

Planning law topic

Housing land supply: how far can you go in the Administrative Court?

1. The classic exposition of the limits of judicial review and also statutory challenges under section 288 and 289 Town & Country Planning Act 1990, which proceed on the same basis, is that:

1.1 Grounds are restricted. JR or the statutory appeals are not appeals in the classic sense of a rehearing. It is not possible to say simply that the decision maker “got it wrong”. Essentially grounds are that:

- the Inspector failed to take into account material considerations;
- took into account immaterial considerations;
- erred in law. In planning, this includes misinterpretation of policy;¹
- there was a breach of the rules of natural justice or a breach of Article 6 rights to a fair hearing; or
- that the decision was irrational or perverse (in the *Wednesbury* sense).

1.2 A more sophisticated version of this formulation for planning cases is to be found in *Bloor Homes v SSCLG* [2014] EWHC 754 (Admin) at para. 19:

The relevant law is not controversial. It comprises seven familiar principles:

*(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p. 28).*

¹ See para. 1.2 (4) below.

(2) *The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953, at p.1964B-G).*

(3) *The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in NewsSmith v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, at paragraph 6).*

(4) *Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] P.T.S.R. 983, at paragraphs 17 to 22).*

(5) *When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).*

(6) *Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).*

(7) *Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for*

example, the judgment of Pill L.J. Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137, at p. 145).

Legality and illegality in the planning process - who decides what?

2. To know whether considerations are material or immaterial, even if one confines it to a limited area like housing, frequently requires a close investigation of the Inspector's decision and the policies applied. For example, in *St. Albans DC v. Hunston Properties and SSCLG* [2013] EWCA Civ 1610 against the background of paras. 47 and 49² of the National Planning Policy Framework ('FW'), the CA held that an Inspector should find a fully Objectively Assessed Need ('OAN') figure for housing. Unfortunately, the inspector had not done that but had used the figure from the revoked East of England Plan.³

3. The court also held that the result of not having a OAN figure did not automatically mean that planning permission should be granted in, e.g., the Green Belt/AONB/National Park, etc. In fact their existence might lead an inspector to conclude that a degree of shortfall in the five-year housing land supply was inevitable. And the weight to be given to any shortfall might therefore reduce.

4. But it was not for the court to say whether there was a shortfall or to do the OAN calculation or to balance the shortfall against harm, e.g., to the landscape, AONB etc.

5. This case shows the court's involvement in the interpretation of the FW and giving guidance how that is to be dealt with but going no further and

² FW 47 reads "To boost significantly the supply of housing, local planning authorities should: - use their evidence base to ensure that their Local Plan meets the full, objectively assessed need for market and affordable housing - identify and up-date annually a supply of specific deliverable sites sufficient to provide 5 years worth of housing against their housing requirements with an additional buffer of 5% to ensure choice and competition in the market for land. [It will be a 20% buffer if there has been 'a record of persistent under delivery of housing']"

FW 49 reads: "Housing application should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a 5 year supply of deliverable housing sites."

³ On the other hand, it was not for the inspector to carry out a Local Plan exercise and to work out what the constraints might be, e.g. because of the effect of the green belt and/or AONB.

certainly not entering into the planning merits. Also faulting the Inspector for taking into account an immaterial consideration namely the use of the East of England Plan figures for housing. He should have used the up to date figures from the SSCLG's household projections.

6. In *Cotswold DC v. SSCLG* [2013] EWHC 3719 Admin, the court held that in assessing OAN, FW 47 provides that a 5% or 20% buffer should be added to the OAN figure. 20% is added if there is persistent under delivery. This is:

6.1 A question of fact for the decision maker (see *Bloor*, above, at [121]-[135]) and it connotes something that has "*continued or occurred for a long time though not necessarily through an authority's deliberate default.*"

6.2 But then how far can the decision maker go? Often the period of persistent under delivery may stretch back many years. So if the period included an out of date plan where delivery complied with the figures there, what should happen?

6.4 It was held that it was proper to look at both the old plan and any housing needs derived separately from that plan; in other words the more up-to-date figures.

6.5 And so this case defines the scope of OAN and persistent under-delivery but does not get involved in the planning detail which is for the Inspector.

Is the issue a legal one or merely the exercise of planning judgment?

7. *William Davis Ltd v. SSCLG* [2013] EWHC 3058 Admin deals with the issue of prematurity, i.e., postponing a decision until a relevant LP policy has been settled. For example, where an application is perhaps so large that it could prejudice the emerging LP policies and identification of preferred sites. It was held that:

7.1 prematurity was not a legal concept. It was therefore a matter for an Inspector to deal with as a matter of planning judgement.

7.2 As against that the claimants said that the Inspector had not considered the pressing need for housing which counted against prematurity. The court refused to be involved in that dispute.

