balance does not apply).

The rest of the Framework

- *Monkhill (as above):* para 172

- Claimant argued that the first part of para 172 (Great weight to conserving the AONB) did not qualify as a Footnote 6 policy because it did not (unlike the rest of the paragraph, which says that permission should be refused for major development in the AONB except in very limited circumstances) have a self-contained balance or test
- The judge found that the first sentence of para 172 was capable of sustaining a clear reason for refusal and therefore its application was capable of disapplying the Framework under 11(d)(i)

Paragraphs 109 and 111

- In *Satnam Millenium Ltd v SSHCLG* [2019] EWHC 2631, the Claimant succeeded in having a decision quashed on the basis of logical inconsistencies between the approach to highways harm and the approach to whether the scheme was deliverable at all. However, as part of the determination of the claim, the Court held:
- 109 and 111 need to be read together: 109 contains the injunction to refuse if a development would lead to severe cumulative residual harm.
- Para 111 requires a TA sufficient to be able to judge the question in 109 – without one, 109 does not itself apply; nevertheless, it is open to the decision maker to refuse permission on the basis of concerns about the absence of evidence showing an absence of harm

Conflicts with Neighbourhood Plans

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- In *Chichester DC v SSHCLG* [2019] EWCA Civ 1640, the Appellant argued that para 198 of the 2012 NPPF should have applied such that permission was refused.
- 198 said that conflict with a made NP should lead to refusal; that has been recast in 2019 NPPF para 12 as where an application conflicts with "an up-to-date development plan (including any neighbourhood plans that form part of the development plan) permission should not usually be granted".
- No Court decision on the interpretation of 12 (2019) but *Chichester* is a signpost – the appeal failed because the relevant policy aspect (housing strategy) was not contained solely in the NP but spread between the NP and the LP. That disposed of the para 198 argument and also shows how para 12 judgements might be made.

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Thank you for listening

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