Landmark Chambers

Development Plan challenges 2021

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Themes

Landmark Chambers

- Like last year, the decisions relate to challenges to both Local Plans and Neighbourhood Development Plans (NDPs) – s.113 of the PCPA 2004 & s.61N of the TCPA 1990 respectively.
- Last year's decisions covered a wider range of issues than those in the last 12 months. Nonetheless, this year we have 4 cases worthy of note, the first 2 relating to local plans – one relating to SEA that was decided just after last year's webinar; the other to the alteration of the Green Belt in a local plan.
- With regard to the two NDP challenges, there is an important decision of the SC in relation to the time limit on challenges; the second is another NDP local green space challenge, following *Lochailort Investments Ltd. v Mendip* [2020] EWCA Civ 1259. These two decisions again highlight the particular characteristics and far-reaching implications of neighbourhood planning legislation.

LOCAL PLANS (1): SEA

Flaxby Park Ltd v Harrogate BC [2020] EWHC 3204 (Admin)

- This is another competing sites case alleging that the LPA's consideration of reasonable alternatives as required by the SEA Regulations (reg 12(2)(b)) was inadequate as seen from the 3 grounds of claim .
- It concerns the lawfulness of the decision of Harrogate BC to include policies identifying Green Hammerton, Cattal GH1 1) as a broad location for a new settlement (under emerging policy DM4 of the Harrogate District LP for 2014-2035).
- The Claimant was the owner and promoter of land focused on the former Flax Golf Course, Harrogate (FX3), which lies on the western side of the A1(M). This was identified as one of two options in the Consultation Draft October 2016.
- GH1 1 became HDC's preferred option in July/August 2017 given its direct access to the rail corridor through two operational rail stations, the absence of significant noise constraints from the A1(M), and proximity to existing settlements providing local services assisting new residents in the early phases of development.

- Holgate J. reaffirmed the principles that apply to a challenge under s.113 re-affirming that in terms of the reasons given in an Inspector's Report these will often only need to be succinct (cf. even a s.78 decision) as long as they convey to the 'knowledgeable audience" a clear understanding of how he/she has decided the main issues before them (see *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1896 at [71]-[76]).
- The J also set out the principles applicable to a public law challenge relating to the handling of "*reasonable alternatives*" (referring to inter alia the *Ashdown Forest* and *Heard* cases*)* and held that although one option had been treated as a "*reasonable alternative*" in the sense that it might sensibly achieve the authority's objectives, it is not obliged to carry on treating it in that way where it considers that only one alternative may go forward. It is entitled to assess how well each alternative performs against this and select accordingly.

- It was held that there was no merit in the contention (ground 2) that there had been a failure to compare the broad locations of Flaxby and Green Hammerton/Cattal on an equal basis because the SA did not include the additional land which had been identified. That additional land was not put forward until after the draft Plan was submitted for Examination in August 2018 – some 2 years after HBC had identified its reasons for rejecting Flaxby – no explanation was given for this delay.
- Under ground 3, C contended that a new settlement at Green Hammerton/Cattal would not be commercially viable and therefore not deliverable. However, judgments made by a lpa and the LPI on viability matters are not open to challenge in the Court unless shown to be irrational. – there is an *enhanced margin of appreciation* for such a technical matter.

- Under Ground 1 it was contended that the Council itself had failed to consider environmental assessment of alternative locations as the mater was wrongly dealt with under delegated powers. The members were required to apply their own minds to the SEA material referred to in reg 8(3) under the LGA 2000 and the Local Authorities (Functions and Responsibilities) (England) Regs 2000.
- The J upheld this ground but only to a limited extent. He nonetheless (under s.113(7)-(7C)) remitted the whole Plan (and not just the new settlement policies as HBC had argued for) for the full Council to consider whether to accept the Inspector's recommendations and whether they wish to adopt the plan containing these policies – considering the SEA material as relevant to that specific task.
- The Plan was adopted on 9 December 2020.
- NOTE – see discussion of the use of witness statements (at paras. [12]-[20]) .

LOCAL PLANS (2):
Cherwell Development Watch v Cherwell DC
[2021] EWHC 2190 (Admin)

Landmark Chambers

- By this Claim under s.113 of the CPA 2004 a coalition of five residents' groups who opposed the extent of Green belt allocations sought to quash the Cherwell Local Plan Partial Review which was adopted on 7 Sept. 2020.
- The Local Plan included an additional 4,400 homes to assist in meeting the City of Oxford's needs up to 2031 pursuant to the duty to co-operate, based on the 2014 SHMA. This required the release of sufficient land from the Green Belt in Cherwell. The proposals also required a replacement for the North Oxford Golf Course (30ha).
- The Cherwell LPI found that "*exceptional circumstances*" had been demonstrated for the Green Belt releases (see NNPPF 2021[140]), considering the the Council's approach as "*justified and effective*" (NPPF 2021 [35] re. soundness).
- At a preliminary hearing, the soundness of Oxford's overall unmet need and the apportionment of 4,400 houses to Cherwell was considered - with the Claimant, the DC and Oxford City Council taking part.

