

Housing and planning

Managing housing growth and the environment – a fair balance or not?



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At a glance

- This article examines the current balance being struck between housing development and the environment in English planning decisions.
- There are inherent tensions in national policy, and the caselaw on the interpretation of the National Planning Policy Framework (NPPF) confirms that housing need has been given the priority.

It is clear that there is a pressing need for new housing in England, and that these demands are not being met. We are well short of the 222,000 new homes that have been estimated as being needed each year.¹ That accumulated demand presses hard on the policies that aim to protect the environment.

The main pressure is felt at the local level. Politicians, despite their words, do not build houses. That depends on the actions of developers and their promotion of individual site applications. Between January and June 2016, 31,300 of the 251,700 planning applications made to local planning authorities were for residential developments.² The majority of these housing applications were granted – in this six month period, 23,500 or some 75%. Indeed, the main work of planning system is done by elected local councillors, as members of the planning committee, and the planning officers that work for them. They do this work knowing that their decisions can be appealed to the Secretary of State, and can be challenged in court. It is the appeals that set the tone for the remaining decisions. Local authorities are still more likely than not to win an appeal, although the rate of success on appeal on larger sites is almost 50:50.³ That is where the Planning Bar⁴ gets most involved, and where we like to think we make most difference – although we do get to promote, and to advise on projects, and not just to react to refusals of permissions and appeals.

The plan-led system

These decisions are shaped by national and local policy. The legal framework is well established, and – on its face – appears to put a clear emphasis on a plan-led system. All planning decisions are made in accordance with the development plan unless material considerations indicate otherwise (the basic test under section 38(6) of the Planning and Compulsory Purchase Act 2004). This is said to require the planning authority ‘to give priority to the provisions of a development plan ...’⁵ If you read the

National Planning Policy Framework (NPPF)⁶, it too confirms that the plan-led system is a core principle.⁷ It emphasises the importance of up-to-date plans, that Local plans are the key to delivering sustainable development and that the extent to which policies are up to date is an important factor in decision-making.⁸ In their supervisory role, the courts will ensure that national policy is correctly interpreted and applied as a matter of law.⁹ It is in that context that the actual effect of the NPPF has become so important.

The tensions in the system

It has become clear that the NPPF is one of the material considerations why decisions will not be determined in accordance with the local plan. Many of these plans are dated, and are under review. But even adopted plans are vulnerable. There are inherent tensions built into the NPPF in relation to national housing policy. This often frustrates the apparent preference for a plan-led system.

Firstly, national policy changed quite dramatically in 2012. It is not just that the national policy is that local planning authorities should ‘boost significantly the supply of housing’. As Lord Justice Laws said in *Solihull MBC v Gallagher Homes* [2014]:¹⁰

The NPPF indeed effected a radical change. It consisted in the two-step approach ... The previous policy’s methodology was essentially the striking of a balance. By contrast paragraph 47 required the [Objectively Assessed Need] to be made first, and to be given effect in the Local Plan save only to the extent that that would be inconsistent with other NPPF policies.

This is a paragraph that finds its way into many submissions, and some would say that there is still a rearguard action going on against acknowledging the change. But the first tension in housing policy is here. The Objectively Assessed Need (OAN) is not some computer model, and it is a misnomer to call it an ‘objective’ assessment. There is much scope, as I know, to challenge the assumptions the individual expert makes and the choice of future projections. The Local Plan Expert Group has also criticised this trend.¹¹ But it goes further than that. It is seen as a legal error to use a figure for the housing requirements below the OAN figure until such time as the Local Plan process comes up with a constrained figure.¹² The identification of the Housing Need is not allowed to be based on a

balance, or on environmental constraints or deliverability. It is an absolute number which is given primacy in the system. It is sometimes referred to, rather tellingly, as a 'policy-off' figure.¹³ It does mean that the identified shortfall is said to be much larger if there is no recent plan.

