

Neighbourhood plans v housing

As the need for housing gains increasing traction, to what extent are neighbourhood plans having to take a back seat? Lucy McDonnell investigates some recent decisions



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Six years after they were introduced by the Localism Act 2011, neighbourhood plans have surprised many commentators with both their level of take-up by communities, and the importance afforded to them by the government.

However, as the need for housing has taken on increasing public importance, becoming a key electoral policy in both the 2015 and 2017 general elections, and a focus of recent Budgets, questions are being raised about the weight afforded to neighbourhood plans when balanced against the imperative of increasing housing supply. There is conflicting evidence on this.

October 2017 analysis of the 69 called-in applications and recovered appeals decided since Sajid Javid was appointed Secretary of State for Communities and Local Government found that 14 developments were refused by the Secretary of State against the recommendation of the planning inspector. Of these 14 developments refused against recommendation, eight involved a conflict with a neighbourhood plan (www.legalease.co.uk/housing-objectives).

This perhaps demonstrates the government's localism focus, with importance afforded to the views of local people in planning development in their area.

Neighbourhood plans were supported by the December 2016 written ministerial statement, which strengthened their position,

providing protection for plans in areas where local planning authorities can demonstrate a three-year housing land supply, and not the normally required five-year housing land supply (see box at top of p25).

This was justified on the basis that neighbourhood plans were helping to boost housing land supply, and so proactive communities who had worked hard to prepare neighbourhood plans should not have their plans undermined by a lack of five-year housing supply by their local planning authority.

Earlier in the December 2016 written ministerial statement Gavin Barwell, the then Minister of State for Housing and Planning, stated that:

Recent analysis suggests that giving people more control over development in their area is helping to boost housing supply – those plans in force that plan for a housing number have on average planned for approximately 10% more homes than the number for that area set out by the relevant local planning authority.

However, the government's claim that neighbourhood plans planned for approximately 10% more homes than local planning authorities was successfully challenged by Richborough Estates in October 2017 (*Richborough Estates Ltd v Secretary of State for Communities and Local Government* [2017] – see box at bottom of p25).

In connection with the judicial review, Richborough Estates applied for disclosure of documents connected to the written ministerial statement. Gilbart J found that the statement that neighbourhood plans on average planned for approximately 10% more homes misdescribed the situation, and the average plan did not plan for 10% more homes. The statement was based on a sample of neighbourhood plans only. It was necessary to disclose the matters that had been put before the Minister.

A shift in balance

There have, however, been two notable decisions where the Secretary of State’s position on applications in relation to neighbourhood plans has changed due to a shift in the balance between neighbourhood plans and a lack of housing land supply.

In Yapton, West Sussex, an application for 100 homes south of Ford Lane was rejected by Arun District Council in October 2014. The Secretary of State then dismissed the appeal in September 2016, disagreeing with his inspector (who had recommended approval of the application) on the weight to be afforded to the Yapton neighbourhood plan.

The neighbourhood plan had been prepared in accordance with an outdated objectively assessed need, and Arun District Council could not demonstrate a five-year supply of housing land. However, the Secretary of State refused permission, giving significant weight to the conflict with the neighbourhood plan, particularly policy BB1 which stated that development should be focused within the built-up area boundary except in specified circumstances, on the basis that policy H1 in the neighbourhood plan said it would allocate additional sites if key sites did not come forward, or if required by local plan policy. On this basis, the Secretary of State concluded ‘that the proposal does not comply with the social element of sustainability’ (see www.legalease.co.uk/ford-lane).

The written ministerial statement

The 2016 written ministerial statement (www.legalease.co.uk/HCWS346) means that neighbourhood plan policies for the supply of housing should not be deemed to be ‘out-of-date’ under para 49 of the National Planning Policy Framework where:

- [The] written ministerial statement is less than 2 years old, or the neighbourhood plan has been part of the development plan for 2 years or less;
- the neighbourhood plan allocates sites for housing; and
- the local planning authority can demonstrate a three-year supply of deliverable housing sites.

A statutory challenge of the Secretary of State’s decision to refuse permission (*Keith Langmead Ltd v Secretary of State for Communities and Local Government* [2017]) was brought on a number of grounds, including that his decision failed to take into account the neighbourhood plan examiner’s reservations about the neighbourhood plan, and that his conclusion, that the neighbourhood plan policy opposing development outside the build-up area boundary except in specified circumstances should be given substantial weight, was irrational.

Lang J:

... reached the conclusion that the Claimant’s true complaint

was not that the Secretary of State had disregarded the need for housing but rather that he gave excessive weight to the importance of the neighbourhood plan, at the expense of the need for housing.

The challenge was dismissed, noting that:

The Secretary of State was entitled to conclude, in the exercise of his planning judgment, that the neighbourhood plan should be upheld as an effective means to shape and direct development in its area, and to place very substantial negative weight on the conflict between the proposal and Policy BB1.

