

# The Duty to Co-operate- 10 years after RS revocation

27<sup>th</sup> May 2020

**PETER VILLAGE QC**

# Introduction

- 27<sup>th</sup> May 2010 – the demise of Regional Strategies, the top down approach.
- Replaced by Duty to Co-operate (DTC), the bottom up approach of “localism”
- Has DTC been a success?
  - Faster plan preparation?
  - Cheaper, fewer resources?
  - Rigorous evidence based decisions? Not top down.

# Background

- Regional Spatial Strategies (RSS) introduced by Planning and Compulsory Purchase Act 2004
- Which in turn replaced a sub-regional strategy (Structure plans) from TCPA 1971 – EIP led.
- RSS produced by Regional Planning Board for each of the 8 regions
- RPB approved by S/S
- EIP of RSS by Independent Inspector – making independent evidence based judgments

# Localism

- “Localism” - central to Tory manifesto to replace the top down approach with the bottom up approach – the notion that local people would decide for themselves how much development to take.
- Rt Hon Eric Pickles gave notice of intention to revoke on 27<sup>th</sup> May 2010
  - "ABOLITION OF REGIONAL STRATEGIES
  - I am writing to you today to highlight our commitment in the coalition agreements where we very clearly set out our intention to rapidly abolish Regional Strategies and return decision making powers on housing and planning to local councils. Consequently, decisions on housing supply (including the provision of travellers' sites) will rest with Local Planning Authorities without the framework of regional numbers and plans.
  - I will make a formal announcement on this matter soon. However, I expect Local Planning Authorities and the Planning Inspectorate to have regard to this letter as a material planning consideration in any decisions they are currently taking."

# Localism (Cont'd)

- 6<sup>th</sup> July 2010 – formal revocation under s. 79(6) Local Democracy Economic Development and Construction Act 2009
- More confusion and chaos (following May announcement) as LPAs binned their LPs based on RS numbers
- CALA Homes – 2000 home RS allocation at Winchester. Judicial Review, on grounds that revocation contrary to and subverted policy and objects of 2009 Act.

# CALA Homes Decision

- CALA Homes Limited v Secretary of State for Communities and Local Government [2010] EWHC 2866 (Admin)
- Sales J: “[T]he main and critical point is that there is no sufficient indication in section 79(6) of the 2009 Act that Parliament intended to reserve to the Secretary of State a power to set that whole elaborate structure at naught if, in his opinion, it was expedient or necessary to do so because it was not operating in the public interest. If Parliament had intended to create such a power for the Secretary of State – something akin to a Henry VIII clause, since the practical effect of it would be to grant the Secretary of State power to denude primary legislation of any practical effect, without having to seek the approval of Parliament for such a course by passing further legislation”: (para 52).

# CALA Homes (Cont'd)

Challenge also succeeded on failure to undertake a Strategic Environmental Assessment – the revocation amounted to a plan, programme or modification the adoption of which may have significant environmental effect.

CALA succeed in obtaining pp for their 2000 homes following a further challenge to the S/S's policy and a further successful challenge to the S/S's dismissal of appeal in teeth of a strong recommendation by Inspector at inquiry.

# Duty to Co-operate

S.33A PCPA 2004 inserted by Localism Act 2011

A duty cast on all LPAs and County Councils to “engage constructively, actively and on an on-going basis in any process by means of which activities within ss(3) are undertaken”.

“Activities” include preparation of strategic DPDs (“..a significant impact on at least two planning areas”)



# How has DTC worked in practice?

- R (on the application of) Central Bedfordshire Council v Secretary of State for Communities and Local Government [2015] EWHC 2167 (Admin) Patterson J said:
- “[50] To come to a planning judgement on a duty to co-operate involves not a mechanistic acceptance of all documents submitted by the plan-making authority but a rigorous examination of those documents and the evidence received so as to enable an Inspector to reach a planning judgment on whether there has been an active and ongoing process of co-operation. The key phrase in my judgment is "active and ongoing". By reason of finding there were gaps as the Inspector has set out, he was not satisfied that the process had been either active or ongoing”.

# DTC in practice

St Albans v Secretary of State for Communities and Local Government [2017] EWHC 1751 (Admin) in which the LPA challenged the Inspector's decision that it had failed to demonstrate compliance with the DTC. It is worth noting that the last time a local plan was adopted in St. Albans District was 1994. The Inspector examined the approach of the Council and found a failure in DTC. He focused on:

- Was the engagement constructive? Active? On-going? Collaborative?
- Ross Cranston J held no legal error by Inspector that the requirement for active and on-going engagement remained even where “discussions seem to have hit the buffers”.

# DTC in practice

- Highly resource heavy for LPAs
- Sound plan may depend on co-operative neighbouring LPAs
- Serious delay if Inspector finds DTC not passed, effectively start again.
- Delay to development plan preparation = economic impact + uncertainty + impact on housing delivery
- A leap of faith that local politicians would take a preternatural approach in determining local housing requirement for their area rather than passing the requirement on to a neighbouring LPA
- Writ in water: no clear indication to LPA or participants in plan process whether duty complied with

# Hall of shame – notable DTC failures

- St Albans (No.1) – 2016 (challenged in High Ct and lost)
- Wealden – Feb 2020
- Sevenoaks – March 2020 – JR pending
- St Albans (No.2) – déjà vu - April 2020. Another challenge?
- (Many other examples of LP/JSP soundness failures or significant delays for other reasons; eg Cambridge/South Cambs; South Oxfordshire; West of England JSP.
- The plan making process has become an arduous obstacle course

# Fit for purpose in post Covid world?

- The pre-existing housing crisis will be exacerbated through significantly reduced housing delivery
- National economic renewal through housebuilding and development
- Rapid development plan preparation now required. Delays of months and years unacceptable.
- DTC too time-consuming, expensive, uncertain, an onerous barrier to delivery.
- Localism a luxury we can no longer afford? An anchor round the necks of LPAs and developers?
- What about an alternative approach? A sub-regional strategy determined at EiP, evidence based, free from local political interference.
- “Sub-regional plans”?

# Conclusion

- Has DTC been a success?
  - Faster plan preparation? No
  - Cheaper, fewer resources? No
  - Rigorous evidence based decisions? The use of standard methodology of housing requirements itself undermines the entire concept of localism – the decision as to quantum is now taken out of the hands of politicians and is itself a mathematical calculation.
  - But at least it is evidence-based.