

Supreme Court Judgement: Interpretation of paragraphs 49 and 14 of the (NPPF)

Briefing Note

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The much-anticipated judgement from the Supreme Court regarding the interpretation of paragraph 49, and the application of paragraph 14 of the NPPF, in respect of the policy context of housing supply was issued on 10th May 2017.

The Supreme Court judgement on the two related planning appeals (*Hopkins Homes v Suffolk District Council* and *Richborough Estates v Cheshire East Borough Council*), concerning housing development and the correct interpretation of paragraph 49 of the NPPF (and its interface with others), provides some clarity upon the application of planning policies where a development plan is considered out of date due to the lack of a five-year supply of deliverable housing sites. However, there remains also some uncertainties which, no doubt, will be tested over time.

A summary of the key points of the judgement are set out below:

'The Tilted Balance'

Paragraph 14 sets out that at the heart of the NPPF is a "*presumption in favour of sustainable development*" and advises that where the development plan is **absent, silent or relevant policies are out-of-date**, planning permission should be granted unless "*any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.*"

Paragraph 49 states "*relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.*"

The Supreme Court judgement on this point did not agree with the earlier Court decisions that were interpreted as holding that a Council's failure to identify an adequate supply of deliverable sites for housing, as per para 49,

would render out of date all policies that restricted the supply of housing including, possibly, countryside and green belt policies. The judgement, instead, chose to adopt a narrower interpretation, related to more specific policies for the supply of housing.

The Supreme Court sought to move away from an overly legalistic interpretation of policy, noting "*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 non-housing policies.*"

Instead, notably, the Court's very clear judgement is that a housing shortfall is sufficient to trigger the 'tilted balance' (a phrase soon to become common parlance at Planning Inquiries) in favour of the grant of planning permission as set out in the second part of paragraph 14 of the NPPF (the "presumption in favour of sustainable development") subject to there being no adverse impacts which would 'significantly and demonstrably' outweigh the benefits of the grant of planning permission and by reference to footnote 9.

This, importantly, then requires assessment of the weight to be given to other wider policies, including specific policies indicating that development should be restricted.

Realism and Footnote 9

In the judgement, Lord Gill also made some very helpful additional observations. It introduced a very welcome interpretation of housing requirements noting that the five-year supply **should be based upon 'deliverable' sites** and highlights the futility of local planning authorities relying upon sites that have "*no realistic prospect of being developed within the five-year period.*"

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Lord Gill also identified that the restrictive designations identified in Footnote 9 (para 14) are not necessarily absolute limitations on development, and further added that *“the rigid enforcement of such policies may prevent a planning authority from meeting its requirement to provide a five-year’s supply”*.

This in effect gives further primacy to maintaining a five year supply of deliverable housing sites which is fundamental to the requirements of paragraph 49.

Implications for the Development Industry

There will continue for some time to be argument over the meaning(s) of this Judgement; however, there are some key aspects that can be derived immediately.

First, the emphasis on meeting five year supply requirements has been highlighted as has the need for this to be based on deliverable sites. This, inevitably, will require debate over land supply to afford greater scrutiny and precision, a factor that will not be lost on local authorities and their reliance on ‘trajectories’ and ‘expectations’.

Second, the Judgement’s direction on the narrower interpretation of ‘relevant policies for the supply of housing’ clarifies the approach that should be taken and the necessity, even if there is a defined shortfall in supply, to assess the implications of each relevant policy on a decision and weigh them accordingly in reaching a planning balance.

Third, it reinforces the role of the decision maker, the Court placing great emphasis on this which will necessarily lead to greater scrutiny when decisions are called into question.

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