Landmark Chambers

Welcome to Part 2 of Landmark Chambers' Planning High Court Challenges webinar series

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Neil Cameron QC (Chair)

Sasha White QC

Topic:
Heritage case-law, including ancient trees: latest developments

Jenny Wigley QC

Topic:
Latest NPPF Cases

Your speakers today are…

Landmark Chambers

Topic:
Development Plan challenges 2021

Stephen Morgan

Topic:
Heritage case-law, including ancient trees: latest developments

Matthew Dale-Harris

Landmark Chambers

Latest NPPF Cases

Jenny Wigley QC

Topics to cover today

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

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

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- 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

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- 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- Para 11(d) – meaning of “out of date” – second trigger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

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- 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’

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- *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

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- 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

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- 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

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- 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)

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- 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

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- 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.

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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.

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Heritage case-law, including ancient trees: latest developments

Sasha White Q.C. and Matthew Dale-Harris

Overview

- Part 1:
  - *City and Country Bramshill Ltd v SSHCLG [2021] EWCA Civ 320,*
    - Assessing heritage impact, Palmer principle disapproved
    - Isolated Homes
  - *Weston Homes* litigation: Bedford approach in doubt

- Part 2:
  - Alternatives
  - Other heritage cases
  - Ancient Trees

City and Country Bramshill Ltd v SSHCLG

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City and Country Bramshill Ltd v SSHCLG

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- Challenge to refusal of various appeals in relation to a proposed redevelopment of a grade 1 listed Jacobean mansion and its grounds.

- Main issues
  - Interpretation of “isolated homes in the countryside” in NPPF 80
  - Assessment of less than substantial and more than substantial harm (NPPF 201/202)

Background

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- Interpretation of planning policy is a matter of law: ***Tesco v Dundee*** [2012] UKSC 13. This decision significantly expanded the scope for challenge to planning decisions.
- Since (at least) ***Hopkins Homes v SSCLG*** [2017] UKSC 37, the higher courts have consistently sought to qualify; preventing "overly legalistic" attacks on decision-making.
- Distinction emphasised by Lord Carnwath:
  - some questions of interpretation logically prior to exercise of planning judgment
  - BUT some policies may be expressed in "much broader terms, and may not require, nor lend themselves to, the same level of legal analysis"
- ***Samuel Smith v North Yorks CC*** [2020] UKSC 3 applied this to "openness".

Bramshill: isolated homes

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- Inspector had concluded that the proposals would create isolated homes in the countryside as part of her wider conclusion that the proposed housing was unsustainable development.
- C's argument:
  - Her reasoning did not engage with the ***Dartford*** [2017] PTSR 737, which was said to establish that dwellings within the curtilage of an existing structure will not be isolated.
  - She had failed to consider whether the dwellings on site formed a settlement: per ***Braintree*** [2018] 2 P&CR9
  - She had failed to consider how the quantum of housing sought under one of the appeals (235) could rationally be said to result in isolated homes.

Bramshill: isolated homes (2)

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- Sir Keith Lindblom P gave the leading judgment of the court:
  - Emphasised (following ***Hopkins Homes*** and ***Samuel Smith***) that the concept was one of policy not law and "*does not lend itself to rigorous judicial analysis… As with many other broadly framed policies in the NPPF, its application will depend on the facts of the case, and decision-makers will have to exercise their planning judgment in a wide variety of circumstances"* (para 30)

Bramshill: isolated homes (3)

Landmark Chambers

- Confirmed the interpretation of NPPF 80 (then 79) set out in ***Braintree***:

> "The essential conclusion…in paragraph 42 of [Braintree] is that in determining whether a particular proposal is for "isolated homes in the countryside", the decision-maker must consider "whether [the development] would be physically isolated, in the sense of being isolated from a settlement". What is a "settlement" and whether the development would be "isolated" from a settlement are both matters of planning judgment for the decision-maker on the facts of the particular case."

Bramshill: isolated homes (4)

Landmark Chambers

- He also
  - stressed distinction between the finding/ratio in ***Braintree*** and obiter comments in that case and in ***Dartford*** (which was about meaning of PDL)
  - Commented (obiter) that the reason why remoteness from a settlement was key was that this was the approach most consistent with Government's evident intention in producing the policy, as part of the aim of promoting sustainable development in rural areas.

- Inspector had referred to ***Braintree*** and her reasoning was unimpeachable.

Bramshill: heritage

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- Appellant argued that Inspector had failed to comply with "principle" in ***Palmer*** [2017] 1 WLR 411
- In ***Palmer***, Lewison LJ considered challenge to an LPA decision where officer had advised that there would be no overall adverse effect on the setting of a listed building from noise and smell of poultry sheds "*if proposed mitigation measures were put in place*". He rejected the claim, stating at [29]:

  "I would accept … that where proposed development would affect a listed building or its setting in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting. That is what the officers concluded in this case. … ."