7.3 The Inspector and the Secretary of State had considered prematurity (and so taken into account a material consideration) but had given it limited weight. They had considered prematurity and the need for housing and had balanced out the two and had done so without committing an error of law or any other material error.

***Development plan and sustainable development
FW 14, FW 47 and FW 49***

8. In *Dartmouth Borough Council v. SSCLG* [2014] EWHC 2636 Admin, the court dealt with two things: the position of Development Plan policies and the issue of sustainability and sustainable development which is a “golden thread running through both plan-making and decision-taking.” (FW 14). The court held that:

8.1 The DP should be considered as a whole. The judge pointed out that policies could pull in different directions and the Inspector might have to decide which policy was the dominant one.⁴

8.2 Was the development sustainable? That was a question of planning judgement overall looking at all material circumstances and no legalistic or step-by-step approach was necessary.

8.3 Again, the court is not getting involved in the decision of whether the development is or is not sustainable but is considering merely the correct approach and whether the Inspector in that case had followed it – which the court held that he had.

⁴ See also *R (Cummins) v. SSETR* [2001] EWHC 1116 Admin at [161 – 162].

9. One of the prime issues in dealing with HLS is whether the development can be regarded as 'sustainable' in accordance with definitions in the FW, including FW 14. A further issue is the effect of FW 47 and FW 49. The effect of these latter two paragraphs may have a decisive effect on how a planning inquiry is decided. That is because FW 49 tells us that "relevant policies for the supply of housing" will be out of date if there is not a 5 year HLS. FW 47 is the start of how to calculate such a supply. The reason why this is important is because, if a relevant policy is out of date, the FW provides for a weighted balance in dealing with a decision or an appeal. An appeal can only be dismissed if the harm '*significantly and demonstrably*' outweighs the benefits.

10. In *East Staffordshire Borough Council v. SSCLG* [2016] EWHC 2973 Admin, the court had to consider the ambit of FW 14 dealing with the presumption in favour of sustainable development. Can a development which is inconsistent with a recently adopted Local Plan still be sustainable? There are a number of points:

10.1 Applying section 38(6),⁵ which is the legal test for decision makers, it says that a decision should be made in accordance with the provisions of the Development Plan unless material considerations indicate otherwise. *Prima facie* therefore permission should be refused where there is conflict with the DP.

10.2 FW 14 says that the presumption in favour of sustainable development for decision-taking:

"..... means [Here there is a footnote, footnote 10, which says: "Unless material considerations indicate otherwise"]:

· approving development proposals that accord with the development plan without delay; and

· where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

⁵ Ss. 38(6) Planning & Compulsory Purchase Act 2004 and 70(2) Town & Country Planning Act 1990.

- *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or*
- *specific policies in [the FW] indicate development should be restricted."*

[Here, footnote 9 says: "For example, those policies relating to sites protected under 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."]

10.3 FW 12 says that development that conflicts with an 'up-to-date Local Plan' should be refused unless material considerations indicate otherwise.⁶

10.4 In the judge's view the Inspector had erred because there was a failure of reasoning: he did not analyse the pros and cons of the development so as to decide how the one might outweigh the other. Perhaps more seriously, he had found the development to be 'sustainable' without explaining how this was so when it was inconsistent with significant policies in an up-to-date Local Plan. There was a misinterpretation of policy and a failure to take into account relevant considerations see at [51]-[53]).

10.5 The LP has primacy therefore. Development not in accordance with it is, *prima facie*, not sustainable and should not be permitted. This comes from an analysis of the terms of FW 14. There is a residual discretion to approve it but that is very limited. Accordingly, one of the things that this case says, very importantly, is that an up-to-date LP will dictate a decision on development – even if that can be argued to be otherwise sustainable – unless there are very limited circumstances which have yet to be specified.

⁶ If it accords with it, it should be approved.

11. *Suffolk Coastal DC v. Hopkins Homes Ltd.*⁷ This deals with the interpretation of FW 49 and the meaning of 'relevant policies for the supply of housing'. The CA said:

33. *Our interpretation of the policy does not confine the concept of "policies for the supply of housing" merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognizes that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed - including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it - that policies of both kinds make the supply what it is.*

12. Thus policies relating to the AONB or local landscape designations in the DP may be regarded as 'out of date' within the meaning of FW 49 if there is no 5 year HLS. The consequence will be, subject to one point, that it will be necessary to show that the harm 'significantly and demonstrably' outweighs the benefits.

