The NPPF and the Presumption in Favour of Sustainable Development

Q: is it open to decision-makers to use terms (such as minor, limited, etc) when carrying out a balancing exercise, given that such terms are not referred to or defined in the NPPF?

A: Yes – a decision-maker is not confined to using terms which appear in, or are defined in, the NPPF when carrying out a balancing exercise. If a decision-maker is using a term which appears in the NPPF, s/he will need to understand it correctly. However, when carrying out a balancing exercise, a decision-maker can describe the weight to be given to factors in a way s/he considers useful. The error which the local authority made in *R (James Hall and Company Ltd) v City of Bradford MDC* [2019] EWHC 2899 (Admin) was to proceed on the basis that "minimal harm" was equivalent to "no harm". There was no class of minimal harm in NPPF 193 or 196, and therefore once harm was identified, it had to be treated as less than substantial harm.

Q: should the PPG be given less weight than the NPPF?

A: Not necessarily, this being a matter of judgment for the decision-maker. The weight to be given to various factors is always a matter for the decision-maker: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759. That said, a decision-maker would be wise to have regard to the fact that the NPPF has a higher status than the PPG, and is often the product of consultation. The courts sometimes say that policy in the NPPF is "amplified" in the PPG (e.g. *R (East Bergholt PC) v Babergh DC* [2019] EWHC 2200), but this is not to say that the PPG can deal only with matters raised in the NPPF.

Q: how much weight should be given to the High Court decision in *R (West Berkshire DC) v SSCLG* [2016] PTSR 215, given that it was overturned in the Court of Appeal [2016] 1 WLR 3923?

A: The High Court decision was overturned on all grounds by the Court of Appeal. It is therefore unlikely to be suitable to rely upon the reasoning in the High Court. The Court of Appeal (at para. 3) praised the "very full account of the planning background" set out by the High Court, referring in particular to certain paragraphs. It may be appropriate to rely on the essentially descriptive elements of the High Court's decision, but not upon its reasoning.

Q: does NPPF 58 set out a complete list of matters to be dealt with in a Local Enforcement Plan?

A: NPPF 58 does not state that the matters it refers to are the only matters which could be dealt with in a Local Enforcement Plan. Further guidance in relation to Local Enforcement Plans is set out in the PPG, Section "Enforcement and post-permission matters", at para. 006.

Q: Are decision-makers taking the step-by-step approach to the tilted balance?

A: We are not yet aware that decision-makers are routinely following the detailed approach set out by Holgate J in *Monkhill Ltd v SSHCLG*. A decision does not need to legalistically set out every step as described in that case. Indeed, a decision-maker which seeks to follow the approach to the letter may find themselves a hostage to fortune when a challenge suggests that the approach has not been followed exactly.

Q: If there is a housing land supply shortfall, does that mean that policies beyond housing land supply policies can be out of date?

A: The approach in the 2018/19 NPPF has changed from that in the 2012 version. NPPF 11, read with footnote 7, now says that the tilted balance will apply when the most important policies for determining the application are out of date, and that this is deemed to be the case in circumstances of a housing land supply shortfall in an application involving the provision of housing. Footnote 7 does not necessarily render other policies out of date, but it does mean that the tilted balance will apply.

Housing Delivery

Q: is historic shortfall in housing delivery accrued during the plan period wiped clear if after a five year period the council has to engage the standard method for deriving a housing requirement i.e. is this shortfall added to the local housing need derived from the standard method?

A: The historic shortfall is not added to the need figure from the standard method. The standard methodology it is said "*… uses a formula to identify the minimum number of homes expected to be planned for*, *in a way which addresses* projected household growth and *historic under-supply*": see the PPG Reference IDs: 2a-002-20190220 and see also 2a-005-20190220. Given this it is not correct to add historic shortfall to the local housing need derived from the standard method.

Q: How is 5YLS likely to be interpreted where consents exist but delivery has stalled, for viability reasons or as a result of the current crisis?

Q: If a LPA is claiming a HLS at or just over 5 years, can this now be challenged on the basis that given the current crisis, some of the projected delivery may not be delayed or may not come forward? Could it be argued that there will be a duty on LPA's to review their projected delivery ASAP once the likely consequences of the crisis can be quantified?