Bramshill: heritage (2)

Landmark Chambers

- Appellant argued at inquiry that ***Palmer*** "internal balancing" should be applied.
- Inspector declined to apply approach, saying that ***Palmer*** ***"****clearly does reinforce that a balancing exercise needs to be carried out but does not direct the decision maker to only one method by which that should be done*".
- She was faced with situation where variety of appeals made it difficult to match harms of each proposal against individual benefits.

Bramshill: heritage (3)

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- Sir Keith Lindblom P:
  - Rejected contention that s.66(1) or NPPF stipulated any particular approach to the balancing of heritage harm against likely benefits ([72]-[73])
  - Emphasised that the concept in NPPF 199 that great weight be given to the conservation of a designated asset "*does not predetermine the appropriate amount of weight to be given to the "conservation" of the heritage asset in a particular case*."
  - There is no ***Palmer*** principle as suggested.

Bramshill: heritage (4)

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- Also addressed concepts of substantial and less than substantial harm (at [74]:
  - What amounts to substantial harm will always depend on circumstances and is a matter of fact and planning judgment
  - NPPF does not direct DM to adopt and specific approach to identifying harm or gauging its extent

- Approved the methodical approach of the Inspector which had ensured that both harms and benefits were fully appreciated.

Weston Homes v SSHCLG (CO/4743/2020)

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Weston Homes v SSHCLG (CO/4743/2020)

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- Challenge to refusal of appeal in relation to new residential tower in Norwich City Conservation Area.
- Main ground of claim alleged failure to apply **"*Bedford*"** approach to calibration of heritage harm
- Holgate J. granted permission noting that: "The substantive hearing will also provide an opportunity for the court to consider the ratio of the decision in ***Bedford***, and the extent to which it remains good law in the light of current policy and more particularly ***Hopkins*** and ***Samuel Smith***."
- Claim withdrawn following ***Bramshill.***

Alternatives

R (Save Stonehenge WHS Ltd) v SST [2021] EWHC 2161 (Admin)

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- DCO for construction of new 13km route for A303. Dual carriageway + 3.3 km tunnel.
- Third parties argued that alternative tunnel options should have been considered.
- Applicant had carried out an options appraisal, which the ExA addressed, but neither the ExA or the SST went on to express their own conclusions about the possible alternatives.
- This was in circumstances where Panel found that the road would cause substantial harm to the World Heritage Site.

R (Save Stonehenge WHS Ltd) v SST (2)

Landmark Chambers

- Holgate J. held that:
  - (1) the designation of the site as a WHS and (2) the extent of identified heritage harm put the case into the exceptional category of cases (per ***Trusthouse Forte***) where an assessment of relevant alternatives is required.
  - NB neither ExA or SST thought that the proposal would be net beneficial in heritage terms.

Other cases

- A number of LPA decisions were quashed on heritage grounds.

- Reflects continuing need for LPAs to take particular care when summarising representations from consultees as well as the statutory duty and relevant NPPF provisions in light of the ***Barnwell Manor*** line of authorities.

R (Kinsey) v Lewisham LBC [2021] EWHC 1286:

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- 110 unit redevelopment of 1970s sheltered housing
- Committee granted permission but quashed on four grounds
  - Failure to correctly advise members of duty to give considerable weight
  - OCR also omitted and changed several elements of conservation officers' advice (which was withheld from public)
  - Lang J also held that conservation officers' advice should have been made public
  - Separate ground succeeded re legitimate expectation that Council would consult the Design Review Panel.

R (Liverpool Open and Green Spaces) v Liverpool CC [2020] EWCA Civ 861:

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- Upheld conclusion of Kerr J that Council's application of s.66(1) of the Listed Buildings Act was flawed because:
  - No adequate reference to need to give great weight to heritage assets
  - No reference to consultation response from Council's conservation team (strong objection)

- Lindblom LJ at [81]-[82], the OCR left "substantial doubt" as to whether the s.66(1) duty was discharged.

