



## That “fertile hunting ground for planning lawyers”, by Harriet Townsend

Mrs Justice Andrews’ description of the NPPF in her judgment in [Paul Newman Homes Ltd v SSHCLG](#) [2021] EWCA Civ 15, reflects the view of many. In dismissing the Claimant’s appeal, however, the Court of Appeal reminds us again that the fertility of the hunting ground does not guarantee the hunter a prize – or indeed anything at all.

This was a challenge to an Inspector’s decision to dismiss an appeal for outline planning permission for 50 houses outside a village in the Aylesbury Vale district. Importantly, by way of factual context

- (a) There was only one development plan policy considered to be relevant to the proposals, namely GP35 of the 2004 Plan. This is one of those general development control policies that does not explicitly provide for grant or refusal. Rather, it lists a number of design considerations that new development proposals must respect. The Council had argued that, whatever the design of this outline proposal, it would cause significant harm to landscape character and therefore it conflicted with this policy. The Inspector agreed.
- (b) The Inspector also concluded that the Council had a five year supply of housing; that GP35 was up to date and relevant; and that development would conflict with it, and for that reason would not accord with the development plan. The planning balance under s38(6) suggested that permission should be refused.

The Claimant, however, raised two interesting points on the interpretation of planning policy, which neither Sir Duncan Ouseley ([\[2020\] PTSR 434](#)), nor the Court of Appeal could resist grappling with in some detail. The points at issue were as follows

- (1) Whether it was an error of interpretation to apply GP35, with its list of relevant design considerations, at the outline stage; and
- (2) Whether the tilted balance under paragraph 11(d) of the NPPF is triggered when there is only a single relevant and up to date policy, such as GP35, in the development plan.

Dealing with GP35 first, Andrews LJ began by distinguishing the question whether a policy is relevant (a planning judgment) from its interpretation (a question of law). The distinction, she went on to say, can be a fine one [§18]. The task facing the Claimant, therefore, was to show that GP35 could not as a matter of interpretation be applied to an outline permission. The court held that the language of GP35 was wide enough to apply where, for example, development on the site, however structured, would block out an important historic view [§24], leading to the conclusion at §26 that “The Judge did not see GP35 as just a handy reference point for topics relevant to the assessment of the impact of the development on the character and appearance of a rural area. He said it gave policy weight and significance to those topics, which bite at the stage when an outline planning permission is being considered. I agree...” The Council and Inspector had correctly understood the policy.

With that finding, the judgment moves to paragraph 11(d) of the NPPF, which sets out two circumstances or “triggers” in which the tilted balance will apply as follows:-

- [the first trigger], where there are no relevant development plan policies, or [the second trigger] the policies which are most important for determining the applications are out-of-date ...

As for the first trigger, to be relevant,

- (1) A policy “must have a real role to play in the determination of the application, but there is no requirement that it ... should be enough in itself to enable the decision maker to grant or refuse that application. ‘Relevant’ does not mean and cannot mean, ‘determinative’. The first trigger cannot be activated if there is a relevant policy in the local plan, as there was here.” [§39] And
- (2) There is no need to restrict the concept (of relevant policies) to policies that are specifically targeted at the type of development under consideration ... or the location of the proposed development [§40].

As for the second trigger

- (1) It requires a three step exercise to ascertain whether the second trigger applies: the first step is to identify the policies in the development plan that are the “most important” for determining the application; the second is to examine each of those to see if it is out of date; and the third is to stand back and assess whether, taken overall, those policies could be concluded to be out of date for the purposes of the decision [§44-45 citing Dove ] in [Wavendon Properties v SSHCLG](#) , whose approach “is entirely sound”]
- (2) There is no requirement that there be more than one policy in the basket of “policies which are most important for determining the applications” [§43-47].

So, as I have said, at the end of the day this hunter’s bag is empty. However, the rest of us benefit from a Court of Appeal judgment containing some pretty detailed judicial guidance on both (a) the words introduced in 2018 to trigger the tilted balance in paragraph 11(d) of the NPPF; and (b) those general development control policies, like GP35, that do not specifically address the principle of development. Whether this leaves the hunting ground more or less fertile, I wouldn’t presume to say.

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