

Supreme Court judgment: how to use NPPF policies

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Introduction

The judgment of the Supreme Court in relation to *Suffolk Coastal District Council v Hopkins Homes and Richborough Estates v Cheshire East Borough Council* was handed down on 10 May 2017. Whilst directly relating to two housing schemes, it has much broader implications in terms of:

1. The relationship between the National Planning Policy Framework (NPPF) and the development plan;
2. The role of planning decision-makers as experts who are entitled (and required) to make judgments, compared to the role of the court in interpreting law and policy; and,
3. A concern regarding an over-legalisation of planning process.

We have identified four key issues arising from the judgment and four implications that it is likely to have upon the development industry.

Context

There can be no dispute that Britain is in the midst of a housing crisis that needs addressing: the long term under-delivery of new homes has had a dramatic and adverse impact on affordability which has prevented many people from being able to access a home of their own. In her foreword to the recently published Housing White Paper "Fixing our broken housing market", the Prime Minister noted that:

"Our broken housing market is one of the greatest barriers to progress in Britain today... housing is increasingly unaffordable. ... As a result it is difficult to get on the housing ladder... I want to fix this broken market ... The starting point is to build more homes." Section 6 of the NPPF, "Delivering a wide choice of high quality homes" seeks to

respond to the housing crisis, with paragraph 47 summarising its purpose as being "to boost significantly the supply of housing".

Paragraph 47 of the NPPF goes on to require local planning authorities (LPAs) to "ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area" and to "identify and update annually a supply of specific deliverable sites sufficient to provide five years' worth of housing against their housing requirements...".

Paragraph 49 then considers the implications of a local authority not being able to demonstrate a five year supply (5YS) of housing land. In such a situation, "[r]elevant policies for the supply of housing should not be considered up-to-date...". Accordingly, the so-called "tilted balance" in the second part of paragraph 14 applies and planning permission should be granted unless:

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

The implication of these national policies has occupied much thought and time at planning inquiries and the interpretation of paragraph 49 was considered by the courts on seven occasions between October 2013 and 2015 - with varying outcomes. This in itself is ironic, given that the intention of the NPPF was to be "written simply and clearly...[thereby] allowing people and communities back into planning".

This is, however, the first time that issues concerning the NPPF have come before the highest court in the land and whilst the specific focus of the Supreme Court was on "the narrow issues of interpretation of para 49", the two cases before it also provided the opportunity for the judges to "look more broadly at issues concerning the legal status of the NPPF and its relationship with the statutory development plan". ▶▶

WHAT THE JUDGES SAY



The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, 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.

Paragraph 59



If a planning authority that was in default of the requirement of a five-years supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated.

Paragraph 83

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The cases at issue: summary

Yoxford, Suffolk Coastal	Willaston, Crewe, Cheshire East
<ol style="list-style-type: none"> 1. Application by Hopkins Homes Ltd for 26 houses. 2. Planning permission refused in September 2013. 3. Appeal dismissed in July 2014. 4. Inspector concluded that: <ul style="list-style-type: none"> · It was “very unlikely that a five years’ supply of housing land could be demonstrated” (paras 5-6) · None of the policies in the plan relating to the boundary of settlements, landscape, townscape, settlement hierarchy and the character of key and local service centres were relevant policies for the supply of housing · Each of these policies was seen to be up-to-date 5. The appeal decision was quashed in the High Court by Supperstone J in January 2015 who accepted the submission for Hopkins that the inspector had erred in thinking that paragraph 49 only applied to “policies dealing with the positive provision of housing”. 	<ol style="list-style-type: none"> 1. Application by Richborough Estates for 170 houses (subsequently reduced to 146) between Willaston and Crewe. 2. Appeal against non-determination was allowed in August 2014. 3. Inspector concluded: <ul style="list-style-type: none"> · Cheshire East unable to demonstrate 5YS of housing land · Policies relating to green gap, open countryside and housing in the open countryside were relevant policies for supply of housing · These policies were to be given reduced weight by virtue of NPPF paragraph 49 4. The Council’s challenge succeeded before Lang J in the High Court, who quashed the inspector’s decision in February 2015 on the basis that the Inspector had erred in treating the green gap policy as subject to paragraph 49.

At the heart of the Supreme Court judgment were two, relatively small-scale housing appeals. Both focused on the same issues in respect of paragraph 49 but approached them from quite different directions.

The cases were brought before the Court of Appeal in January 2016 at a conjoined hearing. In Paragraph 21 of his judgment, Lindblom LJ offered three possible alternative interpretations of NPPF paragraph 49:

1. Narrow: limited to policies dealing only with the numbers and distribution of new housing, and excluding any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority’s area.
2. Wider: including both policies providing positively for the supply of new housing and other policies, or “counterpart” policies, whose effect was to restrain supply, by restricting housing development in certain parts of the authority’s area.

3. Intermediate: similar to the wider interpretation, but excluding policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages or a specific landscape designation.

Lindblom LJ adopted the “wider” interpretation of paragraph 49. In so doing, he read the words “for the supply of housing” as meaning “affecting the supply of housing”. By contrast, he rejected the “narrow” interpretation that was advocated by both councils as “plainly wrong”.

Lindblom LJ found for the developers in both cases:

1. He agreed with Supperstone J that the inspector in the Suffolk Coastal case had wrongly applied the erroneous “narrow” interpretation.
2. He disagreed with Lang J’s conclusion in the Cheshire East case that the Inspector had erred in treating the green gap policy as subject to paragraph 49, and concluded that his decision should be restored.

In considering these issues, the Supreme Court judgment has raised a number of important issues that will have long-lasting implications for the development industry. These are summarised below.

