Landmark Chambers

HOUSING LAND SUPPLY AND PARA 11 NPPF

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Overview

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2020's cases unsurprisingly grapple with the maturing state of NPPF housing policy and guidance. In particular they encompass:

- issues which are relevant to the changes to successive versions of the NPPF, which are useful for future changes (*Gladman);*
- basic issues of interpretation of para 11, including certain issues relating to when policies are out of date, and the NPPF's relationship to the development plan (*Peel* and *Gladman*)
- Issues which arise when the Standard Method affects existing plans (*Wainhomes);* and
- some highly fact-specific guidance about housing land supply questions, such as the approach to changing ONS data (*Oxton Farm; Keep Bourne End Green)*

Paragraph 11 – decision taking

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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-date7, 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 proposed6; 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 whole6.

6 The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.

7 This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73);

Peel Holdings v SSCLG [2020] EWCA Civ 1175

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- Peel concerned development plan policies for countryside and specific area protection in a plan that had expired in 2016; the strategic housing policies had not been saved.
- Peel argued that notwithstanding the principle that “out of date” is a planning judgement (see *Hopkins Homes* [2017] UKSC 37 at 55), the legislative context and the NPPF as a whole meant, in line with Lord Carnwath’s dictum at *Hopkins Homes* [63], that a policy in a time-expired plan is out of date by definition;
- Peel also argued that without its corresponding strategic policies, policies which restrained development in certain areas must also be out of date

Peel: nothing automatic, all planning judgement

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- NPPF itself does not suggest time expiry means policies out of date
- Legislation – regulations prospective and not determinative of the interpretation of para 11 – (see [68] final sentences for this point)
- Agreement with *Paul Newman New Homes* [2019] EWHC 2367 that different expression than “out of date” would have been used if expiry meant out of date (see [65] to [67] for this)
- Lord Carnwath not laying down principle in his *obiter* remark in *Hopkins [63]*
- Policies for environmental protection (and Green Belt) not apt to be out of date just on the expiry of the plan (see [68] for reasoning on this)
- On the facts, the Sec State hadn’t conflated 213 consistency exercise with the question of para 11d out of date (see [69]).
- Not automatic then – but still capable of being successfully argued now???

Gladman v SSHCLG [2020] EWHC 518

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- Gladman argued that an Inspector on appeal had erred by importing into the ‘tilted balance’ in 11(d)(ii) questions relating to degree of conflict with, and weight to be given to, development plan policies
- It was said that those matters should be left to the s.38(6) overall balance, with the NPPF test comprising one of the ‘material considerations’ without ‘double counting’ the development plan points.
- The case adds to, but does not cover the same points as, the extensive survey of how to approach 11(d) in Holgate J’s previous decision, *Monkhill Ltd v SSHCLG* [2019] EWHC 1993.

Gladman - development plan analysis part of 11d(ii)

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- When carrying out the tilted balance, the Court held, it was not right to exclude questions of development plan compliance and weight
- The earlier cases, like *Crane* [2015] EWHC 425, about paragraph 14 of the 2012 NPPF, remain relevant (see [87] to [90])
- The words of 11d(ii) do not require development plan policies to be excluded, contrast footnote 6, which only applies to the question of whether the tilted balance is to be disapplied, not how it operates if it does apply
- Para 14 relating to neighbourhood plans is a clue to the answer
- The purpose of 11 and the NPPF in general is inconsistent with ignoring the development plan because there will be policies (eg housing, affordable housing, jobs) which will weigh in favour of the grant of consent also
- Complexity of this outcome?

Wainhomes (NW) v SSHCLG [2020] EWHC 2294

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- Wainhomes argued that an Inspector had erred by finding that the Standard Method was the basis for assessing housing land supply requirement, but then failing to find that the Standard Method applied across the HMA would have radical effects on the distribution of housing (and on areas 'safeguarded' such as the site in question in the case)
- The Sec State indicated that he would consent to judgement but the LPA maintained a defence to the claim
- A key step in the Inspector's evaluation was whether on the facts of the case the 5+ year old plan had been reviewed and found in no need of change – she decided that it had not, and therefore the SM applied: see the provisions of para 73 and footnote 37 of the NPPF

Wainhomes – lessons

- The decision itself is highly fact-specific, but it gives an example of how para 73 review relates to para 11d questions of out-of-dateness
- LPAs can review their plans under para 73 and self-certify subject to JR (eg the hotly-contested example of the Reigate & Banstead review in 2019
- However, it is sometimes (often?) unclear if what is being undertaken is such a review, or has reached the point where the "review" is being undertaken – this causes practical difficulties
- If there is no review, and the plan is more than 5 years old, then the SM will apply and there will be a potential argument that the policies are out of date – certainly the housing targets and land supply but also potentially restraint policies (as a matter of judgement, following *Peel*)

Oxton Farm v Harrogate BC [2020] EWCA Civ 805
Keep Bourne End Green (R oao) [2020] EWHC 1984

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- **Oxton Farm** argued that it was mandatory on the wording of the PPG to use the latest data from ONS
- The Court held that it was not – there may be reasons not to which need to be explained
- Here, the emerging plan did not use SM but justified another approach.
- The Officers Report also said that in the circumstances para 11 of the NPPF "could not be ignored" although it did not strictly speaking apply – upheld
- In ***Keep Bourne End Green*****,** a local plan challenge, the Court rejected an attempt to make it construe the Technical Consultation document and responses as policy; and held that it was legally permissible to infer from it that ONS 2016 data was problematic for plan making in some ways

Summary and prospects

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- Not had the last word on 11d – *Peel* not proceeding to SC but the high bar of "automatically" out of date when expired/shorn of strategic policies does not rule out surmounting the lower bar of planning judgement along the same lines, and *Peel* is already contested in that way
- The Courts continue to pick a line between intervention (when there is a true matter of interpretation, eg *Gladman*) and reticence (*Peel, Keep Bourne End Green*)
- But the change over between NPPFs, and between systems of assessing (and then deciding on) housing requirement, is highly likely to give rise to litigation as planning reform takes place in 2021.

Thank you for listening

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