Landmark Chambers

Welcome to Landmark Chambers' Planning High Court Challenges Annual Conference, Part 2

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Dan Kolinsky QC (Chair)

Rupert Warren QC

Topic:
Housing land supply and para 11 NPPF

Stephen Morgan

Topic:
Development Plan challenges

Your speakers today are…

Landmark Chambers

Jenny Wigley

Topic:
Legal challenges and PD rights

Alistair Mills

Topic:
Round-up of non-housing NPPF cases

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HOUSING LAND SUPPLY AND PARA 11 NPPF

Rupert Warren QC

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- basic issues of interpretation of para 11, including certain issues relating to when policies are out of date, and the NPPF's relationship to the development plan (*Peel* and *Gladman*)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.

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Round-up of non-housing NPPF cases

Alistair Mills

Round up the usual suspects

- Emerging Plans
  - *Starbones*
- Green Belt
  - *Samuel Smith*, *Mayor of London*, *Keep Bourne End Gr*een, *Aireborough Neighbourhood Development Forum*
- Heritage
  - *Bramshill*, *Kay*, *Spitfire Bespoke H*omes
- Open Space
  - *Lochailort*

Emerging Plans – the Law

- NPPF 48 provides factors to take into account when deciding what weight to give to emerging plans (consider stage of preparation, unresolved objections, consistency of policies with the NPPF)
- *Starbones Ltd v SSHCLG* [2020] EWHC 526 (Admin)
- Appeal dismissed for mixed use tower at Chiswick Roundabout, near Kew Gardens
- Claimed that SoS failed to understand and apply NPPF 48
- Given very short shrift – SoS's decision was a matter of judgment

  > "Secretary of State's judgment that only limited weight should be given to an emerging plan on which the examiner had not yet reported was entirely orthodox" (para. 85)

Emerging Plans – SoS practice

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- Publication Draft of Site Allocations and Development Policies document being prepared for further consultation: no weight – Earl Road, APP/R0660/W/19/3155191, 12 June 2019
- Assembling evidence base: very little weight – Hatchfield Road, Newmarket APP/H3510/V/14/2222871, 12 March 2020
- Pre-submission consultation draft: little weight – Vauxhall Bus Station, APP/N5660/V/19/3229531, 9 April 2020
- During examination of London Plan, before IR: little weight – 215 Tunnel Avenue, APP/E5330/V/18/3216423, 25 September 2019
- Advanced stage (interim conclusions by Examining Inspector): moderate weight – Pale Lane, APP/N1730/W/18/3204011, 4 November 2019
- Significant weight: policies of London Plan unaffected by SoS direction – Vauxhall Bus Station

Emerging NPs – SoS Practice

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- Pre-submission consultation and publicity under Reg 14: no weight – Fiddington APP/G1630/W/18/3210903, 22 January 2020
- Further consultation before submission for examination: little weight – Station Road, APP/D3505/W/18/3214377, 1 April 2020
- Yet to be submitted under Reg 16: limited weight – Barbrook Lane, APP/A1530/W/19/3223010, 7 April 2020

Green Belt (Decision-making)

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- *Samuel Smith v North Yorkshire Council* [2020] PTSR 221
- Extension of quarry in the Green Belt
- Question: had there been failure to consider visual impact in the context of the Green Belt?
- SC stressed that openness is a matter of judgment
- Also – openness is the counterpart of preventing urban sprawl
- *Mayor of London v SSHCLG* [2020] JPL 1387 – referring to one of the paras of GB policy in the NPPF suggests all have been considered, absent positive indication (drawing on *Jones v Mordue* [2016] 1 WLR 2682)

Green Belt (Plan-making)

- Exceptionality is a matter of judgment: *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 (Admin)

  > "But reading [paras 47 and 83 of the former NPPF] properly together, the effect is that the mere *identification* of housing need, or unmet housing need, cannot be *assumed* by itself to constitute an exceptional circumstance to justify an alteration in the boundary of the green belt. But it does not follow that it is *incapable* of amounting to an exceptional circumstance. Whether it does so is a matter of judgment for the decision-maker, which depends in part on how much significance or weight the decision-maker attaches to that identified need."

