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The tilted balance in NPPF 2019

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Topics

- The tilted balance as expressed in the 2019 NPPF
- *Monkhill* and Holgate J's "15 point plan"
- Relevant development plan policies
- Most important policies
- Out of date
- Standard of reasons
- Tilted balance and 5YHLS
- Practical pointers

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Para 11(d) NPPF 2019

For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; or

ii. 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.

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Para 11(d) NPPF 2019

- Presumption of sustainable development – no longer a “golden thread”
- Relationship with s.38(6) PCPA 2004 and para 11(c) NPPF
- Main textual differences with 2012 NPPF:
 - “Out of date” trigger only applies to “most important” policies
 - Restrictive policies must provide a “clear” reason for refusal
 - Footnote 6 sets out an *exclusive* list of restrictive policies

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New Footnote 7

- clarifies the meaning of “*out-of-date*” in this context as including, for applications involving the provision of housing:
 1. situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer) (“5YHLS”). or
 2. where the Housing Delivery Test indicates that the delivery of housing was substantially below (75%, subject to transitional arrangements) the housing requirement over the previous three years.

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Paras 12-14 NPPF 2019

- Emphasis on primacy of the development plan
- Modified tilted balance in the case of recently adopted neighbourhood plan – triggered where LPA cannot demonstrate three year HLS and 45% housing delivery
- Interpret 2019 NPPF on its own terms and not by reference to 2012 NPPF or previous case law – *Paul Newman Homes* [2019] EWHC 2367 (Admin) at para 38

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Paragraph 11 – Some hangovers from para 14

- *Wychavon* approach vs *Renew Land* approach
- East Staffs DC [2017] EWCA Civ 893
 - No presumption outside para 14
 - No further requirements beyond para 14
- *Gladman v Daventry DC* [2016] EWCA Civ 1146
 - Not out of date just because time expired – test consistency with NPPF but see now *Hopkins Homes*

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Monkhill and the 15 point plan

- One of the first decisions to consider new tilted balance
- At para 39 Holgate J sets out detailed 15-point framework for applying para 11(d):
 - Tilted balance does not displace s.38(6) (1-3)
 - Where no relevant development plan policies, grant PP unless limb (i) or limb (ii) applies (4)
 - Where “most important” relevant development plan policies out of date, grant PP unless limb (i) or (ii) applies (5)

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Monkhill and the 15 point plan

- If either limb (i) or (ii) applies, presumption of sustainable development no longer applies. Essentially a matter of planning judgment (6)
- Where more than one Footnote 6 policy is engaged and they provide a clear reason for refusal, limb (i) is satisfied (7) – but note *Paul Newman Homes* on “policies”
- Limb (ii) cannot be relied on to support grant of PP where limb (i) applies. Therefore where limb (i) is engaged, should generally be applied first (8-9)



Monkhill and the 15 point plan

- Under limb (i):
 - *application* of restrictive policy must provide a clear reason for refusal – not enough for policy to be engaged (10)
 - Only those factors which fall into ambit of relevant footnote 6 policy to be taken into account (11)
 - In some cases, footnote 6 policy will require all planning matters to be considered / full balancing exercise (e.g. Green Belt). No justification here for applying limb (ii) as well as limb (i) (12)
 - In others (e.g. heritage) limb (ii) may still apply (13-14)
- If no Footnote 6 policy engaged go straight to limb (ii) (15)



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End of the Approach in *Forest of Dean*

- Meaning of “restricted” – foot note 9 in NPPF 2012 provided “examples”
- *Forest of Dean v SSCLG* [2016] EWHC 421 (Admin), Coulson J at [28] as follows:

“... I think that it is appropriate to give the word “restricted” in Limb 2 of paragraph 14 a relatively wide meaning, to cover any situation where the NPPF indicates a policy that cuts across the underlying presumption in favour of development.”

