What implications do recent legal challenges have for neighbourhood planning?

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Introduction

Neighbourhood planning has become a focus of litigation, as local communities have sought to use neighbourhood plans to resist development pressures created by the absence of a five year housing land supply and the presumption in favour of sustainable development in the NPPF.

The Secretary of State has been generally supportive, recovering appeals where neighbourhood plans are in issue, and attaching significant weight to their policies even when they are out of date by reference to paragraph 49 of the NPPF.

Early attempts by developers to challenge emerging neighbourhood plans were unsuccessful. In *BDW Trading Ltd. v. Cheshire West & Chester Borough Council* [2014] EWHC 1470 (Admin) and *R (Gladman Developments Ltd.) v. Aylesbury Vale District Council* [2014] EWHC 4323, the Courts upheld the making of neighbourhood plans in the absence of an up to date district level development plan, emphasising the relatively low hurdles to be overcome in order for a plan to succeed at examination.

Recent case law

*Crane v. Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) was an unsuccessful challenge to a decision by the Secretary of State to dismiss an appeal for housing based on conflict with a neighbourhood plan. There was no five year housing land supply, and so the housing policies in the plan were out of date. The main implications are:

- A proposal on an unallocated site can be in conflict with a neighbourhood plan which allocates land for housing, even if it does not contain explicit policies to restrict housing elsewhere, such as a settlement boundary.

- Conflict with a plan that is out of date can be given very substantial negative weight in the planning balance. Neither the NPPF nor case law prescribe the weight that attaches to such a plan - it is a matter of planning judgment.

*Woodcock Holdings Ltd. v. Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) was a successful challenge to a decision by the Secretary of State to dismiss an appeal based on conflict with, and prematurity in relation to, an emerging neighbourhood plan. Again, there was no five year housing land supply. The main implications are:
The Court's approach to conflict with a neighbourhood plan in *Crane* does not apply in the absence of site allocations for the relevant settlement in the emerging neighbourhood plan.

Paragraph 49 of the NPPF applies to an emerging plan, and housing policies in emerging plans are to be treated as out of date where there is no five year housing land supply.

To refuse planning permission on the grounds of prematurity, it is necessary to consider whether there were particular issues that should be determined through the examination process, rather than in a development control decision. The limited and 'somewhat superficial' scope of the examination of a neighbourhood plan has important implications for reliance on prematurity in relation to that process:

- it is only in relation to issues that will fall within the remit of the examination that prematurity can arise; and
- where, for example, the examination will not consider whether more housing needs to be allocated in a settlement, or can be accommodated there without detriment, determining those issues through the development control process would not give rise to a proper prematurity objection.

A housing policy in a neighbourhood plan would not satisfy the basic condition to have regard to the NPPF, and in particular the need for flexibility and to plan positively for growth, if it set a numerical cap on new housing. That point has particular force in the absence of an up to date objective assessment of housing need.

In judging the weight to attach to an emerging plan, the decision-maker must grapple with all three factors in paragraph 216 of the NPPF.

*R (Larkfleet Homes Ltd) v. Rutland County Council* [2015] EWCA Civ 597 was a judgment of the Court of Appeal dismissing a challenge to the Council's decision to proceed to a referendum on a neighbourhood plan. The main implications are:

- Neighbourhood plans may allocate land, and do not need to be prepared as a local development document in order to do so. Section 17 of the Planning and Compulsory Purchase Act 2004 does not apply to neighbourhood plans, as they are not prepared by the local planning authority.
- A Strategic Environmental Assessment of a neighbourhood plan must consider both positive and negative effects.

*R (DLA Delivery Ltd.) v. Lewes District Council* [2015] EWHC 2311 (Admin) was an unsuccessful challenge to the making of a neighbourhood plan. The main implications are:

- Applying *Gladman*, there is no need for there to be an up to date Local Plan in order to make a neighbourhood plan (although the absence of an up to date Local Plan may be material in determining an application which conflicts with the neighbourhood plan).
- No appearance of bias arises just because the choice of examiner is left to the Local Planning Authority and the examiner selected has approved all of the neighbourhood plans put his or her way.
**Comment**

Whilst the decision in *Crane* allows significant weight to be attached to out of date policies in neighbourhood plans, it may be that the *Woodcock Holdings* case will also prove to have substantial repercussions by identifying the limitations of a prematurity argument in relation to an emerging neighbourhood plan. In the right case, it may signal the existence of a window of opportunity - before the plan is made - for those promoting development which is unlikely to be allocated.

**Hereward Phillpot QC** has considerable experience and expertise in all aspects of neighbourhood planning. He successfully represented Aylesbury Vale District Council in defending the making of the Winslow Neighbourhood Plan (*R (Gladman Developments Ltd.) v. Aylesbury Vale District Council* [2014] EWHC 4323 (Admin)), and in resisting the related application for an interim injunction (CO/3104/2014), and acts both for local planning authorities and developers in section 78 appeals concerning emerging neighbourhood plans.