- Successful challenge on exceptionality – serious failings on the particular facts in *Aireborough Neighbourhood Development Forum v Leeds CC* [2020] EWHC 1461 (Admin)

Heritage

- Requirement of an “internal heritage balance”? *City and Country Bramshill Ltd v SSHCLG* [2019] EWHC 3437 (Admin)
- See *Kay v SSHCLG* [2020] EWHC 2292 (Admin) NPPF 196 requires
  - Initial establishment of nature and extent of harm to significance, ignoring beneficial impact
  - Only after harm fixed that beneficial impact to be considered in assessing whether public benefits outweigh the harm
- *Spitfire Bespoke Homes v SSHCLG* [2020] EWHC 958 (Admin) – approach to considering the impact of a proposal on the conservation area

Local Green Space

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- *R (Lochailort Investments Ltd) v Mendip DC* [2020] EWCA Civ 1259
- Comparison of policy with the Green Belt:
  - Policy tests for development within LGS as restrictive as in Green Belt
  - However, this does not mean no development in the LGS
  - The proposed NP policy was more restrictive than GB policy, with no reason given for this
  - The designation requirements for LGSs are less stringent than for the GB
  - Requirements for the endurability of LGSs are also less stringent than for the GB

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DEVELOPMENT PLAN CHALLENGES

Stephen Morgan

Introduction

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- 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)

Landmark Chambers

(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**.

LOCAL PLANS: CAPACITY TO CHALLENGE

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

Landmark Chambers

(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

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

Landmark Chambers

(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)

Landmark Chambers

(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)

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- 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)

Landmark Chambers

(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)

Landmark Chambers

(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)

Landmark Chambers

(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

[2020] EWHC 1984 (Admin)

Landmark Chambers

(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

Keep Bourne End Green v Bucks Council

[2020] EWHC 1984 (Admin)

Landmark Chambers

(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)

Landmark Chambers

(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

Landmark Chambers

(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

Landmark Chambers

(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

Landmark Chambers

(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.

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Legal challenges and PD rights

Jenny Wigley

Topics For Today

Landmark Chambers

- Legal Challenge to the recent changes to the GPDO and UCO – Judgment of the Divisional Court in R (Rights : Community : Action) v. SSHCLG [2020] EWHC 3073 (Admin) was handed down 17 November 2020;

- Round up of other important Higher Court decisions relating to PD rights from the last year;

- More detail can be found in the series of papers and the webinar given on permitted development in October 2020 – all can be found on Landmark's website (resources section) or ask our marketing team for details.

Rights : Community : Action litigation
3 statutory instruments under challenge (1)

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SI 2020/755, bringing in:

- New class AA in Part 1 of Sch 2 to the GPDO 2015 - development in curtilage of a dwelling house – enlargement of existing dwelling house by the addition of storeys;

- New classes AA, AB, AC and AD in Part 20 of Sch 2 to the GPDO – rights to create new dwellinghouses by additional storey(s) on top of existing commercial buildings (office, retail, launderettes, betting offices and pay day loan shops) and on top of existing dwelling houses, 30m and 18m limits;

- NB note class A of Part 20, (new dwelling houses on top of detached blocks of flats) introduced SI 2020/632 was *not* under challenge

Rights : Community : Action litigation
3 statutory instruments under challenge (2)

Landmark Chambers

SI 2020/756, bringing in:

- New class ZA in Part 20 of Sch 2 to the GPDO 2015;
- Namely demolition of a detached building with B1 use rights or of a single block of flats and replacement by either new single dwellinghouse or single purpose built block of flats;
- Within same footprint (not exceeding 1,000sq m); no more than 18m in height or 7m higher than previous building and no more than 2 storeys more than previous building. Building must have been vacant for 6 months and constructed prior to 1 January 1990.

