

DEVELOPMENT PLAN CHALLENGES



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Introduction

- Notwithstanding the **proposed reforms** to the development plan system, as part of the proposed wider reforms including the introduction of zoning, the current development plan system remains highly relevant and this could well be the case for some time.
- The development plan is at the **heart of the planning system** as development management decisions are based on the development plan: s.38(6) of the PCPA 2004 and s. 70 TCPA 1990.
- Hence, the **importance** of the nature and scope of any right to review the lawfulness of such plans and court decisions on these.
- Themes – **Local Plans** and Neighbourhood **Plans** - housing

LOCAL PLANS: CAPACITY TO CHALLENGE

Aireborough Neighbourhood Development Forum v Leeds City Council (No.1) [2020] EWHC 45 (Admin)

- (1) The Claimant (C) was an **unincorporated association** which had been formerly designated (and its renewal remained pending) as a neighbourhood forum under s.61F of the TCPA 1990 with objectives including the good planning of the neighbourhood.
- (2) C sought to challenge the Council's decision to **adopt a site allocation plan**.
- (3) The Council contended that the Forum did not have legal capacity to bring the challenge as it **was not a "person" aggrieved** within s.113(3) given that it was no longer designated as a neighbourhood forum. It contended alternatively that even if in principle an unincorporated association could be a person aggrieved, **the Forum was not such a person**.

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- (4) Lieven J (14 Jan 2020) considered this as a **preliminary issue** and concluded that an unincorporated association had **capacity** to bring both a judicial review and a statutory challenge.
- (5) The J distinguished private and public law litigation – in **private law** the individual had to demonstrate that they had a **legal right** that was infringed; therefore it was fundamental that they had capacity to sue.
- (6) In contrast the critical question in JR or PSR was whether a claimant was a **person aggrieved** or had **standing** to challenge, which was not a test of legal capacity; it was one of **sufficient interest** in the decision.
- (7) The Forum, the J held, was a local body with a constitution and purposes relating to the good planning of the local area, **whether or not it was designated** under the 1990 Act.

LOCAL PLANS: CAPACITY TO CHALLENGE

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- (9) The fact that its **statutory function** was no longer in existence at the date of the claim did not prevent its more wide-ranging purposes from continuing to apply. Therefore it had **capacity** to bring the claim.
- (10) Wider **public policy** issues had over time led to a more flexible approach to the issue of standing, particularly in matters concerning planning of the local environment, where the nature of the impact might fall most directly on a group of people living in a particular area.

LOCAL PLANS: REMEDY

Aireborough Neighbourhood Development Forum v Leeds City Council (Nos. 2 & 3) [2020] EWHC 45 (Admin)

- (1) The consequential **substantive hearing** held that the Inspector had made a material error of fact amounting to an error of law (No.2 [2020] EWHC 1461 (Admin)). This related to the GB allocations across the area subject to the SAP.
- (2) The J then had to consider the **appropriate remedy**, bearing in mind the amendments to s.113 which expanded the court's powers with an alternative remedy to quashing the plan in whole or part allowing the court to remit it to an earlier stage with appropriate directions(s.113(7)-(7C)).
- (3) In deciding the appropriate remedy, the **starting point** is the nature of the legal errors found and how they could be remedied. The J held that the errors identified **could not be cured** by requiring additional reasons and had been fundamental to the I's analysis (applying *the University of Bristol case* [2013] EWHC 231 (Admin)).
- (4) It was therefore appropriate to **remit the matter** to the SoS and therefore to PINS, rather than quashing all or part of the Plan (No.3 [2020] EWHC 45 (Admin))

LOCAL PLANS: DUTY TO COOPERATE (DtC)

Sevenoaks DC v SSHCLG [2020] EWHC 3054 (Admin)

