Only a partial victory?

In this article John Pugh-Smith considers the recent successful appeal by the Government in Secretary of State for Communities and Local Government v West Berkshire District Council and Reading Borough Council [2016] EWCA Civ 441 and its future implications

Last year's sensational decision by Mr Justice Holgate ([2015] EWHC 2222 (Admin) led to the immediate withdrawal of the relevant section of the national Planning Practice Guidance (PPG) advising that small housing sites of ten units or less than 1,000 square metres of floorspace were exempt from providing affordable housing on-site or through a commuted payment. On 19th May 2016, following the 'handing-down' of the Court of Appeal's judgment on 11th May 2016, that PPG advice was re-instated in the following terms:

Reference ID: 23b-031-20160519 Planning obligations

Are there any circumstances where infrastructure contributions through planning obligations should not be sought from developers?

As set out in the Starter Homes Written Ministerial Statement of 2 March 2015, starter homes exception sites should not be required to make affordable housing or tariff-style section 106 contributions. There are specific circumstances where contributions for affordable housing and tariff style planning obligations (section 106 planning obligations) should not be sought from small scale and self-build development. This follows the order of the Court of Appeal dated 13 May 2016, which give legal effect to the policy set out in the Written Ministerial Statement of 28 November 2014 and should be taken into account. These circumstances are that;

- *contributions should not be sought from developments of 10-units or less, and which have a maximum combined gross floorspace of no more than 1000sqm*
- *in designated rural areas, local planning authorities may choose to apply a lower threshold of 5-units or less. No affordable housing or tariff-style contributions should then be sought from these developments. In addition, in a rural area where the lower 5-unit or less threshold is applied, affordable housing and tariff style contributions should be sought from developments of between 6 and 10-units in the form of cash payments which are commuted until after completion of units within the development. This applies to rural areas described under section 157(1) of the Housing Act 1985, which includes National Parks and Areas of Outstanding Natural Beauty*
- *affordable housing and tariff-style contributions should not be sought from any development consisting only of the construction of a residential annex or extension to an existing home*

In a strongly worded Press Release issued on 11th May 2016 the Planning Minister, Brandon Lewis MP, was clear as to his views:

We're committed to building more homes, including record numbers of affordable homes – key to this is removing unnecessary red tape and bureaucracy that prevents builders getting on sites in the first place.

Today's judgment by the Court of Appeal restores common sense to the system, and ensures that those builders developing smaller sites – including self-builders - don't face costs that could stop them from building any homes at all.

This will now mean that builders developing sites of fewer than 10 homes will no longer have to make an affordable homes contribution that should instead fall to those building much larger developments.

He added:

This case was a total waste of taxpayers' money and the uncertainty the case created amongst housebuilders stalled new development from coming through.

I hope councils focus their time and money on delivering the front line service that their residents rely on and helping support new housebuilding in their areas that is very much needed.

However, was the Minister right to be so "up-beat"? Whether or not the reasoning of the Court of Appeal will be the subject of scrutiny by the Supreme Court, not just local planning authorities, and, neighbourhood plan-making bodies but also the development industry are now faced with a number of challenging issues. First, there is the growing tension between the drive towards increased devolution, and, the localism agenda on the one hand and Governmental intervention on "failing authorities" on the other. This is evidenced by the mixed messages coming from the recently assented Housing and Planning Act 2016 and the further legislation proposed in the latest Queen's Speech for neighbourhood planning. Secondly, there is the tension between the Government's drive towards Local Plan coverage and its early 2017 "use it or loose it" deadline and a statutory plan-making system based on soundness. Thirdly, does the statutory under-girding of the plan-led development system provided by s.38(6) of the Planning and Compulsory Purchase Act 2004 still have structural integrity faced with so many greater material considerations resulting from, now, Ministerial Statements finessing the NPPF?