A: The impact of the current Covid-19 crisis is clearly relevant. There has been a recent appeal decision on this: see the appeal decision in respect of Nine Mile Ride Wokingham at paras. 109 – 111 dated 9 April 2020. The Inspector accepted the view of the appellant that there would be an effect on housebuilding, albeit temporary (lasting 3 – 6 months) and thus removed 168 homes from the trajectory.

Q: Does this mean an oversupply this year cannot be measured against a significant undersupply next year? In other words, if a LPA deliver 130 per cent this year but only 60 per cent next year - are they automatically into the presumption?

A: In calculating the 5YLS the only years that can be looked at are years within the five-year period being considered, so a massive oversupply in a year preceding the relevant five-year period under consideration would be irrelevant. The situation is different with the Housing Delivery Test as this looks at whether delivery was below certain specified percentages of housing required over the previous three years. In that situation one would look at both under and over-supply in that relevant three year-period to see if the percentage was met or not.

Q: In relation to 5 YHLS and in particular paras 73 and 74 of the NPPF is there any relevant case law or appeal decision in respect of Council's seeking to use a 5 year land report (which has not been subject to consultation) as opposed to an annual position statement (APS) for a Local Plan which is over 5 years old? The NPPF seems clear on this that only an APS can be used?

A: We are not aware of any cases on this. Paras. 73 and 74 specifically refers to APSs and these are defined in the glossary as "A document setting out the 5 year housing land supply position on 1st April each year, *prepared by the local planning authority in consultation with developers and others* who have an impact on delivery" (emphasis added).

Green Belt

Q: Can a Local Planning Authority ignore one of the five objectives under NPPF 134?

A: The NPPF says that there are five purposes to the inclusion of land in the Green Belt. Whilst the weight to be given them will be a matter for the local planning authority (and Inspector on appeal or considering soundness of a local plan), a local planning authority which simply ignores one factor may well be acting

unlawfully. It may be that not every purpose is applicable to every parcel of land, but this still requires the purposes to be considered for their relevance.

Q: How is the line drawn between 'mineral extraction' and the equipment, bunds etc which are not strictly for the extraction of minerals?

A: In *Europa Oil and Gas Ltd v SSCLG* [2014] 1 P&CR 3 (High Court) and [2014] PTSR 1471 (Court of Appeal), consideration was given to the question of whether the meaning of "mineral extraction" included exploration for minerals. It was held that it would be odd if there were more support for extraction of minerals than for the exploration for them. This suggests that the courts will take an expansive approach to the question of whether elements are for "mineral extraction".

Q: Would the principles in *Samuel Smith* apply e.g. to solar farms in the Green Belt?

A: Whilst the immediate context of the *Samuel Smith* case was a quarry, it is reasonable to assume that the principles would apply well beyond that immediate context. However, the case was considering mineral extraction, a specific form of development mentioned in para. 90 of the original NPPF (now NPPF 146). This provides that certain specified forms of development are not inappropriate so long as they preserve the openness of the Green Belt and do not conflict with the purposes of including land within it. NPPF 147 relates to renewable energy projects in the Green Belt. *Samuel Smith* was not specifically considering this paragraph.

Q: What if a Local Planning Authority's Green Belt policies are out of date?

A: If a Local Planning Authority's Green Belt policies are out of date (for instance, if it has not been amended to include a new potential exception to appropriateness), then the development plan is still the starting-point. However, the Local Planning Authority or an Inspector may give less weight to non-compliance with an element of the development plan which is no longer in step with the NPPF, according to NPPF 213. Whether the tilted balance would apply would require an analysis of NPPF 11(d). The identification of "the policies which are most important for determining the application" will depend on analysis of the application and the relevant development plan policies more broadly (*Wavendon Properties Ltd v SSHCLG* [2019] PTSR 2077).

Q: What does *Samuel Smith* say about a view in which every new building in the Green Belt automatically adversely affects openness?

A: The NPPF does not say that every new building adversely affects openness. It does however say that the construction of new buildings will be inappropriate development, subject to certain exceptions (NPPF 145). *Samuel Smith* was dealing with a form of development (mineral extraction) which the NPPF says is not inappropriate provided it preserves openness and do not conflict with the purposes of including land within the Green Belt. *Samuel Smith* was therefore not directly about the construction of new buildings. The general emphasis in that case on the planning judgment of the decision-maker will be important to Green Belt cases generally, but in the context of construction this would need to be through the lens of NPPF 145.

Questions have been edited.