- There is much criticism of **s.33A of the PCPA 2004** which is reflected in the current proposals for its removal – but no indication of what will replace it.
- In this recent case (13/11/2020, Dove J.) the Council challenged, relying on four grounds, the decision of the Inspector conducting the Examination of its Local Plan who concluded that it had failed to comply with the Duty as there was a “....**lack of ongoing, active and constructive engagement** with neighbouring authorities in an attempt to resolve the issue of unmet housing need and the inadequacy of cross-boundary planning to examine how the identified needs could be met.”
- This followed **vehement criticism** by Council of Inspector’s approach as reported in the planning press – the Council leader accused PINS of “*a huge abuse of the process*” and said that the Inspector’s findings called “*into question the integrity of the whole plan-making system in this country.*”
- The Court held that there was **no substance in any of C’s grounds.**

LOCAL PLANS: DUTY TO COOPERATE

Sevenoaks DC v SSHCLG [2020] EWHC 3054 (Admin)

- (1) C, whose area contains a significant element of **Green Belt** (93%) as well as **AONB** (60%), had begun preparation of its plan in 2015.
- (2) The HLS proposed in the submission Plan (submitted on 30 April 2019) was **75% of the total housing need** derived pursuant to the standard methodology.
- (3) A **DtC Statement** was provided as were a number of **SoCG** with the neighbouring authorities of Tunbridge Wells BC and Tonbridge & Malling BC. No request made to either authority by C to assist it in meeting its unmet need.
- (4) The Inspector had found that once the extent of the unmet need emerged after completion of the regulation 18 consultation, C **should have contacted its neighbouring authorities** in an attempt to resolve the issues arising from the unmet housing needs.

LOCAL PLANS: DUTY TO COOPERATE

Sevenoaks DC v SSHCLG [2020] EWHC 3054 (Admin)

- (5) She concluded that there was no communication let alone engagement in between the emergence of this issue and embarking upon a Reg 19 consultation and this **underpinned her conclusion** that there had not been constructive, active and ongoing engagement. She was addressing the **quality of the manner** in which the issue had been addressed, rather than the identification of a particular solution.
- (6) The matter was not raised with neighbouring authorities **until after the Reg 19** consultation and shortly prior to the submission of the plan.
- (7) The possibility that it **may have led to the same outcome** was nothing to the point – effective constructive engagement had not taken place at the time required. By the time there was communication in respect of this issue it was too late.
- (8) The contention by C that the **neighbouring authorities would have refused to assist**, does not provide any basis for concluding the Inspector's conclusions were irrational.

LOCAL PLANS: ASSESSMENT OF HOUSING NEED

Keep Bourne End Green v Bucks Council
[2020] EWHC 1984 (Admin)

- (1) This decision of Holgate J (July 2020) related to a challenge by a charity against Wycombe DC's decision to adopt a Local Plan which **removed a site of about 32 hectares from the Green Belt** for housing (about 467 dwellings).
- (2) During the period up to the Examination of the Plan, **the ONS published 2016-based population and household projections** which were respectively about 50% and 40% lower than the previous projections.
- (3) However, the Council did not consider that the **revised projections** affected the soundness of the draft plan as was explained in the main modifications (MM6).
- (4) C contended that the **OAHN should be based on the latest figures and revised downwards accordingly.**

LOCAL PLANS: ASSESSMENT OF HOUSING NEED

Keep Bourne End Green v Bucks Council
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- (5) The Inspector concluded that the household projections were only the **starting point** for establishing a housing requirement figure and that, having regard to the importance of boosting supply of housing, it would be unjustified to revisit the plan's evidence base and delay adoption of the plan in the light of the 2016-based projections issued in 2018.
- (6) The Court held that the PPG then applicable stated that local needs assessments should be informed by the latest available information BUT further indicated that, in **the absence of meaningful change in the housing situation**, assessments were not rendered outdated every time new projections were issued. It was a matter for planning judgment with which the court would not interfere unless the decision was irrational.