In summary, the Court of Appeal's judgment, jointly prepared by Lord Justice Laws and Lord Justice Treacy, with which the Master of the Rolls, Lord Dyson, was as follows. It reminded that the ability of government to make policy is a common law prerogative power and that it was entitled such policy in unqualified terms. Here, the Written Ministerial Statement (WMS), on its face, had not sought to countermand or frustrate the effective operation of s.38(6) of the 2004 Act (and s.70(2) of the TCPA 1990) although it had expressed the Secretary of State's substantive planning policy

in unqualified though trenchant terms. Once it was accepted that the articulation of planning policy in unqualified or absolute terms was not in principle repugnant to the proper operation of s.38(6) of the 2004 Act, such use of language in the WMS was unobjectionable; so although the WMS was expressed in mandatory terms the policy outlined in it was not to be faulted on the grounds that it did not use language which indicated that it was not to be applied in a blanket fashion, or that its place in the statutory scheme of things was as a material consideration for the purposes of s.38(6) of the 2004 Act and s.70(2) of the 1990 Act, and no more. It did not countermand or frustrate the effective operation of those provisions. Subject to Secretary of State not introducing into planning policy matters which were not proper planning considerations at all his policy choices were for him. The planning legislation established a framework for the making of planning decisions: it did not lay down merits criteria for planning policy or establish what the policy-maker should or should not regard as relevant to the exercise of policy-making. Further, the Secretary of State was not obliged to go further than he did into the specifics, and in consequence was not to be faulted for a failure to have regard to relevant considerations in formulating the policy set out in the WMS. Another important issue, at the Court of Appeal hearing in mid-March 2016, was whether a non-statutory consultation process contravened the requirements of procedural fairness would always be fact and context sensitive. The Court held that the test was whether the process had been so unfair as to be unlawful. It found that the consultation in this instance had been fair, and, that appropriate consideration had been given to the consultation responses. Regarding the application of the Public Sector Equality Duty to the policy-making process, the Court found that while the considerations in ss.149(1)(a)-(c) of the Equality Act 2010 had not been addressed prior to the making of the WMS a formal Equality Statement, produced on 5th February 2015, demonstrated a consideration of the potential for adverse impacts on protected groups. It held that the process required by s.149 did not requires a precise mathematical exercise to be carried out in relation to particular affected groups and whilst it could be said that the Equality Statement took a relatively broad brush approach, compliance with the terms of s.149 had been achieved by what had been done in the instant case. As the Equality Statement satisfied the statutory requirements, the fact that it was not prepared as part of the policy decision, and post-dated it, did not warrant the quashing of the decision.

More specifically, on the application of the plan-led system Laws and Treacy LJJ, commented as follows:

The Rule against Fettering Discretion – Flexibility

19. The rule against fettering discretion is a general principle of the common law. It is critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or unreasonable (through failing to have regard to relevant factors) or both. In the law of planning it is reflected in the description of planning policy by Sedley LJ as "not a rule but a guide": *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520 at paragraph 16. It is given life by s.38(6) of the 2004 Act and

s.70(2) of the 1990 Act, which show that neither the development plan (itself, of course, a policy) nor any other policy relevant to the matter in hand is to be applied rigidly or exclusively by the decision-maker. Here we are primarily concerned with s.38(6). Guidance as to its operation in practice is to be found in the decision of the House of Lords in *City of Edinburgh Council v Secretary of State* [1977] 1 WLR 1477, which was concerned with the statutory predecessor of s.38(6) in Scotland (s.18A of the Town and Country Planning (Scotland) Act of 1972) …

[An extract from the speech of Lord Clyde is then set out]

20. We would draw two connected points from these observations. First, while the development plan is under s.38(6) the starting-point for the decision-maker (and in that sense there is a "presumption" that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations: see in particular Glidewell LJ's *dictum* in *Loup* [(1995) 71 P&CR 175 @ 186) cited by Lord Clyde. Secondly, policy may overtake a development plan ("… outdated and superseded by more recent guidance"). Both considerations tend to show that no systematic primacy is to be accorded to the development plan

