Tattenhall Neighbourhood Plan Judicial Review: lessons for practitioners

In May 2014 the judicial review of the legal challenge to the Tattenhall Neighbourhood Plan made by Barrett Homes and Wainhomes Developments was published. This review by a senior high court judge, Mr Justice Supperstone, clarifies and confirms a number of matters regarding the production of Neighbourhood Plans.

The legal challenge

Tattenhall Parish Council in Cheshire West produced a Neighbourhood Plan which contained a restrictive policy limiting the scale of individual proposals for housing development to no more than 30 dwellings. The claimants, who had planning applications for housing on large greenfield sites on the edge of the parish concurrently at appeal, challenged the legality of this policy, arguing that it had no evidential support and that other options, such as whether a strategy involving fewer large sites would offer a more suitable environmental alternative than a more dispersed pattern of development, had not been considered.

The decision considers a range of complicating factors, which can be explored in detail by reading the full 34 page judgment. For practitioners and communities preparing Neighbourhood Plans, however, a few simple lessons can be highlighted.

Lessons for practitioners

The first lesson concerns the way in which strategic environmental assessments are carried out. It is a legal requirement that, in the case of Neighbourhood Plans which will have a significant environmental impact, a strategic environmental assessment (SEA) must be made in which the effects of carrying out the plan, and the reasonable alternatives to it, are identified, described and evaluated. One ground for the legal challenge was that reasonable alternatives to the restrictive housing policy had not been considered.

The local authority argued that the Neighbourhood Plan did not assess alternative forms of housing development, because other options had not commanded community support during consultation and so the restrictive housing policy was the only reasonable approach to housing in the Neighbourhood Plan that would be supported by the community at referendum. A “do nothing” option had been considered as a strategic alternative, but rejected as this would not enable the Neighbourhood Plan to achieve sustainable development, which is another legal requirement.

The judge agreed with this and found that the level of consideration of alternatives in the sustainability assessment was sufficient to meet the requirements of the SEA Directive and the Regulations.

The first lesson is that the alternative forms of development considered in Strategic Environmental Assessments for Neighbourhood Plans do not have to be comprehensive, but may be limited to that which prior community consultation has identified as being likely to command community support. In other words, if there is insufficient community support for an option in a neighbourhood plan, it is not a “reasonable alternative” and therefore it is not necessary to consider it in any detail.

The second ground for challenging the Neighbourhood Plan was that it failed to meet the Basic Conditions. The claimants alleged that the independent examiner had failed to consider whether the inclusion of a policy restricting the delivery of housing is appropriate in order to deliver the objectives of national guidance in NPPF, in particular under paragraph 47. Furthermore, as there were no strategic housing policies within the Local Plan against which to judge the content of the TNP it was not possible to judge whether the Neighbourhood Plan was in general conformity with strategic local policy.

The judge found that the independent examiner had in fact considered whether the Neighbourhood Plan has due regard to national policy. The examiner's remit is simply to assess whether the TNP satisfies the "basic conditions" set out in legislation, which do not include whether or not the plan is "sound" as an inspector would have to do for a local plan. The examiner found that the TNP "has regard to national policy"; it was not his job to determine whether the TNP was "consistent with national policy", which is the test that an inspector applies to a local plan.

The second lesson is that the requirement that a neighbourhood plan "has regard to national policy" is not as exhaustive as the requirement that a local plan is "consistent with national policy" and that the test of "soundness" which applies to the consideration of a local plan does not apply to a neighbourhood plan.

The third lesson concerns how the test of being "in general conformity to strategic local policy" is applied. The claimants alleged that there were no strategic housing policies in the Local Plan against which to judge the contents of the TNP.

The judge accepted the local authority's argument that there is no reason to suppose the Tattenhall Neighbourhood Plan will be inconsistent with the emerging Local Plan once it is adopted, whatever housing requirement is ultimately settled upon. The restrictive housing policy had been amended to remove any limit on overall numbers of houses before it went to examination. However, in the event of a conflict with the Local Plan, the most recently adopted plan will take precedence.

The judge confirmed that the independent examiner's role is to consider whether the neighbourhood plan is in general conformity with the adopted development plan as a whole, and not to assess how one policy in the neighbourhood plan relates to one element in the emerging local plan.
The claimants argued that the restrictive housing policy was not justified by evidence and that the examiner had failed to probe the evidence base for the policy. However, the local authority argued that the limiting number in the policy was derived from the community's preference, expressed in consultation responses to the emerging Neighbourhood Plan, for development to come forward in a phased manner and at a scale that reflects the existing character of the area's settings and buildings.

The fourth lesson is that a housing policy in a Neighbourhood Plan restricting the number of houses in any individual development may be based on the preferred scale of development expressed by the community during consultation on the emerging Neighbourhood Plan where this follows logically from the aims of the plan, in this case "to respect and where possible enhance the natural, built and historic environment" and "to maintain the strong and established sense of place". This assumes there is no overall cap on housing numbers which might undercut the housing growth set out for the neighbourhood area in the Local Plan.

The final ground for appeal concerned apparent bias on the part of the independent examiner, Nigel McGurk. The examiner declared that he was a non-executive director of a land and property company, Himor Ltd, which has a legal interest in a site at Hoole five miles from the Tattenhall parish boundary, which is being promoted for development. The claimants contended that a constraining policy on land for housing development at Tattenhall would potentially elevate the

need for housing development elsewhere within the district.

The judge thought that an informed observer would be aware of the fact that the claimants' sites in Tattenhall and the site at Hoole would be coming onto the market at different times, and as the Hoole site is in the green belt it is uncertain whether it will be developed at all.

Consequently the judge found that an informed and fair minded observer, having considered all the facts, would not conclude that there was a real possibility that the examiner was biased.

The final lesson here is that local authorities and Neighbourhood Plan bodies need to be aware of the potential dangers of conflicting interests when they appoint the independent examiner. The implications of decisions made by the examiner about a Neighbourhood Plan for any personal or commercial interest he or she may have will be scrutinized very closely by aggrieved parties.

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