LOCAL PLANS: ASSESSMENT OF HOUSING NEED

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- (7) The overall package of considerations on which the Inspector relied was plainly capable of amounting to “**exceptional circumstances**” justify altering the GB boundary. The I's judgment was within the range of decisions which a reasonable Inspector could reach and was not irrational (NB. At [164] ref. to *Aireborough 2*).
- (8) The site policy complied with the **Conservation of Habitats and Species Regulations 2017**, bearing in mind that no development would be able to take place without the grant of pp, which itself would be subject to a further appropriate assessment complying at that stage (Judgment [171]-[178]).
- (9) **Footnote:** note the Court's setting out of (i) the **principles** applicable to s.113 challenges (at [55]-[58], [80] & [95] of Judgment referring to *CPRE Surrey v Waverley Borough Council* [2019] J.P.L 505; and (ii) the need for **procedural rigour** in public law proceedings (At [29]-[41] of Judgment).

NEIGHBOURHOOD PLANS: Basic conditions *R (oao Wilbur Developments Ltd) v Hart DC* [2020] EWHC 227 (Admin)

- (1) Developer sought JR of LPA's decision to **accept an examiner's report** into a NDP and to proceed to referendum.
- (2) The issue related to policy HK6 of the consultation draft which stated that a development between two neighbouring villages would only be permitted where it did not lead to **physical or visual coalescence** of the villages or damage their identities.
- (3) Policy HK7, also in issue, specified that development must not impact on **certain views** from one village to the other.
- (4) These covered C's site for which planning permission had been **refused** and the site was **not allocated** in the NDP.
- (5) **Basic condition (a)** (para. 8(2) of Sch. 4B to the TCPA 1990) *requires having regard to national policies contained in guidance issued by the SoS.*

NEIGHBOURHOOD PLANS:

R (oao Wilbur Developments Ltd) v Hart DC

[2020] EWHC 227

- (6) C contended that the Examiner and LPA **failed to have regard** to the NPPF requirement for adequate evidential basis as well as the conclusion that Policy HK7 met the basic conditions and had acted **irrationally**.
- (7) The Court held that the challenge amounted to a **covert way** of impermissibly reviewing the planning merits.
- (8) The LPA's **powers were limited** to considering the examiner's recommendations and reasons for then and to satisfy itself that the draft plan as modified met the basic conditions, was compatible with ECHR rights and met specified statutory requirements.
- (9) The Examiner's reasoning met the required standard and the LPA acted lawfully in adopting this. His approach and findings were **consistent with the NPPF and PPG**.

NEIGHBOURHOOD PLANS:

R (oao Lochailort Investments Ltd) v Mendip

[2020] EWCA Civ 1259

- (1) In contrast in this case the CA did find a “**gaping hole**” in the Examiner’s report.
- (2) The Appellant owned 2 of 10 parcels of land designated as **Local Green Space** (NPPF[99]-[101]) and subject to **Policy 5** which provided that development on LGS would **only be permitted if it enhanced both the original use of the site and the reason for its designation.**
- (3) **NPPF[101]** provides that policies for managing development within a LGS should be **consistent with those for Green Belts.**
- (4) The Examiner found that the plan **met the basic conditions** and that it was consistent with the NPPF.
- (5) However, the developer submitted that Policy 5 was **inconsistent with GB policy** and therefore failed to meet basic condition para 8(2)(a). The High Court (Lang J) **rejected the developer’s application** for JR.

NEIGHBOURHOOD PLANS:

R (oao Lochailort Investments Ltd) v Mendip

[2020] EWCA Civ 1259

- (6) **Allowing the appeal** the CA held that Policy 5 was more restrictive than NPPF[101] and therefore not consistent with it.
- (7) Although any such non-compliance would **not automatically render** a policy unlawful, any departure had to be reasoned. No such reasons were given. Nothing before the authority had considered the question independently meaning that the validity of its decision to approve the Plan **rested on the report of the Examiner**.
- (8) The J had approved the Examiner's view, observing that some national GB policies would be unsuitable for LGSs. However, there was **no justification** in the Examiner's Report for departure from national policy.
- (9) See the CA Judgment in relation to **two other grounds** as it provides guidance as to the correct approach.

Thank you for listening

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