But then there is a second tension, regarding the housing land supply in the next 5 years. Paragraph 49 of the NPPF states: '... Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.' Not only is the calculation often based on the OAN, but proving deliverability is often a difficult task. A council can still have an adopted Local Plan, with a new housing target, and find that the lack of sites coming forward means that it is declared to be not 'up-to-date'. They can also be criticised for a 'persistent' under delivery of housing (often due to the recession) and find that they have to show a 20% buffer as well.

The broad effect of NPPF para 49 has also proved to be dramatic. The question as to what are the 'relevant policies for the supply of housing' for the purposes of paragraph 49 has been widely drawn. After some conflicting earlier court decisions, the Court of Appeal has taken a very wide view in *Hopkins Homes*.¹⁴ Although it is under appeal to the Supreme Court, it is likely to remain the approach. It could be said that the chickens rather came home to roost. Crucially, the Court highlighted that any policy, whether directly related to housing or not, could be relevant if it has a restrictive impact upon the delivery of housing and thus that any policy would be out-of-date insofar as it impacts on the delivery of housing.

The effect of the NPPF has therefore been to shift the decision-making balance in favour of granting planning permission for housing. Firstly, the locally-adopted development plan will be treated as out of date. The restrictive plan policies remain relevant considerations, but only as one among many. There will still be some scope for argument. As Lindblom LJ said in *Hopkins Homes*:

47. ... The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements.

As to the actual decision about whether or not to grant planning permission, the NPPF does not apply a

simple planning balance as once used to be the case. Paragraph 14 of the NPPF states that, where development plan policies are out-of-date, the 'presumption in favour of sustainable development' applies which means:

- ... 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; or
 - specific policies in this Framework indicate development should be restricted.

Environmental constraints on housing development

It is not quite an open field day for new housing. The NPPF recognises that this presumption in para 14 does not require a grant of planning permission where, 'specific policies in this Framework indicate development should be restricted.' It does so with reference to the footnote to para 14. The list of policies in footnote 9 to paragraph 14 contains some important policies where housing would be restricted. These include the policies on the:

Birds and Habitats Directives... and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

There is therefore still strong policy support for the more major interests. The Birds and the Habitats Directives require appropriate assessment of the likely effects on protected European sites and species, and even nearby housing may be deemed to be inappropriate unless considerable mitigation measures are used (hence the debate on the funding and use of alternative green spaces to provide for the recreational needs of new residents rather than the open spaces of the Thames Basin Heathlands)¹⁵. We also still see restrictions, for instance, on development affecting designated listed buildings and conservation areas.¹⁶

But there is one important omission regarding the broader environment. General areas of countryside, including 'green wedges or gaps', are not listed in the footnote. Local landscape designations have been discouraged, and the only reference to protection is for green fields which are in valued landscapes (as referred to in para 109). The carefully-drawn limits to settlements are not included. If the development plan is not up to date, then these areas are vulnerable. The loss of undesignated countryside is not often considered significant enough to outweigh the benefits of boosting the supply of new housing.

We are also seeing the gathering momentum to consider the release of green belt land for housing. Plans have just been published to provide tens of thousands of new homes on the green belt around Greater Manchester, and a new urban extension in Hertfordshire is proposed for 2,000+ houses in the green belt. This is at least being done through the plan-led process.

The more general environmental constraints regarding pollution also remain. There have been few refusals on the grounds of adverse air quality impacts, but it will be interesting to see if the judgment in *ClientEarth (No.2)*¹⁷ has greater impact. Regarding the general law of nuisance, it must be remembered that planning permission does not authorise a nuisance as reiterated in the case of *Lawrence*.¹⁸ It can have a direct impact, so that the Ministry of Sound could block the development of new flats next to its nightclub.¹⁹ In the end, the issue was resolved by a deed of easement that ensured that the future owners of the flats would not be able to complain about any noise generated by the Club.