Written ministerial statement judicial review

Richborough Estates, as part of a consortium of developers, filed a judicial review in January 2017 on the following grounds:

- there was a legitimate expectation of consultation;
- the statement was illogical and irrational taking into account its stated intention and was *Wednesbury* unreasonable;
- the statement was based on mistaken facts and misleading evidence, which it was *Wednesbury* unreasonable to rely on to formulate policy;
- in the context of government policy to increase housing supply, the statement was irrational, perverse and *Wednesbury* unreasonable; and
- the statement was illogical, irrational and *Wednesbury* unreasonable in approaching the lack of five-year housing land supply.

The judicial review was heard in the High Court in November 2017 and was dismissed, with Dove J finding that all five grounds could not be sustained.

Same plan, different outcome

Burdell Road

By contrast, in October 2017, permission was granted for 108 dwellings off Burdell Road, a site elsewhere in Yapton, by the Secretary of State on a called-in application.

shortfall locally since the time of that Inquiry, the Inspector's report and the Secretary of State's decision.

The inspector concluded that the 100 homes allocated in the Yapton neighbourhood plan policy

they concluded that '[t]he direction of travel supports the development of the application site' and concluded that the benefits would outweigh the harm, including the conflicts with the current local plan and the neighbourhood plan.

Following the Burdell Road appeal, in December 2017 an application identical to the 2014 Ford Lane application was allowed an appeal. The decision stated that since the original decision:

... it is acknowledged by the Council that the housing land supply position within the district has materially worsened...

The proposal would conflict with the neighbourhood plan requirement to enhance the existing settlement plan and was in excess of the 30-40 dwellings to be accommodated in Sayers Common within the neighbourhood plan period.

The Secretary of State noted a persistent undersupply of housing locally, with a maximum of 1.9 years housing land supply, and that the objectively assessed need, when examined as part of the local plan, would be substantially higher than the figure upon which the Yapton neighbourhood plan was based. In this case, the Secretary of State found that neighbourhood plan policy BB1 was out of date and carried only limited weight, in contrast to the position on the Ford Lane appeal decision. It was concluded that the conflict with the neighbourhood plan carried limited weight 'because of the severe housing shortage in the light of the substantially revised [objectively assessed need]' (see www.legalease.co.uk/burdell-road).

The Yapton neighbourhood plan was prepared based on an objectively assessed need of 580 dwellings per year, contained in the then-emerging Arun local plan. However, the local plan examination was suspended in February 2016 for the council to reconsider the housing need, subsequently advancing an objectively assessed need of 919 dwellings per annum. On the Burdell Road application, the inspector found in relation to the Ford Lane site that:

... [m]atters have though moved on considerably in terms of the increased severity of the housing

H1 were based on an out-of-date objectively assessed need, although recognising that further allocations may be required if the housing requirement for Yapton was larger than anticipated. The built-up area boundary was set by an out-of-date objectively assessed need, and although the development would conflict with that boundary 'the shortfall is of substantial weight against the out of date policy'.

The inspector noted that at Ford Lane, the Secretary of State had found policy H1 not out of date, as it included flexibility if housing allocations were increased locally. The inspector agreed with this conclusion, but noted that the parish council had not reviewed the neighbourhood plan, and the council did not intend to produce a small sites development plan document until three years after the adoption of the new local plan, to allow neighbourhood plans to come forward. The inspector's report concludes that '[t]ime is now passing, and there is a critical imperative to get the housing market moving', considering that waiting for the adoption of the new local plan and for the neighbourhood plan to be updated would 'seriously harm deliverability of housing including affordable housing locally'. While the inspector noted para 198 of the National Planning Policy Framework and the government's localism agenda,

and noted this was underpinned by the Burdell Road decision. On the basis that the Secretary of State found 'the circumstances were not normal because of the severe housing shortage', the council had no in-principle objection to the current proposal. The inspector found, as the Secretary of State found at Burdell Road, that the conflict with the neighbourhood plan carried limited weight. Any adverse impacts did not outweigh the identified benefits, and planning permission was granted.

There has been a similar change of position on the weight afforded to the Sayers Common neighbourhood plan.

Sayers Common

In 2012, Mid-Sussex District Council refused permission for 120 dwellings, community facility/office space, a care home and retail units in Sayers Common. Eric Pickles, the then Secretary of State for Communities and Local Government, then dismissed the appeal, despite his inspector's recommendation to allow it. The Secretary of State concluded that the proposal would conflict with the neighbourhood plan, which had been formally made after the inspector's report was written. The proposal would conflict with the neighbourhood plan requirement to enhance the existing settlement plan, and was in excess of the 30-40 dwellings to be accommodated in Sayers Common within the neighbourhood plan period. Therefore, permission was refused

(see www.legalease.co.uk/sayers-common).

The developer, Woodcock Holdings Ltd, brought a statutory challenge of the Secretary of State's decision, arguing that the decision:

- failed to identify the nature and extent of the conflict with the neighbourhood plan;
- had not applied the presumption in favour of sustainable development;
- did not apply the Planning Practice Guidance policy that permission would rarely be refused where there was a conflict with a draft neighbourhood plan which had not reached the local authority publicity period; and
- did not apply the National Planning Policy Framework

policy on weight to be afforded to emerging plans.