Rights : Community : Action litigation
3 statutory instruments under challenge (3)

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SI 2020/757:

- Amends the Use Classes Order 1987;
- Use classes A, B1 and D are revoked;
- New class E, commercial, business and service (includes much of former A1, A2 and A3 plus former B1 and some of D1 and D2);
- New classes F1 and F2 for remainder of D1 and D2 (learning institutions and community)
- Some in former A4, A5 and D2 classes moved to *sui generis*

NB – Effects of those SIs

- SI 2020/756 and 757 introduce new permitted development rights but each are subject to conditions including the requirement to obtain prior approval on a wide range of matters including, amongst others, transport and highway impacts, contamination risks, flooding risks, the external appearance of the building, the provision of adequate natural light in all habitable rooms, and impact on the amenity of the existing building and neighbouring premises

- SI 2020/757 amends the classes of uses within which changes are not to be considered to be development requiring planning permission (see article 3(1) of the UCO 1987)

Rights : Community : Action
Interesting that Court felt it necessary to make this clear:

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"It is important to emphasis at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. Similarly, criticism has been made of the way in which, or the speed with which, these changes were made. Again, these are not matters for the court to determine save and in so far as they involve questions concerning whether or not the appropriate legal procedures for making the changes were followed." (para 6)

Rights : Community : Action
Grounds of Challenge

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- Ground 1 – Failure to carry out an SEA under Environmental Assessment of Plans and Programmes Regulations 2004;

- Ground 2 – Failure to comply with PSED under s.149 Equality Act 2010;

- Ground 3 – Unlawful public consultation
  - Did not ‘conscientiously consider’ responses;
  - Did not take into account advice from Gov’t’s own experts
  - Failure to act consistently with what was done in relation to 5G phone masts
  - Breach of legitimate expectation re: SI 2020/756

Rights : Community : Action
Grounds with Traction (1)

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Ground 3(d)

Court granted permission for JR but dismissed claim on the basis that

- There was a representation that there would be further consultation in relation to SI 2020/756
- That gave rise to a procedural legitimate expectation
- But on the evidence, the defendant acted lawfully because he had good reasons for departing from that representation
- Those reasons were proportionate to the action taken (reasons based on economic emergency created by the pandemic)

Rights : Community : Action
Grounds with Traction (2)

Landmark Chambers

Ground 1 – To succeed C had to establish that SIs met the Directive criteria:

Directive requires environmental assessment of plans and programmes which are:

- Subject to preparation and/or adoption by an authority at national, regional or local level
- Required (or regulated) by legislative, regulatory or administrative provisions
- Set the framework for future development consent of projects
- Likely to have significant environmental effects.

(First two agreed to be met, fourth was not a way out for SoS, third was the main subject of consideration in the case)

Rights : Community : Action Grounds with Traction (3)

Landmark Chambers

Court granted JR permission for Ground 1 but dismissed claim on the basis that the plan or programme did *not* set the framework for future development consent of projects:

- Amendments to UCO 1987 simply define certain boundaries of development control

- Amendments to GDPO 2015 do not set a ‘framework’ within the meaning of the 2004 Regs as requirement for prior approval simply forms part of the conditions imposed on the grant of certain PD rights and only delimits the scope of LPA powers and does not set the criteria of how they are to be exercised.

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Judicial reasoning

- Prior approval requirements do not themselves set criteria or rules for determining or constraining discretionary powers of LPA – the SIs only delimit the scope of the LPA's powers;

- SIs under challenge do not repeal or modify a pre-existing plan such as a development plan that was itself subject to SEA (but surely render some provisions or policies redundant in relation to certain projects?)

NB - Application has been made for permission to appeal

Round up of other higher court cases on PD rights

Landmark Chambers

- *Gluck v. SSHCLG* [2020] EWHC 161 (Admin) – LPA and applicant can agree to extend timescales for determination of prior approval under Article 7(a) or (b) – Art 7(c) since amended to reflect this with effect from August 2020

- *McGaw v. Welsh Minsters* [2020] EWHC 2588 – how to calculate 3m height limit in Class E of Part 1 Sch 2 (building in curtilage of dwelling house)

- *T & P Real Estate Ltd v. Sutton LBC* [2020] EWHC 879 (Ch) – interpretation of Art 4 Direction is a matter of public law for a planning appeal or JR, not for a private law Part 8 determination in the High Court (abuse of process)

- *New World Payphones* [2019] EWCA Civ 2250 – LPA required to determine whether definitional requirements are met before determining prior approval but how does this fit with *Keenan* and *Marshall?*

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

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