Landmark Chambers

Latest NPPF Cases

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Topics to cover today

Landmark Chambers

- Housing and the tilted balance;
- Green Belt;
- Retail;
- Gypsies and Travellers;

Paul Newman New Homes Ltd v SSHCLG [2021] EWCA Civ 15

Landmark Chambers

- Para 11(d) – "*no relevant development plan policies*" – first trigger
- Proposal for residential development
- Inspector found that the proposed development was contrary to one local plan policy which was concerned generally with design and rural character and appearance, and that this policy was a "*relevant*" policy, so the tilted balance was not engaged
- Developer challenged decision
- Argued that for the purposes of paragraph 11(d), a "relevant" policy had to be a policy targeted at the specific development under consideration (e.g. affordable housing policy, or a policy about building in the countryside)
- Not a policy as general as the one being considered by the Inspector here

Paul Newman New Homes Ltd v SSHCLG [2021] EWCA Civ 15

Landmark Chambers

- High Court dismissed the challenge, and Court of Appeal agreed with the High Court
- "relevant" in para 11(d) simply means "*no more than some real role in the determination*" – no requirement for the policy to be determinative of the application/appeal
- Reiterated that the issue of how important a policy is to the determination is a question of planning judgment
- The first trigger ("no relevant development plan policies") not met if there is just one policy that plays some real role in the determination of the application
- A low threshold – in practice difficult to show "*no relevant development plan policies*"

Peel Investments v SSHCLG [2020] EWCA Civ 1175

Landmark Chambers

- Para 11(d) – meaning of “out of date” – second trigger
- Site for proposed housing development was in a protected “green wedge” area, protected by a development plan policy
- At the appeal, developer had argued that the “green wedge” policy was out of date because it was in a time-expired development plan
- Secretary of State, agreeing with his inspector, disagreed with this argument and found that the “green wedge” policy was not out of date and had full weight
- Question: Is a policy in a time-expired plan is automatically out of date by definition?

Peel Investments v SSHCLG [2020] EWCA Civ 1175

Landmark Chambers

- Court of Appeal found that there is nothing in para 11(d) to suggest that the expiry of the period of the plan automatically renders the policies in the plan out-of-date – it is a matter of planning judgment

- The green wedge policy addressed environmental protection, which clearly had a life beyond the expiry of the plan

- Secretary of State's approach was lawful

- Query – still open to a decision-maker to find that a policy is out of date because it is in a time-expired plan, but it is not automatic – a matter of planning judgment

Other useful cases on ‘out of date’

- *Oxton Farm v. Harrogate BC* [2020] EWCA 805 - LPA was held justified in determining that the housing policies in a extant Core Strategy were ‘out of date’ and so the tilted balance was triggered even though there was a 5yhls.

- *R (o.a.o Ewans) v. Mid Suffolk DC* [2021] EWHC 511 (Admin) –

  - Another case where LPA justified in determining policies ‘out of date’ and applying tilted balance even though there was a 5 yhls.

  - Para 48 NPPF did not prevent LPA according more weight to emerging local plan than to emerging neighbourhood plan. Para 48 was not the final arbiter – other factors such as which contained a more recent assessment of housing needs could be relevant.

Monkhill Ltd v SSHCLG [2021] EWCA Civ 74

Landmark Chambers

- Para 11(d)(i): "*granting permission unless…the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed…*" – first limb
- Proposal for residential development in an Area of Outstanding Natural Beauty
- No 5YHLS, so most important policies were out of date and para 11(d) applied
- But Inspector found harm to AONB and found that this was a "*clear reason*" for refusing permission because para 172 (now 176) of the NPPF stated that "*great weight should be given to conserving and enhancing landscape and scenic beauty*" in an AONB – so tilted balance was disengaged due to para 11(d)(i)
- Developer argued that Inspector was wrong to interpret paragraph 172 of the NPPF as a policy which was "*a clear reason for refusal*" – argued that a policy will only provide a "clear reason for refusal" if that policy itself provides that permission should be refused unless certain requirements are met, or if it provides for its own, self-contained balancing exercise (like the NPPF heritage policies)