- There was an October 2018 update on Oxford Housing Need. Although that indicated a reduced need, the 2014 figure of 1400 dpa for housing need was retained as the Council's consultants advised that there was still an acute affordable housing need and significant market signals affecting Oxford. At the main hearings, the Claimants maintained their contentions.
- The Oxford LP then overtook the Cherwell LP, with its Final Report published in May 2020 and the LPIs who concluded that even at 1400 dpa, affordable housing delivery would be likely to fall below overall affordable housing need and was sound.
- The Claimants contended **firstly** that the Inspector had failed to take into account the reduction in housing need from the 1,400dpa to 776 dpa when deciding that exceptional circumstances existed to justify building on Green Belt land.
- **Secondly**, it was contended that the LPI acted irrationally in concluding that the agricultural land could provided an equivalent facility to the existing golf course.

Landmark Chambers

- Applying the principles set down in *CPRE Surrey v Waverley* [2019] EWCA Civ 1826, it was **held** that it was not wrong in principle let alone unlawful for a LPA to incorporate a proportion of the unmet housing need arising in another authority's area in the housing requirements set out in its local plan.
- The assessment of that unmet need in a neighboring authority is not an exact science. It is a classic process of evaluation undertaken not by the Court but by a planning decision maker, inherently imprecise and for which there is no prescribed, uniform approach.
- Thus, the scope for a rational and lawful planning judgment is broad.
- The Court will consider the extent to which a Claimant has participated in the debate on housing need during the Examination. The principle of consistency (see *Wiltshire DC v SoSEnv* (1993) 65 P & CR 137) may be in play.

- All parties in the Cherwell Examination process, including the Claimant, were fully aware of the Oxford Plan process and the significance of that process to the Cherwell plan.
- The Cherwell Inspector recognized the conclusions of the recent Examinations in the neighbouring districts of West Oxfordshire and the Vale of White Horse. The LPI does not have to assess the OAN in both areas.
- The LPI had also appropriately considered the suitability of the land for the proposed replacement golf course and made a planning judgment on the suitability of that.
- The Cherwell Inspector's planning judgment could not therefore be criticised.

NEIGHBOURHOOD DEVELOPMENT PLANS (1): *R. (on the application of Fylde Coast Farms Ltd) v Fylde BC* [2021] UKSC 18

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A challenge to a NDP is made under s.61N of the TCPA 1990 which provides:

"(1) A court may entertain proceedings for questioning a decision to act under section 61E(4) or (8) only if

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the decision is published. (MAKING THE PLAN)

(2) A court may entertain proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc) or paragraph 13B of that Schedule (intervention powers of Secretary of State) only if -

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the decision is published. (CONSIDERATION OF EXAMINER'S REPORT)

(3) A court may entertain proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of Schedule 4B only if -

(a) the proceedings are brought by a claim for judicial review, and

(b) the claim form is filed before the end of the period of six weeks beginning with the day after the day on which the result of the referendum is declared." (HOLDING A LOCAL REFERENDUM)

- The Claimant's complaint, lodged on 16 July 2017, was that the LPA failed without good reason to accept an amendment to the draft NDP recommended by the Examiner in respect of the St Anne's on the Sea NDP, prepared by the Town Council. That recommendation was in the context of an absence a 5 yr. HLS.
- The amendment would have resulted in the C's land being included within the settlement boundary. However, the LPA had on 2 March 2017 rejected that recommendation because of the potential impact on the Ribble and Alt Estuaries SPA and Ramsar site & did not meet the basic conditions or EU obligations.
- C complained that it therefore became unlawful for the LPA to make the plan, even though approved by the requisite referendum.
- C filed its claim form within the 6 weeks of the making of the plan on 26 May 2017 (re. s.61N(1)) but well outside the 6 week time limit for challenging pursuant to s.61N(2) the LPA's consideration of the Examiner's report.

- The LPA thus objected that the claim form was filed out of time under s.61N(2). The C replied that its claim fell squarely within the permission for making a legal challenge to the making of a NDP provided by s.61N(1).
- Both the Planning Court and the CA agreed with the LP.
- The Supreme Court referred to the longstanding tension between whether an early challenge was required ort a party could wait until the end of the process.
- Sometimes Parliament makes it clear by providing that a challenge may be brought at the end of the decision-making process e.g. s.113 means that the majority of challenges to a Local Plan must be brought after the final version is adopted (*Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin)).

- The SC held that the case law indicates that there is no clear or obvious resolution of that tension. Ultimately, a choice has to be made between competing interests of different kinds.
- However, s.61N makes different provisions to address the issues in relation to the making of a NDP. *Parliament was entitled to strike the balance in this particular context as it thought and the words of the provision itself provide a clear answer as to how it intended that should be achieved*.
- It may be that the preponderance of judicial authority tends to favour the "wait to the end" approach (encapsulated in *Burkett v Hammersmith & Fulham BC* [2002] UKHL 23*).* However, the links and similarities of the processes for LPs and NDPs are not so great as to render a "challenge early" principle incapable of being rationally applied to the neighborhood process.

