Planning and Environment Newsletter

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Welcome to the latest edition of nplaw's Planning and Environmental Law update. Although many of you will have been away over the Summer, there has still been a lot happening in the world of planning law, so we thought we would just take a few minutes to fill you in.

Housing Supply issues you need to address at appeal even if you do have a 5 year supply of housing land

The Secretary of State (SoS) for Communities, Sajid Javid, has recently published his decisions in respect of appeals against refusals of planning permission for two different sites comprising up to 1,500 homes in the countryside beyond the Green Belt in Essex in which he concurred with his Inspector on almost all the issues and dismissed both appeals, in particular, because he considered the local authority had a 5 year housing land supply.

The local authority had refused both applications on the basis that they conflicted with the development plan, and because the local authority had a 5-year supply of housing land excluding the two sites. An inquiry which heard both appeals took place in late 2014 at which each appellant argued that the local authority did not have a 5-year supply.

This case gives a useful insight into the SoS's thinking regarding the housing land supply debate.

Shortfall/backlog

In this case, there was no dispute that the backlog – however it was calculated – should be recovered over 5 years, i.e. using the Sedgefield method. However, the appellants argued that a 'backlog' going back to before the start of the plan period should be added to the objectively assessed need (OAN) calculation. The Inspector and SoS rejected this.

The Buffer and how it should be applied.

The appellants contended that UDC had persistently under-delivered and that there should therefore be a 20% buffer rather than the 5% buffer UDC had applied. This was rejected by the Inspector and SoS. The Inspector noted that although there had been under delivery in some of the years affected by the recession and also noted that there were delays with specific larger sites this did not amount to persistent under-delivery. UDC stated that in order to avoid this in future it was now preferring a larger number of smaller sites, thus reducing the risk of under delivery. The Inspector also said that whilst there is no policy or guidance on the matter, his view was that the buffer should be added after adding together the 5 year requirement and the backlog, otherwise the buffer would be diminished by the backlog.

The weight to be attached to Affordable Housing in the planning balance and the effect on the OAN.

It was not in dispute that the provision of affordable housing was a benefit of the proposals worthy of significant weight, which, both the SoS and the Inspector said applied whether or not there was a 5 year supply of housing land.

The appellants argued that the OAN should be increased substantially in order to ensure that 'full' affordable housing need was met as part of it.

The Inspector and SoS found in favour of UDC: The SoS said "*neither the Framework nor the PPG suggest that the affordable housing needs need to be met in full in the OAN, on the grounds that this may produce a figure which has no prospect of being delivered in practice*".

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Lapse Rate

The Inspector and the SoS found no evidence to justify the case for including a 'lapse rate' to the planned supply, as the appellants had proposed.

The weight to be attached to Delivery in the planning balance

The Inspector and SoS attached reduced weight to the delivery of housing on the basis that very few of the proposed houses would in fact be delivered in the next 5 years.

Policy in relation to the protection of the countryside

The SoS disagreed with the Inspector on this issue of policy. UDC has a countryside protection policy which aims to 'protect' the countryside beyond the green belt. In departing from his Inspector, The SoS found the policy to be consistent with the NPPF principle to be found in paragraph 17, bullet point 5 that the intrinsic character and beauty of the countryside should be recognised while supporting thriving communities within it. It followed that the breach of the policy which the applications would have resulted in attracted significant weight, notwithstanding that the Plan was out of date itself (for reasons **not connected** with housing land supply).

1. Where you have a backlog remember that a fully up to date OAN effectively wipes out backlog from previous years.
2. If you have under delivery due to the recession or due to unexpected hitches with infrastructure which leads to delays in bringing larger sites forward, do not despair. You may still be able to argue that the under delivery is not persistent or it is due to factors which will not be repeated in the future and that therefore a 5% buffer is appropriate.
3. In relation to point 2 above you may wish to think about, when preparing new Local Plans, allocating more smaller sites which are likely to have less infrastructure needs and therefore carry less risk of delay in delivery.
4. When adding the buffer (either 20% or 5%), unless you have very good reasons for not doing so, it should be added after adding together the 5 year requirement and the backlog, otherwise the buffer is be diminished by the backlog.
5. The OAN does not need to enable all the affordable housing requirement as indicated by the development plan policy to be met. The OAN figure needs to reflect what can, in practice, be delivered.
6. The weight to be attached to the provision of affordable housing is always significant.
7. The weight to be attached to out of date policies which are consistent with the NPPF can be significant.
8. The reference to paragraph 17, bullet point 5 of the NPPF is a good counterbalance to the unhelpful wording in paragraph 109 which seeks to protect and enhance only valued landscapes. Although not at issue in these appeals, there is clear case law to the effect that valued landscapes consist of more than those with statutory designations, although being valued only by local people is usually not enough to provide protection.

And speaking of out-of-date policies in paragraph 7 above brings us to

the Hopkins Homes case…

The Supreme Court has granted permission to Suffolk Coastal District Council and Cheshire East Council to appeal the landmark decision of the Court of Appeal in the case of Suffolk Coastal D.C. v Hopkins Homes and Richborough Estates Partnership LLP v Cheshire East Borough Council [2016].