Monkhill Ltd v SSHCLG [2021] EWCA Civ 74

Landmark Chambers

- High Court found that the Inspector's approach was correct, and the Court of Appeal agreed
- Inspector's application of the NPPF policies was lawful
- Court found that para 172 clearly envisaged a balance being struck when it was applied in the making of a planning decision – in which any harmful effects to the AONB would be given due weight
- If there were no benefits to set against the harm to the AONB, or if there were benefits but they were insufficient to outweigh the harm, the decision-maker could properly conclude that the application of the policy did indeed provide a clear reason for refusing the development proposed.
- NB Holgate J's 15 point route map to para 11 (para 39, [2019] EWHC 1992 (Admin))

Gladman Developments Ltd v SSHCLG [2021] EWCA Civ 104

Landmark Chambers

- Para 11(d)(ii): "*granting permission unless…any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the policies in this framework taken as a whole*…" – second limb
- Two appeal decisions relating to residential development – the "*tilted balance*" in para 11(d)(ii) was engaged
- Inspectors found the proposals conflicted with Development Plan, and took into account of that Development Plan conflict when carrying out the "*tilted balance*"
- Two questions for the Court:
- 1) whether a decision-maker, when applying the "tilted balance" was required not to take into account relevant policies of the development plan
- 2) whether it was necessary for the "tilted balance" and the duty in section 38(6) of the PCPA 2004 to be performed as separate and sequential steps in a two-stage approach.

Gladman Developments Ltd v SSHCLG [2021] EWCA Civ 104

Landmark Chambers

- High Court dismissed the challenge, and Court of Appeal agreed

- First issue
- Court found that there was nothing in the tilted balance which required development plan policies to be disregarded – the weight to be attached to development policies, whether telling in favour of or against a proposal, could be a matter to be assessed in the balance

- Second issue
- Court backed away from laying down any rules for a decision-maker
- Could do it in separate stages (tilted balance and s.38(6)) or in one all-encompassing stage
- Though if the latter, decision-maker has to keep in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations

Tewkesbury BC v. SSHCLG [2021] EWHC 2782 (Admin)

Landmark Chambers

- LPA challenged Inspector's decision for failing to take into account previous oversupply when calculating five year land supply;
- Challenge rejected – NPPF silent on whether or not earlier oversupply should be taken into account;
- As a result, whether or not to take into account previous oversupply is a matter of planning judgement for the Inspector;
- In this case Inspector was entitled to decide not to factor it in, particularly given her concerns over the supply trajectory;
- Query whether in other circumstances may be appropriate to take it into account to avoid disincentivising LPA in being pro-active in encouraging the bringing forward of supply.

Green Belt

- Sefton MBC v. SSHCLG [2021] EWHC 1082 (Admin) – application of para 144 (now 148) concerning applications for proposals affecting the green belt. Single exercise of planning judgement to assess whether there were very special circumstances to justify the grant of permission;

- R (oao Co-Op Group Ltd) v. West Lancs BC [2021] EWHC 507 (Admin) – assessment of GB openness a matter of planning judgement not law. Characterisation as 'absence of visible development' not unduly limited;

- R (oao Lochailort Investments Ltd) v. Mendip DC [2020] EWCA Civ 1259 – in the absence of reasoned justification, the effect of para [103] of the NPPF is that an LGS policy in a neighbourhood plan which was more restrictive than national GB policy would be unlawful.

Retail

- R (oao Asda Stores Ltd) v. Leeds CC [2021] EWCA Civ 32.

- NPPF para 90 (now 91) provides that out-of-town retail developments ‘should be refused’ if they were likely to have a significant adverse impact on town centre vitality and viability.

- That did not create a ‘presumption’ and did not have trumping status over other policies in the NPPF.

Gypsies and Travellers

- Smith v. SSHCLG [2021] EWHC 1650 (Admin);
- Challenge to the definition of ‘gypsies and travellers’ in the revised Planning Policy for Traveller Sites 2015;
- That definition now excludes those who have ceased to travel and have settled permanently;
- Argued that it unlawfully discriminated against elderly and disabled gypsies contrary to ECHR art. 14 and Equality Act 2010, s.19;
- But definition only applied in respect of the land-use needs and had to be read with the NPPF;
- Discrimination met a legitimate aim of focussing on meeting needs of those with a nomadic lifestyle and was objectively justified;
- Still needed to consider cultural needs and other personal circs of permanently settled gypsies and travellers when determining individual applications.

Thank you for listening

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