13. However, the decision is more nuanced than that paragraph might suggest. Thus:

- The court emphasised that the statutory framework for the making of decision, i.e., the DP, remains and that the weight to be attached to all relevant policies is for the decision maker [42].
- Again, it is for the decision maker to decide as a matter of planning judgement whether a policy is or is not a relevant policy for the supply of housing [45].
- Even if a policy is 'out of date' it does not become irrelevant; it must not be ignored or disapplied. Again, the weight to be given to such a policy will be for the decision maker [46].

⁷ [2016] EWCA Civ 168. Permission to appeal to the Supreme Court has been given and judgment is awaited. .

- Furthermore, the weight to be given to an 'out of date' policy in a situation where there is no 5 year HLS may depend, e.g., on the extent to which the supply falls short of the 5 years. Interestingly:

"There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land." [47].

14. And the policies in FW 14, 47 and 49 are not there to punish LPAs when they do not have a 5 year HLS. They are to be applied so that decisions are arrived at in the public interest [48].

15. *Forest of Dean DC v. SSCLG*.⁸ In that case the High Court had to deal with FW 14. The relevant part dealing with decision taking has been set out above.

16. Coulson J held that there were two tests:

16.1 the first where 'significantly and demonstrably' was to be applied. This may well be the great majority of cases.

16.2 The second was where there was harm to something coming within a policy referred to in footnote 9, e.g., a designated heritage asset or the AONB. In that case the balancing exercise is simply one of harm against benefits, i.e., a non-weighted balance [20-22 and 33-35].

16.3 Note however that the balance may have to be struck twice.

17. Frequently one has to deal with the vexed question of a council that does not have a 5 year HLS but is doing its best to provide housing land for development. The result that it is in breach of FW 49 and the 'significantly and demonstrably' test under FW 14 kicks in so that it may have difficulty in showing

⁸ [2016] EWHC 421 Admin.

that the harmful effects of the development outweigh the benefits. The weight to be given benefits and harm is therefore very important. The correct approach is probably as follows:

- a) Lindblom J (as he then was) in *Crane v SSCLG* [2015] EWHC 425 (Admin) at paragraph 71 held that in such circumstances the FW does not stipulate how much weight should be given to such "out of date" policies.
- b) The Court of Appeal in *Suffolk Coastal District Council v Hopkins Homes Ltd and SSCLG* [2016] (above) confirmed this approach (paragraph 46 of the judgment). This is an assessment which has to be undertaken by the decision maker.
- c) Relevant considerations on the issue of weight in *Crane* included:
 - i. The reasons for the shortfall
 - ii. Any interim measures being taken by the Local Planning Authority to release land for housing.
- d) The case of *Phides Estates (Overseas) Ltd v SSCLG* [2015] EWHC 827 (Admin) identifies at paragraph 60 that relevant considerations in assessing the benefit that a particular scheme will have by increasing the supply of housing will vary from case to case. It will depend for example on:
 - i. The extent of the shortfall;
 - ii. How long the deficit is likely to persist;
 - iii. What steps the authority could take to readily reduce it; and
 - iv. How much of the shortfall the development would meet.

18. The CA in *Suffolk Coastal* also accepted that a relevant consideration can include the degree to which relevant policies fall short of providing for a five year supply of housing land and the purpose of a restrictive policy (paragraph 47). There will be cases in which restrictive policies are given sufficient weight to

justify refusing planning permission despite there not being an up to date supply of housing.⁹

19. Finally, I have referred to issues of planning judgment or the weight to be attached to considerations being left to the Inspector or the Secretary of State. That is always subject to the proviso that their judgment in this respect is *Wednesbury* reasonable. It is unusual for a decision to be impugned for this reason but not impossible. For example, what if a council or an Inspector imposes a condition requiring a road to be constructed on a particular development site but constructed up to the boundary of the adjoining land? There may be good reason for doing so because the site in question is only part of a larger development, e.g., a new settlement or an urban extension. The developer might seek a ransom strip.

20. However, there is at least one case, *Hall & Co. Ltd. v. Shoreham UDC* [1964] 1 WLR 240 (CA), where a similar condition¹⁰ was held to be *Wednesbury* unreasonable on the basis that no reasonable council could have imposed it. It interfered with the company's property rights without compensation whereas the regular course would have been to use compulsory purchase powers under which compensation is payable. This case has both been supported and criticised; the issue may be whether it is still unreasonable in modern planning to impose such a condition.

21. These cases illustrate the simple point that the courts will say what factors the Inspectors can or cannot or should or should not take into account but they will avoid getting into the detail of how this should be done or the weight that should be attributed to the relevant factors. These are all matters for the Inspector or the Secretary of State alone.

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⁹ They may also include settlement boundary policies, even where there is no 5 year HLS and the policies are therefore out of date. According to the Secretary of State they may still carry 'significant weight'.

¹⁰ It required the construction of a 'relief road' on the company's land to relieve very considerable traffic congestion.