Landmark Chambers

- NDPs are the product of separate legislation with the *promotion of local democracy primarily in mind*, and critically involve the holding of a *referendum*.
- It is understandable that Parliament should have decided to avoid the too-frequent overturning of referendum results by public law challenges made after the event based upon allegedly unlawful act acts or omissions occurring at an earlier stage in the process.
- S.61N is entirely restrictive and not permissive.
- It does not create new general public law rights but prescribes that those existing rights of challenge shall be brought by JR and commenced within a rigid, non-extendable six week time limit – see the "***only if***" in each subsection.

NEIGHBOURHOOD DEVELOPMENT PLANS (2): *Abbey Properties Cambridgeshire Ltd v East Cambridgeshire DC and Witchford PC* [2020] EWHC 3502 (QB)

Landmark Chambers

- Challenge under s.61N(2) on DC's decision to accept the recommendations of the Examination in relation to the Witchford NDP (WNP).
- The two relevant strategic policies in the East Cambridge Local Plan 2015 were GROWTH 1 (Levels of housing) & GROWTH 2 (Locational Strategy).
- The Local Plan was proposed in Spring 2016 to be replaced and the hearing sessions for the emerging Local Plan were held between June and September 2018. **The Inspector recommended main modifications, including the deletion of the Horsfield as an LGS designation.**
- However, following further correspondence from the Inspector, the DC resolved to withdraw the Plan because of concerns over the fundamental nature of the main modifications required.

- However, the Inspector refused the request of the Claimant's planning consultant to explain the basis of her recommendation saying that she was unable to provide this as she had no jurisdiction as the Plan had been withdrawn before she wrote her Report.
- Following consultation, the pre-submission draft WNP included the Horsefield LGS designation, amongst 13 sites, as Policy WNP – G12 Local Green Space. Each site was constrained from development except where very special circumstances could be demonstrated in line with the NPPF ([147]).
- The Claimant objected to the designation of its site as LGS in the WNP on the basis of the LPI's recommended main modifications and disputed the adequacy of the housing supply in the WNP, and that the 2015 was out of date on that basis and the tilted balance applied to applications

- The Claimant also proposed that part of its site could be used as LGS, and part for housing to enable that. The Claimant also referred to the subsequent litigation brought by *Lochailort Investments Ltd*.
- The WNP Examiner concluded that the Strategic Policies did not require Witchford to accommodate more than small scale development within the development limits. The decision was challenged on 2 grounds.
- The judge firstly pointed out that the basic conditions under para. 8(2) of Schedule 4B are not to be equated with the test of soundness for LPs for the purposes of s.20 of the PCPA 2004. He also pointed out that for NDPs the Examiner must be satisfied that it is appropriate to make the order ”*having regard to national planning policies and advice”.* By contrast, the test of soundness under the NPPF is that the local plan is *“consistent with national policy*” (NPPF 2021 [35(d)]).

- Regarding ground 1 (flawed designation of the site as LGS), it was held that when the Examiner's Report was read as a whole it was clear that he was satisfied that the LGS designation would endure beyond the end of the plan period as required under the NPPF[101]. There was no conclusion that the WNP already required reviewing.

- Further, it was not necessary for the DC or Examiner to have made further enquiry as to the reasons why the LPI recommended deletion of the LGS designation.

Landmark Chambers

- Under ground 2 (improper interpretation of GROWTH 2) it was argued that because the Inspector considered that GROWTH 1 was out of date it followed that the location or strategy including the development envelopes in GROWTH 2 would also be out of date as they were fixed or identified against the overall development requirements set out by policy GROWTH 1. This was rejected.
- The Examiner had explained that his planning judgment that the locational strategy in policy GROWTH 2 remains relevant and up to date and that is respect of the development envelope, notwithstanding the provisions of policy GROWTH 2, the WNP had extended development limits to accommodate appeal decisions which had been reached since those previously defined in the ECLP. Held that he was entitled to so conclude.

Additional case references

***CPRE Kent v SoSCLG* [2021] UKSC 36** – Claimants who were unsuccessful at the permission stage of a JR or PSR would usually be liable for the defendants and interested parties' reasonable and proportionate costs of filing an acknowledgement of service and summary grounds.

***Manydown Co Ltd v Basingstoke and Deane BC* [2012] EWHC 977 (Admin)** – re. time limit for challenges under s.113 of the PCAP 2004

***CPRE Surrey v Waverley BC* [2019] EWCA Civ 1896** at [71]-[76] – reasons provided in a LPI's Report may only need to be succinct.

***Heard v Broadland DC* [2012] Env.L.R. 23** – re. SEA of alternatives

***Ashdown Forest Economic Development LLP v Wealden DC* [2016] PTSR 78 at [42]** – identification and treatment of reasonable alternatives is a matter of "evaluative assessment" subject to review only on public law grounds.

Assessment of housing need cases

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

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

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