R (Wyeth-Price) v Guildford [2020] EWHC 3355 (Admin)

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- Lang J applied *Liverpool Open Spaces* to quash *r*esidential permission near listed buildings (inc Grade II*).
  - Officer had referred to introductory paras on heritage in NPPF (now 194-198) and to s.66(1), but :
    - Had not explained how s.66(1) was to be applied;
    - Had not referred to or demonstrably applied the decision-making policies in NPPF 199-201; and
    - His consideration of the potential impacts did not reflect NPPF guidance.
  - Lang J suggested that application of ***Mordue*** principle (NPPF compliance sufficient to discharge s.66(1) duty requires that the NPPF is properly worked through for members

Ancient trees

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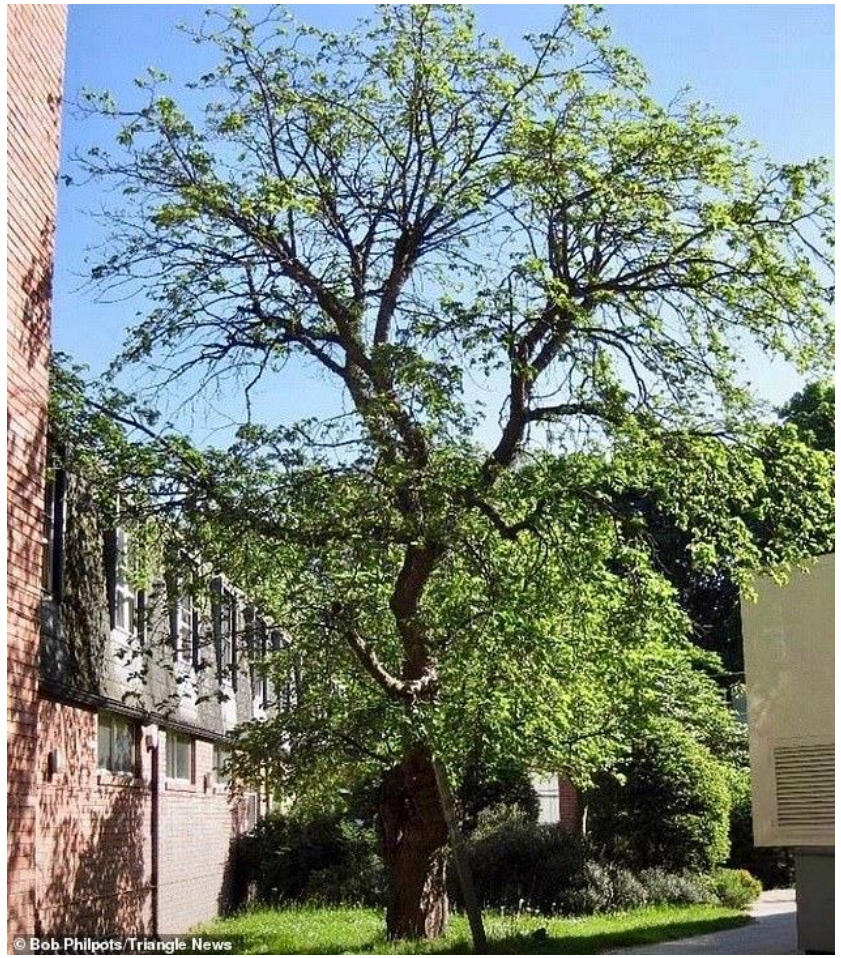
- NPPF 180(c):

  "*when determining planning applications LPAs should apply the following principles… (c) loss or deterioration of irreplaceable habitats should be refused unless there are wholly exceptional reasons*[63]*, and a suitable compensation strategy exists*"

- Footnote 63: "*For example, infrastructure projects (including nationally significant infrastructure projects, orders under the Transport and Works Act and hybrid bills), where the public benefit would clearly outweigh the loss or*
- *deterioration of habitat*"

Juden v Tower Hamlets LBC [2021] EWHC 1368 (Admin)



- Permission quashed for redevelopment of London Chest Hospital involving relocation of veteran mulberry tree
- Council found tree more likely than not to survive, but risk it would not.
- Officers had drafted OCR on basis that 180(c) did not apply; but late amendments identified it as a material consideration and advised that WEC existed.
- However, that advice packaged the suitability of the compensation strategy with question of WEC.

- Court held that:
  - Requirements for wholly exceptional circs AND suitable compensation strategy are cumulative
  - Not appropriate to consider whether a suitable compensation strategy can be achieved as part of assessment of whether WEC exist.
- Noted that it would have been open to officers to advise that 180(c) did not apply, advice could have been couched in terms of risks and important factors.

Government intention to further strengthen

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- Rebecca Pow, Parliamentary Under-Secretary at DEFRA, on 20 October 2021 responded to Lords Amendments to Environment Bill:
  - Taking forward work on ancient woodland inventory
  - Committed to review NPPF "*to ensure that it is being correctly implemented in the case of ancient and veteran trees and ancient woodland"* and if necessary amend NPPG
  - Will consult on strengthening NPPF wording "*to better ensure the strongest protection of ancient woodland, while recognising the complex delivery challenges for major infrastructure.*"
  - LPAs to be required to consult SSLUHC on applications affecting ancient woodland

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Development Plan challenges 2021

Stephen Morgan

Themes

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- 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)

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- 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)

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- 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.

- 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

Landmark Chambers

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.

- 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)

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- 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.

- 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

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***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

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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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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.

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