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**Securing consent: accentuating the positives and minimising the negatives**

Richard Ground QC and Ashley Bowes

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## Maximising Benefits

Richard Ground QC

# Structure



- Structure of today
  1. CIL 122 and Benefits on Site
  2. Maximising particular benefits
  3. Benefits and the Development Plan
  4. Amendment on Appeal.
  5. Minimising the harms
  6. Questions

# The CIL 122 problem



- CIL 122
  - 2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—
    - (a) necessary to make the development acceptable in planning terms;
    - (b) directly related to the development; and
    - (c) fairly and reasonably related in scale and kind to the development.
- So if a benefit is going to be delivered by S106 it can only be reason for granting if it is necessary does that mean it can only be used to neutralise a particular harm of the development.
- Can you use benefits to outweigh more general policy harms of Greenfield development?

# Benefits on Site



- It is quite clear that if the benefit is on site it needs to be taken into account and given separate consideration because it is part of the development
- This was the accepted position in ***Amstel Group Corp v SSCLG [2018] EWHC 633 at §65 and 66******Amstel Group Corp v SSCLG [2018] EWHC 633 at §65 and 66***
- In the benefits of a school had to be taken into account even if more than necessary because it was part of the development.

# Off site benefits justifying departure



- Off site benefits can be taken into account if they are necessary to justify a departure from policy
- This was the analysis in in *R(oao Hampton Bishop) v Herefordshire Council* [2014] EWCA Civ 878
- Thus the necessity test in the Regulations test can be passed on the basis that the benefit being offered is necessary as “one of the material considerations justifying departure from Policy H7.”[para 52]

# Affordable housing



- Affordable Housing is often a key benefit.
- Quite often useful to find recent Secretary of State and appeal decisions in area where need for affordable has been considered.
- Housing needs statements. AMR's particular local need and delivery.
- Specific evidence about need in area.
- Evidence from Registered Providers of particular need and suitability of Site.
- Housing officers and the LPA Mix and Tenure

# Housing Numbers and Delivery



- Clearly the housing numbers and any deficit on a 5 year supply can be a great and significant benefit as well as potentially being gateway to tilted balance.
- Worth of course finding recent housing appeals in the area and LPA position to see if worth fighting issue.
- Important also to provide evidence of delivery of the actual scheme from housebuilder.



# Open Space



- There will of course be policy requiring Open space. Exceedance can often be positive benefit.
- However there is often a deficit of particular sort of open space formal or informal which can increase weight
- Even if not there can be qualitative improvement from scheme.
- Design benefit.

# Economic Benefits



- For Housebuilding HBF document that outlines the 1.5 jobs for every dwelling from construction and then the multiplier effect.
- There is also then the permanent effect on economy from extra expenditure of future residents. [HCA document Calculating Jobs by Cost]
- Economic benefits can be more significant in certain economic contexts Growth areas etc.



- BNG from EA 2021 is set to become compulsory for all applications under The Town and Country Planning Act 1990 from Winter 2023
- The new metric 3.1 was published by NE in April 2022 but can continue with 3.0 if have already used for project.
- However of course benefits must be considered now. the NPPF para 180 calls for opportunities to improve biodiversity to be taken “especially where this can secure measurable net gains for biodiversity or enhance public access to nature where this is appropriate”

# Benefits and the Planning Arguments



- The use of the Benefits may be such that it can be said that:
  - The Development plan read as a whole is complied with.
  - If that is not a good argument the material considerations outweigh the conflict with the plan.

# Amendment on appeal



- Inspectorate Procedural Guide Annexe M
  - “important that what was considered by the Inspector is essentially what was considered by the LPA”
- Amendments considered under Wheatcroft principles whether would deprive those of opportunity for consultation.
- **Holborn Studios** test is not whether it is fundamental change but rather whether in all circumstances deprives those entitled to be consulted of the ability to respond.
- In these circumstances clearly desirable to amendments at the time of the appeal and to make them such that it is still essentially the same scheme that was considered by the LPA.

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## Minimising the Harms

Dr Ashley Bowes

# Step 1: Is there a conflict at all?



- Do not concede a conflict too quickly!
  - Consistency with a DP is a powerful consideration in favour of a scheme.
  - Carefully consider whether the plan policies are met before moving to the NPPF.
- But if there is a conflict, minimise the weight to attach to it ...

## Step 2: Demonstrate the conflict is small/inevitable



- Demonstrate the degree of conflict is small.
- Demonstrate the conflict is inevitable to meet the stated aims ...



## Step 2: Demonstrate the conflict is small/inevitable



- Inevitable there will be a loss of greenfield sites, with a degree of associated local change, to meet the agreed need for housing.
- Check whether delivery on the site is relied upon by the Council in land supply assessment or LP trajectory (it does happen!)
- Check whether the policy (with which there is a conflict) is still relevant (e.g. safeguarded policies)

# Step 3: Show there is no 5 year HLS



- A failure to demonstrate a five-year land supply against the relevant figure is a powerful consideration.
- To maximise the relevance of <5 year HLS, consider:
  - Driving it down to the lowest possible degree (<3 years ideally)
  - Showing there is no short-term likelihood of the shortfall being made-up (e.g. LP progress).

# Step 3: Show there is no 5 year HLS



- Con't ...
  - Demonstrate the shortfall has been long-standing.
  - Point to social/economic consequences of it not being met (e.g. widening affordability ratios)

# Step 4: Can you engage the tilted balance in any event?



- *Paragraph 11(d) NPPF engaged where:*
  - *No relevant policies; or*
  - *Most important policies for determining the application out of date*
- No 5 year HLS or failure of HDT automatically engage tilted balance (NPPF fn.7)
- But what do most important and what does out of date mean in other cases?

# Step 4: Can you engage the tilted balance in any event?



- Most important:
  - Basket of most important policies a planning judgment (*Paul Newman* [2021] EWCA Civ 15)
  - Can be a single policy in the most important basket (*Paul Newman* [2021] EWCA Civ 15)

# Step 4: Can you engage the tilted balance in any event?



- Con't ...
  - Basket does not need to be sufficient by itself to determine the application (*Paul Newman* [2021] EWCA Civ 15)
  - Inclusion in the basket can be influenced by whether a policy is breached (*GOESA* [2022] EWHC 1221 (Admin)).

# Step 4: Can you engage the tilted balance in any event?



- Not out-of-date automatically because:
  - It is chronologically old (***Daventry*** [2016] EWCA Civ 1146).
  - In a plan beyond its operational time limit (***Peel*** [2020] EWCA Civ 1175).
  - It is in a plan adopted before the NPPF was published (NPPF, para.219).

# Step 4: Can you engage the tilted balance in any event?



- May be out of date because:
  - Inconsistent with NPPF (***Eastleigh*** [2019] EWHC 1862 (Admin)).
  - Boundaries based on housing numbers which are out of date (***Wokingham*** [2019] EWHC 3158 (Admin)).
  - Breached in the past to meet HLS?? (see Dove J's comments in ***Gladman*** [2019] EWHC 127 (Admin)).





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# Questions??

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