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Now that the dust is settling after the long-anticipated Supreme Court decision in *Hopkins Homes*, it is worth reflecting on the key messages arising from the decision. We also look at the recent Court of Appeal decision in *Barwood,* which illustrates the pitfalls that can arise where a Local Planning Authority (LPA) does have a five year supply of housing land and its development plan is up to date.

Outside the UK Supreme Court

Hopkins Homes

The decision is relatively short by Supreme Court standards but the case has a long title: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another & Cheshire East Borough Council v Secretary of State for Communities and Local Government and another [2017] UKSC 37*.

The key messages emerging from it are these:-

a) The case provides a final ruling on which development plan policies are rendered "out of date" where the LPA does not have a 5 year supply. The Supreme Court disagreed with the previous Court of Appeal rulings and decided that the "narrow" approach applied – i.e. the only policies rendered out of date are those dealing with the numbers and distribution of new housing. Put another way, what is captured is only policies for the supply of housing – not also policies which merely affect the supply of housing in some way. As the court said (para 57) "*It is true that other groups of policies, positive or restrictive, may interact with the housing policies, and so affect their operation. But that does not make them policies for the supply of housing in the ordinary sense of that expression*". It's worth remembering, as the Supreme Court pointed out, that policies can become out of date (and so trigger NPPF 14) for many reasons – not having a five year supply under NPPF 49 is not the only route.

b) However, deciding whether a policy is "out of date" does not actually get you very far down the path of deciding whether a planning application merits permission or not. The Supreme

Court drew the following quote from the Court of Appeal decision – "*We must emphasise here that the policies in paragraphs 14 and 49 of the NPPF do not make 'out-of-date' policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker … Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is 'out-of-date' should be given no weight, or minimal weight, or, indeed, any specific amount of weight*". In other words, even if a policy is "out of date" for NPPF purposes, the LPA may have a considerable degree of lawful discretion as to what weight to give it – and so will need to think carefully about this.

c) The Supreme Court was clearly very keen to shift the emphasis away from technical arguments about whether a policy was "out of date", and towards the exercise of planning judgment under paragraph 14. The court said that if there was a failure to achieve a 5 year supply "*it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised, it is that paragraph, not paragraph 49, which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed*"

d) In other words, if a policy is "out of date", it doesn't automatically mean that it carries no weight or any particular weight. Nor does the fact that other policies are not "out of date" mean that they necessarily ought to be given full weight. The point is instead that where you do not have a 5 year supply, that causes housing policies to be out of date, and whenever you have out of date policies the advice of the NPPF is that the "tilted balance" at para 14 should be applied. This advice, together with the fundamental NPPF objective of boosting the supply of housing may lead the LPA to conclude that development plan policies should be given reduced weight – not only housing supply policies, but also policies which have the effect of restricting the supply of housing. As the court said (para 55) "*The pressure for new land may mean…… that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgment*". It's necessary as always to reach a decision on the basis of the application's individual facts and circumstances.

e) The Court was clear (although not providing a detailed explanation) that the second exception to the "tilted balance" in NPPF 14 ("specific policies in this Framework indicate development should be restricted") should be taken as a reference not only to NPPF policies but also to related development plan policies.

Barwood Strategic Land II LLP v East Staffordshire BC [2017] EWCA Civ 893

This was an unsuccessful appeal of a high court decision quashing a Planning Inspectorate decision. The LPA's situation was one which one which most LPAs would envy. Not only did it have a five year supply, but the Inspector concluded that the development plan was neither absent nor silent in relation to the proposed development. So the NPPF 14 tilted balance was clearly not engaged.

However, the Inspector went on to note that NPPF 14 begins "*At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking*". He concluded that this statement meant that the presumption should be taken into account as a material consideration when the proposal was contrary to the development plan.

But the Court of Appeal was very clear that this approach was wrong and unlawful. The phrase "*presumption in favour of sustainable development*" is found only in NPPF 14. It is only relevant to the decision in the circumstances specified in NPPF 14 – i.e. where the proposal accords with the development plan, or where the development plan is absent, silent or relevant policies are out-of-date (and NPPF says what the presumption means in these circumstances). But if none of these circumstances apply, the presumption is not relevant to the decision and the proposal should not be assessed against it.

The relationship between NPPF 14 and Section 38(6)

As planning officers will know, planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise (Section 38(6) of the Planning and Compulsory Purchase Act 2004).

But this statutory duty has an uneasy relationship with the NPPF. On the one hand, NPPF2 explicitly acknowledges the s38(6) duty and says only that it is "a material consideration in taking planning decisions". But the wording of NPPF 14 is somewhat absolute in tone and suggestive that where its "tilted balance" is applied (because policies are out date etc.), that approach should dictate the outcome.

In our view, the courts have yet to grapple fully with this conflict. In *Hopkins Homes*, the court confirmed the approach of numerous previous judgements in confirming that the NPPF is only guidance: "*Paragraph 14 cannot, and is clearly not intended to, detract from the priority given by statute to the development plan*" (i.e. section 38(6). And as mentioned earlier, it said that "*although the footnote* [footnote 9] *refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies*". However, the courts have never said that the Guidance status of the NPPF empowers LPAs with a wide discretion to depart from it, let alone ignore it. Indeed, the emphasis given by judgements in planning cases to the processes and policy objectives contained in the NPPF and how decision-makers have observed them (or not) suggests an approach of giving the NPPF weight verging that give to a statutory duty.

As an illustration, the court in Hopkins said "*Paragraph 49 merely prescribes how the relevant policies for the supply of housing are to be treated where the planning authority has failed to deliver the supply. The decision-maker must next turn to the general provisions in the second branch of paragraph 14. That takes as the starting point the presumption in favour of sustainable development, that being the "golden thread" that runs through the Framework in respect of both the drafting of plans and the making of decisions on individual applications. The decision-maker should therefore be disposed to grant the application unless the presumption can be displaced*" This is suggestive that decision-makers should simply apply the tilted balance where it applies – s38(6) seems to have been left behind.

How to resolve this somewhat confusing context? Firstly, no LPA can afford to ignore s38 (6). Whilst on has the impression that successive government policy-makers have found it an inconvenience, none has repealed it. So – unlike any national planning policy – it remains the law. LPAs must observe and apply it - and be seen to do so. At the same time, it would not be appropriate to ignore the NPPF 14 tilted balance where it applies. We feel that the best course in considering applications in reports is to assess them against the development plan, giving primacy to this, but also then assessing them against the NPPF14 tilted balance, considering what weight reductions to policies it is appropriate to apply.

It should be remembered that LPAs have a considerable discretion in reaching planning judgements – something which the courts continue to emphasise. So unless development plan policy is substantially divergent from the NPPF, in practice it ought not to be too demanding to arrive at a consistent outcome from both directions. For example, if a proposal would conflict substantially with development plan policies which aim to protect the character of a settlement and protected landscapes, those are objectives which resonate with NPPF objectives. So it might be appropriate not to accord those policies materially reduced weight despite the lack of a five year supply. In turn, that could lead to an assessment both that no material considerations outweighed the overall conflict with the development plan (S38(6), and also that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits when assessed against the NPPF policies taken as a whole (NPPF 14).

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