

The tilted balance: Where are we now?

Published 15 November 2019

Paragraph 11 of the NPPF (2018) and the tilted balance: Where are we now? and Removal of use of section 73 to amend descriptions of development

- Local authorities inability to demonstrate a 5 year housing supply is to be treated in the same way as out of date policies.
- Just because one planning policy is out of date the tilted balance should not automatically apply
- The tilted balance is always a material consideration if relevant and should be applied irrespective of whether it is expressly raised or not.

Applying Paragraph 11 NPPF

There is a presumption in favour of granting sustainable developments unless the application of policies gives a clear reason for refusing permission (11(d)(i) NPPF).

The wording of paragraph 11 remains unchanged. However in the recent judgment *Monkhill Ltd v SSHCLG [2019] EWHC 1993 (Admin)* the High Court considered it key that paragraph 11(d)(i) is read with the footnote 6 which lists relevant policies which, if applicable, remove the tilted balance.

Holgate J's judgement includes a practical summary of the steps to follow in applying paragraph 11:

- Apply rules of s.38(6) -any determination must be made in accordance with the development plan unless material considerations point otherwise;
- If the application is in line with an up-to-date plan and no other considerations indicate otherwise, permission should be granted (para 11(c) of the NPPF);
- If the above doesn't apply, consider whether there are any relevant development plan policies and if so whether they are out of date (11(d) NPPF);
- If this applies, look to whether any of the NPPF policies give a clear reason for refusing the proposal (11(d)(i) footnote 6). If so, permission should be refused (subject to s.38(6));
- If this does not apply the decision taker should apply the titled balance (11(d)(i) footnote 7 and s.38(6)).

Footnote 7 makes it clear that policies are to be treated as out of date where a local authority cannot demonstrate a 5 year supply or meet the Housing Delivery Test. Paragraph 172 of the NPPF, which deals with the refusal of major development in certain areas such as AONB, also falls within the scope of paragraph 11(d)(i).

Out of Date Policies

It does not follow automatically that just because one of the policies for determining an application is out of date, the tilted balance must be applied and permission granted.

The NPPF does not specifically determine whether the titled balance applies when 'one of' or 'any of' the most important policies are out of date. However *Wavendon Properties Ltd v SSHCLG [2019] EWHC 1524 (Admin)* has made it clear that the most important policies should be viewed together and an overall judgement made whether the policies as a whole are out of date.

Material Consideration

The Court found that the tilted balance is so fundamental that it should be applied irrespective of whether submissions are made in favour of its application during an appeal. As a fundamental requirement it should be given express consideration (*Green Lane Chertsey (Developments) Limited v SSHCLG [2019] EWHC 990 (Admin)*).

The application of paragraph 11 is clarified by the step by step guide from *Monkhill*. Such judgements provide a more certain approach by the courts of such issues, easing understanding and application by both the courts and local authorities.

Removal of use of section 73 to amend descriptions of development

The Court of Appeal has recently overturned the decision in *Finney* holding that section 73 cannot be used to amend the description of development (*John Leslie Finney v (1) Welsh Ministers (2) Carmarthenshire County Council and (3) Energie Kontor (UK)* [2019] EWCA Civ 1868).

In doing so, the Court of Appeal has effectively closed the ability that *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council* [2017] EWHC 1837 had provided developers with, to increase the amount of development permitted, where the description, rather than a condition, limited the quantum.

The Court of Appeal did suggest that developers could instead use s.96A to amend the description of development. However, it seems unlikely that planning authorities will agree to treat an increase in development as set out in the description of development as a non-material minor amendment. In these cases a fresh application will therefore be required for further information on the implications of the *Finney* decision please see

<http://views.dacbeachcroft.com/post/102ftww/finney-limits-to-the-scope-of-section-73-of-the-tcpa>.

Authors



Jennifer Glasgow

Bristol

+44 (0) 117 918 2565

jglasgow@dacbeachcroft.com