The challenge was successful on all grounds in May 2015 (*Woodcock Holdings Ltd v Secretary*

with the emerging neighbourhood plan and was premature in relation to that plan.

Among the other grounds, the Secretary of State had failed to:

The decision was flawed in affording more weight to the neighbourhood plan due to a lack of other evidence on housing need, and failed to take into account the argument that there should be no cap on housing numbers in the absence of housing need evidence.

of State for Communities and Local Government [2015]). Holgate J identified the:

... sole reason given for the Secretary of State's disagreement with his Inspector's recommendation to grant planning permission was that the proposal conflicted

... weigh the conflict with the strategy in the draft plan, by virtue of the scale of the appeal proposal, against his positive findings that the proposal would give rise to no harm as regards scale, its effect on the character of the village, infrastructure requirements or other harm.

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The decision was flawed in affording more weight to the neighbourhood plan due to a lack of other evidence on housing need, and failed to take into account the argument that there should be no cap on housing numbers in the absence of housing need evidence.

Planning permission had been granted separately for 40 units and an extra care home on part of the site, providing a fall back option which had not existed previously.

The planning application was then redetermined by Greg Clark, then Secretary of State for Communities and Local Government, in February 2016. Planning permission was refused again as the proposal was not in accordance with either the local plan or the neighbourhood plan, which had subsequently been formally made, reaching the same conclusions on policy conflict (see www.legalease.co.uk/sayers-common-redetermined). This decision was also quashed by the High Court.

A further inquiry was held, and the third recovered appeal was decided in December 2017. The inspector recommended permission be granted, and the Secretary of State, now Sajid Javid, agreed. The Mid-Sussex District Plan was undergoing examination in public by the time of the most recent determination on the planning application, and significant weight was afforded to it. Planning permission had been granted separately for 40 units and an extra care home on part of the site, providing a fall-back option which had not existed previously, and the Secretary of State found that the harm to the character of the settlement carried less weight now the principle of development had been established. The fall-back position also weighed in favour of the proposal in terms of listed building impacts, highway safety and drainage and flooding.

The parish council argued that the council could show 5.2 years of housing land supply, but as the document setting this out had been published for consultation only and had not been examined, the district council accepted it was subject to the examiner's final report, and the Secretary of State did not take into account

the consultation document as a material consideration. The Secretary of State agreed that the proposal conflicted with the neighbourhood plan in being located outside the settlement boundary, but stated that this should be considered in the context that some sites would need to be allocated outside the settlement boundary. The Secretary of State also agreed with the inspector that in light of the housing land supply position, the 2016 written ministerial statement was not engaged. The Secretary of State concluded that the benefits of the proposal outweighed the conflict with the development plan, including the made neighbourhood plan, and that the presumption in favour of sustainable development was engaged. Conflict with the neighbourhood plan was afforded moderate weight due to the fact that 'housing figures of the policy do not provide for today's needs' (see www.legalease.co.uk/sayers-common-2017).

Where are we now?

These cases show a potential shift in the balance between the primacy of neighbourhood plans, and the need to provide housing in areas of shortfall. While both of these sites relate to contentious neighbourhood plans which have been the subject of statutory challenges, they do show a greater

emphasis being given to housing land supply, even where the grant of permission conflicts with a neighbourhood plan. This highlights the difficulty for neighbourhood planning groups in preparing plans which can meet objectively assessed needs, and in opposing proposals which do not comply with their neighbourhood plan housing policies. While the principle that neighbourhood plans can come forward in advance of local plans has been established, it remains difficult for neighbourhood planning groups to prepare robust plans in these circumstances. The housing white paper (*Fixing our broken housing market*, www.legalease.co.uk/fixing-housing) suggested a policy would be introduced so neighbourhood planning groups could obtain a housing requirement figure from their local planning authority, which could certainly help neighbourhood groups to plan on the basis of more accurate information. However, the helpfulness of this measure relies upon local planning authorities themselves having accurate and up-to-date information to provide to communities, and neighbourhood groups could still run the risk of their plans becoming out of date as soon as the local planning authority's figures are revised and updated.

Ironically, those neighbourhood groups who have waited, and will now be able to use up-to-date figures, will end up with greater control over their areas. There has been nothing, yet, to suggest that the Secretary of State will override neighbourhood plans that accommodate the right levels of housing. ■

Keith Langmead Ltd v Secretary of State for Communities and Local Government

[2017] EWHC 788 (Admin)

Richborough Estates Ltd v Secretary of State for Communities and Local Government

(2017) unreported, Queen's Bench Division (Administrative Court), 13 October 2017;

[2018] EWHC 33 (Admin)

Woodcock Holdings Ltd v Secretary of State for Communities And Local Government & anor

[2015] EWHC 1173 (Admin)