- Interaction of footnote 9 and paras relating to Heritage Coasts
- Para 11 – an exclusive list – “clear reasons”

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“No relevant development plan policies”

Paul Newman Homes at para 32

- Relevant means relevant to determining the application
- Need not be important or decisive
- “No more than some real role in the determination of the application” – not a fanciful or tangential connection

“Relevant policies” could include a corpus of policies setting out a spatial vision – *Gladman v Canterbury CC* [2019] EWCA Civ 669

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Most important policies

Wavendon Properties v SSHCLG [2019] EWHC 1524 (Admin)
at para 58

- Not a rule or tick box instruction
- Do not need to demonstrate that *all* the most important policies are up to date to disapply tilted balance
- Holistic approach: establish “basket” of which are most important, examine whether these are out of date, and then consider whether basket of MIPs as a whole out of date

“Policies” in the plural includes the singular: *Paul Newman Homes* at para 36

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Out of date

Peel Investments v SSHCLG [2019] EWHC 2143 (Admin)

- Just because a policy is “time-expired” not automatically OOD as a matter of law – relevant but not dispositive matter
- Consider consistency with NPPF (cf para 213) and whether policy still relevant and capable of achieving its objectives, applying it to the “facts on the ground”
- A matter of planning judgement for the decision-maker

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Relevance of the development plan

Gladman v SSHCLG [2020] EWHC 518 (Admin)

- Limb (ii): *adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the policies in this Framework*
- Court found, where tilted balance applies, still need to consider and give weight to development plan policies
- E.g. where proposal accords with most important policies but these are out of date, or where fn 7 applies

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Standard of reasons - 1

Wavendon Properties v SSHCLG [2019] EWHC 1524 (Admin) at paras 60-65

- No need to provide reasons on whether or not most important policies out of date where this trigger for tilted balance not relied on by applicant (ie not a “main controversial issue”)
- Adequacy of reasons a fact sensitive question in each case
- In this case, reasons were necessary where SoS concluded (contrary to Inspector and parties to inquiry) that there was a 5YHLS

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Standard of reasons - 2

Green Lane Chertsey v SSHCLG [2019] EWHC 990 (Admin)

- Not necessary to refer explicitly to tilted balance or relevant NPPF provisions in order to take it into account
- However, where planning permission refused notwithstanding absence of 5YHLS need to explain why tilted balance disapplied
 - E.g. identify *clear* reason for refusal or why harm “significantly and demonstrably” outweighs benefit



Tilted balance and material considerations

Green Lane Chertsey v SSHCLG [2019] EWHC 990 (Admin)

- Emphasis on tilted balance being different to normal planning balance
- Decision makers need to engage with this – merely to find “harm”, “material harm” or that development out of keeping with the area not sufficient to “significantly and demonstrably” outweigh planning benefits
- Needs to be some evidence in reasons that suggests a different balancing exercise undertaken



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Hopkins Homes

- Absence of 5 years supply enough of itself to trigger para 14 “tilted balance”
- So – details of which specific policies are out of date does not need legalistic definition
- Becomes very much a matter of planning judgment with which Court will not interfere ...



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The Role of Out of Date Policies

- ***Crane v SOSCLG [2015] EWHC 425 (Admin)***, Lindblom J
- [72] *But in any event, however much weight the decision-maker gives to housing land supply policies that are out of date, the question he has to ask himself under paragraph 14 of the NPPF is whether, in the particular circumstances of the case before him, the harm associated with the development proposed “significantly and demonstrably” outweighs its benefit, or that there are specific policies in the NPPF which indicate that development should be restricted. That is the critical question. The presumption in favour of the grant of planning permission in paragraph 14 is not irrebuttable. And the absence of a five-year supply of housing land will not necessarily be conclusive in favour of the grant of planning permission.*



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5YHLS and tilted balance

- Crucial to establish 5YHLS position for applicability of tilted balance
- Also necessary to identify (broadly) the magnitude of the shortfall (*Hallam Land Management Ltd v SSCLG* [2018] EWCA Civ 1808)
- But do not need to take into account differing position in draft AMR before published (*Chilton v Babergh* [2019] EWHC 280 (Admin))
- Calculating 5YHLS is a purely **quantitative** exercise

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Practical pointers

- Fast moving area, many recent High Court decisions – *Peel Investments* and *Monkhill* already under appeal
- For LPAs: tread carefully – complex scheme which restricts breadth of planning judgment: use *Monkhill* framework and *Paul Newman/Wavendon* three stage approach to “out of date”
- For applicants: note and exploit nuances which favour grant of PP – e.g. need for “clear” reason for refusal

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