

East Bergholt Parish Council v Babergh District Council

16 December 2019

Issue of deliverability in the NPPF 5 year housing land supply requirement.

East Bergholt Parish Council v Babergh District Council [\[2019\] EWCA Civ 2200](#)

[Chequered Flag Land case note](#)

Facts

This was the Court of Appeal judgment on the appeal of East Bergholt Parish Council against the High Court's decision to dismiss its claim for judicial review in relation to planning permission on 3 applications for up to 229 new dwellings granted by the District Council, for housing development on sites in East Bergholt.

The District Council's Planning Committee resolved to approve all three applications in August 2017.

In each case the proposal did not accord with the development plan, which included the Babergh Core Strategy, adopted by the District Council in February 2014, and the East Bergholt Neighbourhood Plan, made in September 2016.

The District Council concluded that the 5 year housing land supply required under para 47 NPPF did not exist, so that, under NPPF para 49, the policy for the '*presumption in favour of sustainable development*' in NPPF para 14 was engaged and a decision to grant planning permission was justified.

The Parish Council challenged the District Council's decision on the basis that:

1. its approach to the assessment of housing land supply in its decision was flawed by its misunderstanding of the concept of 'deliverability' in the NPPF by equating it to 'certainty' or 'absolute certainty' of delivery
2. in approving the developments, it improperly took into account the potential cost of opposing subsequent appeals if it refused permission.

Legal & Policy Background

Paragraph 47 of the 2012 NPPF stated:

'47. To boost significantly the supply of housing, local planning authorities should:

...identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;

identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15...'

Footnote 11 explained 'deliverable':

'To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.'

Footnote 12 said that;

'[to] be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged'.

Paragraph 49 stated that;

'[housing] applications should be considered in the context of the presumption in favour of sustainable development', and that '[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'.

Paragraph 14 envisaged the 'presumption in favour of sustainable development' operating 'where the development plan is...out-of-date', subject to two exceptions, one of which was that 'any adverse impacts of [approving the proposal] would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole'.

The relevant policy in para 47 of NPPF 2012 remains substantially similar in the later versions of NPPF.

The definition of a 'deliverable' site was changed in both revisions. The definition given in the glossary in Annex 2 to the 2019 version states:

'To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular:

- sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans).
- where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.'

The policy in NPPF para 47 of the NPPF was augmented in Planning Practice Guidance (PPG) dated March 2014, which has been updated.

Decision

1. There was no error in the District Council's assessment of housing land supply

The High Court judge's reasoning was correct.

Reference was made to the case of *St Modwen Developments*, which established that sites could be included in the 5 year supply of housing land even though they were not certain of delivery. The fact that a site was 'capable of being delivered' within five years 'does not mean...it necessarily will be'.

It was considered that *St Modwen Developments* demonstrated that the exercise of assessing 'deliverability' under paragraph 47 of NPPF was '*replete with planning judgment and must always be sensitive to the facts*' particularly in relation to the question of 'achievability'—whether there is a 'realistic prospect' of housing being delivered on a site within five years.

A 'realistic prospect' was not a legal concept but a broad concept of policy, which gave scope for a decision-maker's reasonable planning judgment on the likelihood of development proceeding on a site within 5 years—a predictive judgment on future events, something inevitably uncertain.

NPPF did not set out a fixed method for applying the test of 'deliverability'.

A 'realistic prospect' was not linked to any specific level of likelihood and there were no criteria for deciding this question beyond what was said about the treatment of '[sites] with planning permission' in footnote 11.

The policy left the assessment of a 'realistic prospect' to the decision-maker's planning judgment, which the court would only undo on conventional public law grounds.

The latitude in NPPF was also reflected in the relevant guidance.

What is a 'realistic prospect' is not defined in NPPF or PPG.

As held in *St Modwen Developments* recognised, 'achievability' was just one of four elements of the question of 'deliverability, the other three being: 'availability', 'suitability' and 'viability'.

All four elements had to be present if a site was to be considered 'deliverable'.

All of them entailed the exercise of planning judgment.

In this case it was clear that the District Council had had taken into account all the relevant considerations.

It was concluded that the District Council's assessment of the 5 year housing land supply did not demonstrate a misinterpretation of the policy of para 47 of NPPF, or an unlawful application of that policy, or irrationality, or any other public law error.

2. There was no improper consideration of the possible financial consequences of fighting appeals

The decision was that the District Council had made the decisions to grant planning permission lawfully, with a true understanding of relevant policy and on the strength of relevant land use considerations and that it did not resort to immaterial considerations.

National policy and guidance on the five-year housing land supply was a material consideration in the District Council's decisions. The consideration had to include a 'robust'

assessment, which was, by its nature, to reduce the District Council's financial burden and risk.

Implications

1. The decision confirms important aspects of the assessment of a local planning authority's 5 year housing land supply under NPPF;
 - decision-makers have a 'range of legitimate planning judgment' available to them when considering whether sites have a 'realistic prospect' of development in the five-year period, as required under the NPPF.
 - the degree of confidence required for a site to be considered 'deliverable' is for the decision-maker to decide, within the bounds of reasonable planning judgment.
 - NPPF does not lay down any fixed method for applying the test of deliverability, to be used in every case (including NPPF 2012 version and its revisions in July 2018 and February 2019).
 - where policy allows planning judgment the court will not intrude or subject the decision-maker's exercise of planning judgment to review beyond the range of public law and will only intervene where the decision-maker has failed to understand relevant policy.
 - the court's interpretation of planning policy does not generate new legal principles or tests to replace or reinforce the policy principles or tests it has construed.
2. The decision clarifies the interpretation of 'deliverability' by confirming that sites can be included in a 5 year supply of housing land even though they are not certain of delivery;
 - it also makes clear that a site without either planning permission or a development plan allocation could still, in principle, be classed as 'suitable' for delivery if it had a resolution to grant permission, subject to a section 106 planning obligation.
 - However, it could not be included if it failed the test of availability or achievability (see the court's conclusions below).
3. The judgment also refers to Local Planning Authority's considerations of the possible financial consequences of fighting appeals in making planning decisions;
 - Local Planning Authorities are not entitled to misconstrue or fail to apply government policy because of the risk of the financial consequences of an appeal
 - A 'robust' assessment of the 5 year housing land supply, in accordance with national policy and guidance, is compatible with a defensible assessment.
 - And a defensible assessment is more likely to avoid the expenditure and delay for all parties of avoidable appeals.

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