It is hoped that the Supreme Court will be able to formulate a clear definition of the meaning of "relevant policies for the supply of housing" in paragraph 49 of the NPPF. You will recall that the Court of Appeal had come down on a "wide" definition, which had included policies for the protection of Green Belt and AONB as "policies for the supply of housing" to be treated as "out of date" where a Council could not demonstrate a 5 year housing land supply and triggering the presumption in favour of planning permission in paragraph 14 of the NPPF.

Suffolk Coastal D.C. has also sought permission to challenge a second ground in the judgment where the Court of Appeal had ruled on the approach to assessing the impact of development on the significance of heritage assets.

It is likely that this case will be heard in the Supreme Court between April and July 2017. We will of course let you know as soon as we are aware of the outcome of the appeal and we plan to run a training session on its implications shortly afterwards.

In the meantime, we are finding that this case is useful in that, although it gave a wide definition to "relevant policies for the supply of housing", it also helpfully pointed out that nowhere in the NPPF or elsewhere is a statement that out of date policies should carry little or no weight. For example, in the appeal decisions referred to earlier, the SoS gave significant weight to out of date policies relating to the countryside.

Garden grabbing case to be heard by the Court of Appeal

Permission has been given for the case of Dartford Borough Council v SSCLG [2016] to be heard in the Court of Appeal.

In the initial High Court hearing of the case in January this year, the Court held that only "private residential gardens" in "built up areas" were exempt from the definition of "previously developed land" or "brownfield land" within the NPPF. The decision has potentially widespread consequences as brownfield land has a special status throughout national policy. The case produced the somewhat strange result that land outside the built up area (an undefined term in the NPPF) is prioritised for development (for example by building in large gardens in the countryside or rural villages), whereas land within the built up area is not. It will therefore be interesting to see what the Court of Appeal makes of this.

Here to help

With all this talk of appeals, please remember that nplaw can advise on statements of case and proofs, attend planning informal hearings with you and conduct the advocacy in public inquiries.

Rogue landlords – An Update

You will recall that the Housing and Planning Act 2016, which received Royal Assent in May this year, introduced in Part 2 a new power for local housing authorities to apply for banning orders in respect of rogue landlords and letting agents and an obligation to keep a register of any banning orders made.

The DCLG has confirmed that

- Following a public consultation, banning order offences will be specified in regulations (that will be subject to the affirmative procedure).
- The intention is to introduce the power on **1 October 2017**.

The Neighbourhood Planning Bill 2016-17

On 7 September 2016, the Neighbourhood Planning Bill 2016-17 was introduced to the House of Commons. The purpose of the Bill is to support the government's ambition to deliver one million new homes and it includes measures to streamline and simplify the compulsory purchase system.
Planning is dealt with in Part 1 of the Bill:

- neighbourhood planning (paragraphs 1 to 6);
- planning conditions (paragraph 7);
- planning register (paragraph 8).

and Compulsory Purchase in Part 2:

- temporary possession of land (paragraphs 9 to 21);
- other provisions relating to compulsory purchase (paragraphs 22 to 30).

To supplement the Bill, the DCLG has issued a new consultation on proposed regulations relating to:

- the detailed procedures for modifying neighbourhood plans and Orders
- the examination of a neighbourhood plan proposal where a neighbourhood area has been modified and a neighbourhood plan has already been made in relation to that area
- the requirement for local planning authorities to review their Statements of Community Involvement at regular intervals
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The consultation closes on 19 October 2016.

Training

We have been busy making arrangements for training sessions over the next few months. If you would like to book a place on the following two seminars, please email Fiona Anthony at fiona.anthony@norfolk.gov.uk and provide the name of your organisation and details of the delegates (including names, job titles, email addresses and telephone numbers).

We will be holding seminars in London on **Compulsory Purchase Orders: Their effective use for Regeneration Projects**. These will be held on 23 September and, because the September date sold out within four days, repeated on 11 November.

This seminar looks at the specific issues that arise when acquiring land for regeneration projects, both large and small, and will take into account the recently updated government guidance and the changes put forward in the Housing and Planning Act 2016. The speakers are Chris Skinner and Jane Linley, both solicitors with nplaw who between them have over 60 years' experience of dealing with CPOs. Further details and a copy of the programme can be found on our website www.nplaw.co.uk under News and Events.

The cost of the full day seminar is £95 and includes all refreshments, lunch and course materials. There are just a couple of places left on 11 November.

We are also running a free seminar at County Hall in Norwich on "**Self-build and Custom Housebuilding**" on the morning of Wednesday 19 October 2016. The morning will start with coffee and registration from 9 until 9.30am and we will aim to finish by 11.30am.

Our senior lawyers will take delegates through the key changes brought about by the Self-build and Custom Housebuilding Act 2015, the Housing and Planning Act 2016 and the associated regulations. The latest set of regulations has been published and these, together with all the relevant sections in the 2016 Act, are due to come into force from 31st October 2016.

We are also in the planning stages of arranging other seminars and will circulate details when these become available. In particular, we will be running a session on **Enforcement and Monitoring** in February or March 2017.

We have also agreed that we will hold training sessions on areas in the **Housing and Planning Act 2016** in response to relevant regulations being published. We will aim to hold these seminars within 4 weeks of the regulations being published, so will not be able to give much notice but believe that a fast response will be more helpful to you.

In the meantime, if there are any other areas you would like us to cover, please do get in touch.

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