The Unqualified Articulation of Policy

21. The second of our two principles is that a policy-maker is entitled to express his policy in unqualified terms. It would surely be idle, and most likely confusing, to require every policy statement to include a health warning in the shape of a reminder that the policy must be applied consistently with the rule against fettering discretion – or, in the planning context, consistently with s.38(6) or s.70(2). A policy may include exceptions; indeed the WMS did so, allowing a 5 unit threshold for certain designated areas in place of the 10 unit requirement. But the law by no means demands that a public policy should incorporate exceptions as part of itself. The rule against fettering and the provisions of ss.38(6) and 70(2) are not, of course, part of any administrative policy. They are requirements which the law imposes upon the *application* of policy. It follows that the articulation of planning policy in unqualified or absolute terms is by no means repugnant to the proper operation of those provisions.

Limits

22. That is not to say that the potential contents of a public policy are subject to no legal constraints. The basic tests of reason and good faith apply; and where, as here, the policy is elaborated in a statutory context, the policy-maker cannot promote an outcome which contradicts the aims of the statute. Mr Forsdick characterised this limitation as an instance of the rule in *Padfield v Minister of Agriculture* [1968] AC 997, that a statutory discretion must be deployed to promote the policy and objects of the Act. In fact the power to make policy exercised by the Secretary of State in this case was not statutory, but an instance of the Crown's common law prerogative power. Still, the statutory context is plain; and it is plain (and uncontentious) that the Secretary of State was not entitled to seek by his policy to countermand or frustrate the effective operation of ss.38(6) and 70(2).

So, where does that leave certainty and consistency of decision-making, the two previous objectives of the plan-led development management system? First, is still the ability of LPAs to resist the national exemption through their plan-making process where local circumstances justify such an exemption. Such policies are still capable of being found "sound". However, the prudent Examining Inspector is now more likely to recommend that a modification is made in line with the WMS, resulting in further potential delay from the need to consult. Secondly, Appeal Inspectors are more likely to give great weight to be given to the WMS particularly where the development plan pre-dates the November 2014 publication of this national policy. Thirdly, the opportunity to address the situation through the Housing & Planning Bill has now been lost. Despite a House of Lords amendment allowing LPA to opt out of the exemption in small scale development the determination of the Government to maintain the Bill in the form debated in the Commons has led to the Bill receiving Royal Assent on 12th May seemingly without this provision, although the final wording of the Act has not yet been published on a publicly accessible website.

Given the Government's determination to advance its starter home initiative, perhaps, this omission is unsurprising. However, even that initiative may yet have a slow start as DCLG may not be able to bring the Act into force until at least April 2017 due to the further consultation and subordinate regulations. Although the proposed changes to the NPPF are expected to embrace the Government's affordable housing policy regarding both "starter homes" and the "small sites exemption" these amendments are not currently scheduled to be published before "this Summer". Finally, while the 2016 Act does include transitional provisions it is an unwise administration, after the *Cala* as well as the *West Berks* litigation that attempts to implement anything too quickly. Uncertainty, therefore, is more likely than not to continue for another twelve months irrespective of any Supreme Court appeal hearing.

In conclusion, while the Court of Appeal's decision is a short-term victory for the Government it is certainly not the end of the battle being fought by beleaguered LPAs, nor, the practical consequences of this policy hiatus on the development industry to bring forward a deliverable and viable supply of built housing units. Contrary to the expectations of the Planning Minister there is no certainty that this case's outcome will now lead to a sudden release of small housing sites or, necessarily, new homes. Real life, contrary to the political soundbite, does not always turn out in the way that Marsham Street would wish, nor, does the current outcome of this case relieve this Government of the continuing effects of the law of unintended consequences.

John Pugh-Smith's previous articles "*A Comprehensive Defeat*?" (September 2015) and "*Repealing Sections 106BA to BC – yet another example of the law of unintended consequences*" (April 2016) can be accessed through the following link: http://www.39essex.com/category/newsletters/