Reflections

It is clear that the NPPF has brought about a radical shift in the approach to grants of planning permission for housing development. Many developers who are pressing to obtain permission for more housing on greenfield sites are doing no more than reflecting national policy back at the local decision makers. That said, there is still scope to argue about the weight to be attached to local plan policies that are said to be 'out of date' because of housing land supply policies. There may be even more scope once *Hopkins Homes* has been heard in the Supreme Court in the summer of 2017. In the meantime, securing a five-year housing land supply is imperative for Local Authorities that want to have greater control over applications for housing development in their own areas.

Endnotes

- 1 National Housing Federation, 'Key Statistics Briefing: How many homes do we need?', January 2016; available here: http://s3-eu-west-1.amazonaws.com/doc.housing.org.uk/KSB4_How_many_homes_do_we_need.pdf
- 2 <https://www.gov.uk/government/statistics/planning-inspectorate-statistics> – see particularly Table 2.5.
- 3 Larger sites are defined as those with over 10 houses or more – of which there were 454 in Jan-June 2016, and 46% succeeded on appeal. There were 2,974 minor housing projects with only a 28% success rate. As for the Planning Court, which has seen a continued stream of cases, there are about 40 new planning cases lodged each month.
- 4 The Planning Bar is shorthand for those barristers who are members of the relevant Specialist Bar Association. Membership of the Planning and

Environment Bar Association ("PEBA") is for those who devote a significant proportion of their practices to the fields of planning, environment, compulsory purchase, highways, housing, rating and other aspects of local government and administrative law.

- 5 *Loup v Secretary of State for the Environment* (1996) 71 P&CR 175.
- 6 The NPPF was published by the government in 2012, and remains unamended. Note that the Secretary of State and the Planning Inspectorate prefer to refer to this as "the Framework".
- 7 See NPPF paras 17 and 196.
- 8 See in particular NPPF paras 11 to 14, 150 and 209.
- 9 *Tesco Stores Limited v Dundee City Council* [2012] J.P.L. 1078; [2012] UKSC 13.
- 10 *Solihull MBC v Gallagher Estates Ltd* [2014] EWCA Civ 1610 at [16].
- 11 See the "Local Plans Report to the Communities Secretary and to the Minister of Housing and Planning", March 2016. One of the ad hoc group's main recommendations was for a shorter, simplified, standard methodology for housing market assessments and, in particular for assessing housing need, with the aim of saving very significant time, money and, most importantly, with the intention of removing unnecessary debate from this aspect of plan making.
- 12 *City and District Council of St Albans v Hunston Properties Ltd* [2014] JPL 599.
- 13 An ugly phrase, used by some planning experts, and then adopted by the court in its discussion of housing numbers in *Gallagher Homes Ltd v Solihull MBC* [2014] EWHC 1283 (Admin). It also features in the Technical Advice Note from the Planning Advisory Service on "Objectively Assessed Need and Housing Targets" (July 2015).
- 14 *Suffolk Coastal District Council v Hopkins Homes Ltd.; Richborough Estates Partnership LLP v Cheshire East Council* [2016] 2 P&CR 1; [2016] EWCA Civ 168.
- 15 See, for instance, the situation in Surrey Heath, and the Thames Basin Heaths Special Protection Area, Avoidance Measures & Strategy (<http://www.surreyheath.gov.uk/residents/planning/planning-policy/thames-basin-heaths-special-protection-area-avoidance-measures>). This has produced its own acronym of a "Suitable Alternative Natural Greenspace" (SANG).
- 16 Special regard must be had to these considerations, in accordance with the Planning (Listed Buildings and Conservation Areas) Act 1990. Space precludes a broader discussion of the specific protection of heritage assets.
- 17 *ClientEarth (No.2) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin).
- 18 *Lawrence and another v Fen Tigers Ltd and others* [2014] UKSC 13.
- 19 See <http://news.bbc.co.uk/1/hi/magazine/8535219.stm>.