Key issues

Narrow interpretation of policies

The judgment adopts the above “narrow” interpretation of NPPF paragraph 49, contrary to the Court of Appeal. The higher court has disagreed with Lindblom LJ that the word “affecting” could be used in place of “for” in the second sentence of paragraph 49. The words “policies for the supply of housing” serve just to indicate the category of policies which apply – i.e. housing supply policies. Other policies “may interact with 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” (57).

Where the objectives of NPPF paragraph 47 are not met by housing supply policies, it is reasonable to describe those other policies as being “out-of-date”. However, there is no reason to treat the shortfall in particular policies as rendering out-of-date other parts of the plan that serve a different purpose (58), for example:

“No-one would naturally describe a recently approved Green Belt policy in a local plan as “out-of-date”, merely because the housing policies in another part of the plan fail to meet the NPPF objectives. Nor does it serve any purpose to do so, given that it is to be brought back into paragraph 14 as a specific policy under footnote 9. It is not “out-of-date”, but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles.” (61)

But all that does not matter: the focus is on a 5 year supply

Irrespective of the fact that the judgment adopts the “narrow” interpretation of NPPF paragraph 49, it seeks to widen the debate and shift attention well away from “the need for a legalistic exercise to decide whether individual policies do or do not come within the expression” (59).

Instead, the important issue is whether there is a 5YS. If there is not, then it is irrelevant whether this is because of issues relating to policies ►►

specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies.

The shortfall in supply alone is enough to trigger the operation of the second part of NPPF paragraph 14, and it is that paragraph, rather than paragraph 49, which sets out how development plan policies and other material considerations are expected to be assessed. Lord Carnwath concluded that “the Court of Appeal was therefore right to look for an approach which shifted the emphasis to the exercise of planning judgment under paragraph 14” (60).

Focus moved away from categorisation of weight linked to magnitude of shortfall

At the time of the two planning inquiries, it was generally assumed that if a policy was out-of-date under NPPF paragraph 49, then no, or minimal weight should be attached to it.

Later cases (e.g. *Crane v Secretary of State for Communities and Local Government*) introduced a greater degree of flexibility by suggesting that the decision maker could determine the weight to be applied to an out-of-date policy, for example, depending on the scale of shortfall, the likelihood of that shortfall being made up (including actions proposed by the Council to address it) and the significance of the policy in question.

The Supreme Court judgment does not give any consideration to the effect of the scale of any shortfall in the 5YS. Instead, Lord Carnwath in paragraph 56 states:

“Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the “tilted balance”.”

The judgment recognises that the weight to be attached to other policies will be a matter of planning judgment for the decision maker, and it is not necessary to define them as being either out-of-date or not, merely to determine the weight to be applied.

Reminder: NPPF paragraph 14 is not just about housing

When considering the role of NPPF paragraph 14 and the weight that should be given to policies, the judgment helpfully reminds that, unlike paragraph 49, paragraph 14 is not concerned solely with housing development. Instead, its drafting has to work for other forms of development covered by the development plan which are not subject to a supply requirement as set out in paragraph 49. Paragraph 55 includes the example of employment land, policies for which may become out-of-date because of the arrival of a new source of employment in the area. It states that “whether that is so, and with what consequence, is a matter of planning judgment”.

Implications

Reduced weight can be given to settlement boundary policies if based on out-of-date evidence

In *Richborough*, even though the Supreme Court disagreed with the Court of Appeal (and High Court) regarding the “narrow” vs “wider” definition for paragraph 49, the Inspector was entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they derived from “settlement boundaries that in turn reflect out-of-date housing requirements”.

The implication is that there will need to be more careful consideration of the origins and evidence underpinning development plan policies, in order to understand whether a particular policy is up to date and relevant. More work will be required in the future by appellants, rather than just saying plan policies are not up to date because of a lack of 5YS.

Weight given to restrictive policies may be increased, or reduced to meet housing objectives

The objective of the NPPF to boost housing supply might be frustrated by the application of environmental and amenity policies with “full vigour”, even where there is not a 5YS. Paragraph 49 - in short - indicates how a lack of 5YS could be put right, and at paragraph 83 of the judgment, Lord Gill notes that “it is reasonable for guidance to suggest that in such cases the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date”. It is therefore through the application of paragraph 14 itself that any such shortcomings might be addressed: whilst policies that are not up-to-date retain their statutory force, “the focus shifts to other material considerations” (84) and the “decision-maker should be disposed to grant the application unless the presumption can be displaced” (85).

Paragraph 55 of the judgment notes that “(t)he pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance”. This paragraph goes on to underline the fact that the application of the “tilted balance”, i.e. the weight to apply to different policies is a matter of planning judgment and policies do not have to be out-of-date for differential weight to be applied to them.

Judgment assumes reasonableness on part of decision maker

The judgment underlines how the courts should respect the expertise of specialist planning inspectors and start from the presumption that they understand the policy framework (25).

But what about LPA decisions?

Is there a risk that we will see more appeals, as unsuccessful developers conclude that the application of weight came from a specific stand-point – i.e. one of a council being anti-development? ■

Implications for plan-making: greater use of local designations in addition to settlement boundaries etc.?

There is an increased risk of more green wedge etc. allocations emerging outside of settlement boundaries, so as to provide additional development plan policy content that can be given weight at the outset by councils, to act against development on land that is unallocated for housing.

Final comment

Lord Carnwath and Lord Gill each use the judgment to set out in very clear terms what the role of the Secretary of State is in the planning system, and the interaction between national policy and guidance, and planning law in plan-making and decision-taking. They make it clear that the development plan has primacy. They also express considerable concern regarding the over-legalisation of the planning process; the role of the courts is to rule on how policy and law is worded, not how it is applied by the decision maker. ■