Planning policy: Whose word is final?

Gateley Plc

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The Secretary of State for Communities and Local Government -v- West Berkshire District Council [2016] EWCA Civ 441

Planning decisions are often highly influenced by policy – and often there are relevant policies which tug the decision-taker in different directions. The potential for conflict is greatest where the policies of the local planning authority on the one hand, and the Secretary of State on the other, are not fully aligned.

In terms of housing, the Secretary of State has determinedly pursued a policy of boosting supply which has brought him into conflict with local policy on many occasions, and knowing who is going to have the last word is important for the outcome of many current housing proposals.

The West Berkshire case

In 2015, West Berkshire District Council (WBDC) successfully challenged the decision of the Secretary of State to adopt a policy limiting the requirement for affordable housing. The Court of Appeal has now reversed that however, up-holding the Secretary of State's policy.

The policy in question comprised both the small sites exemption from affordable housing, and the vacant building credit.

It was introduced through a written ministerial statement, made in Parliament on 28 November 2014. This stated that developments of 10 units, or 1,000 square metres or less, would be excluded from affordable housing requirements, and that a lower threshold still would apply in certain designated areas, such as National Parks and Areas of Outstanding Natural Beauty, in which respect developments of five units or less would be so excluded.

It also provided that where a vacant building was being brought back into use (or demolished for redevelopment of the land) a credit (the Vacant Building Credit) would be set against the affordable housing contribution otherwise required.

It seemed to offer a moderate and sensible benefit to the parts of the industry dealing with smaller schemes and a 'credit', which could be of significant benefit on some larger sites as well.

Court of Appeal

Although WBDC's challenge to the lawfulness of that policy was successful in 2015, the Court of Appeal has now reversed that decision.

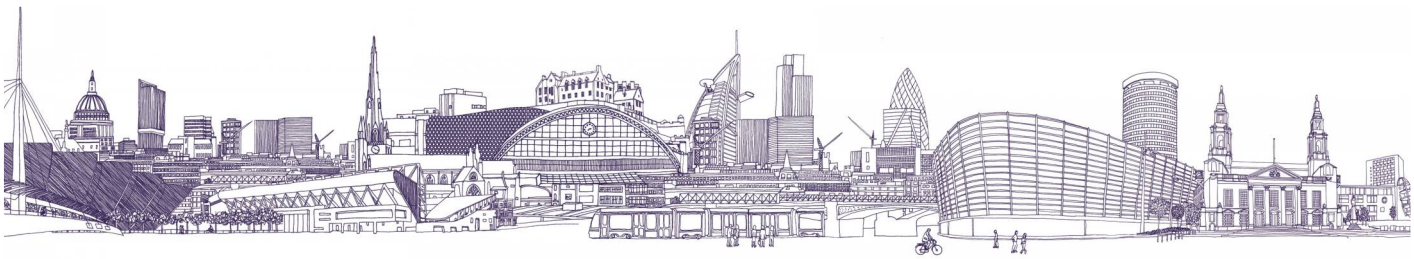
The Secretary of State has therefore won (for the time being at least), but the ultimate outcome is expected to depend on the view that the Supreme Court will take of the matter in due course.

In this article we look at the current state of the law and implications for the industry, in light of the Court of Appeal's decision.

Inconsistency with the statutory scheme

The National Planning Policy Framework emphasises that we are supposed to have a 'plan-led' system of development control, in which development plan policy provides a degree of certainty and site specific guidance to assist decision-takers in deciding planning applications.

WBDC had argued that the Minister's policy was not consistent with the statutory scheme governing planning decision taking. In the lower court their argument found favour with the Honourable Mr Justice Holgate. He said: 'Section 38(6)… gives 'priority' to the policies in adopted development plans. These policies have been formulated by reference to a local evidence base (section 13 of the PCPA2004) and have satisfied the requirements of the statutory process leading to adoption. The legislation does not give a general priority to, or a presumption in favour of, national policy as against statutory local policy… The



new national policy is inconsistent with the statutory scheme because its aim, and the language chosen, purports to confer exemptions in each and every case where affordable housing requirements in an adopted local plan policy are inconsistent with the national thresholds…'

The Court of Appeal's view

The Court of Appeal was not convinced by that reasoning. It recognised two important principles of public law:

1. The exercise of public discretionary power requires the decision maker to bring his mind to bear on every case; he cannot blindly follow a pre-existing policy without considering anything said to persuade him that the case in hand is an exception (British Oxygen [1971] AC 610).
2. A policy maker (notably central government) is entitled to express its policy in unqualified terms. The Secretary of State was therefore not required to spell out that the application of the policy must allow for the possibility of exceptions.

On this basis, the Court of Appeal was comfortable that the Secretary of State was fully entitled to express his policy on exempting small sites from affordable housing requirements (and providing for the Vacant Building Credit) in uncompromising terms. It wasn't necessary for the Secretary of State to express that policy on the basis that he recognised that there would be exceptions to it, since it was integral to the operation of planning law including Section 38(6) of the 2004 Act, but such exceptions could arise.

In the matter of the operation of Section 38(6) the Court of Appeal, despite the importance of the plan-led system, went as far as to state that '…no systematic primacy is to be accorded to the development plan'. The 'presumption' in favour of the development plan in the Court of Appeal's view is no more than a recognition that it is the starting point for considering the merits, the actual weight given to the relevant policies whether in or outside the development plan, is matter for the decision-taker.

The policy which the Secretary of State had formulated on small sites, and Vacant Building Credit, did not countermand or frustrate the effective operation of Section 38(6) of the Planning and Compulsory Purchase Act 2004.

The other grounds

In the lower court, WBDC had also successfully attacked the policy on three other grounds. The Court of Appeal reversed the lower court's decision on each of these also.

First, WBDC had suggested that, in formulating his policy, the Secretary of State had ignored certain material considerations. The considerations included points relating to land supply, an alleged conflict between what was said in the Government's response to consultation and other evidence as to the policy's impact on local contributions towards affordable housing, and a point about the benefits (real or supposed) of a three unit threshold only, as well as issues relating to the Community Infrastructure Levy.

However, the Court of Appeal confirmed that in making planning policy, the Secretary of State is exercising a power enjoyed in right of the Crown, and not by statute. He was not, therefore, subject to the same requirement as would arise under a carefully drawn statutory regime in respect of material considerations and provided that he did not introduce into planning policy making matters that were not proper planning considerations at all, his policy choices were for him.

Second, WBDC had attacked the policy on the ground that the Secretary of State had not consulted adequately. However, having rehearsed the essential legal principles, namely:

1. the consultation document must contain sufficient information to enable an intelligent response;
2. the consultee must know in sufficient detail what the proposal is;
3. the consultation document must enable the consultee to know what factors are likely to be of substantial importance to the decision; and
4. the Minister must take the product of the consultation conscientiously into account.

The Court of Appeal concluded that the degree of consultation undertaken by the Minister was adequate.

Third, WBDC had attacked the policy on the basis of alleged non-compliance with the important duty introduced by the Equality Act 2010. Under Section 149 of that Act, any public authority is to have due regard to matters, including a consideration of the interests of those showing relevant protected characteristics such as age, gender, disability and race.

At first instance, the Judge concluded that the Minister had not taken adequate steps to obtain relevant information so as to comply with this duty, or had not fulfilled it as a matter of substance. He also made further findings in respect of the errors of law which he considered the Secretary of State to have fallen into in this respect.

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However, the Secretary of State had issued an Equality Statement in respect of the policy, and the Court of Appeal considered that, and noted that it stated the Government to be reconsidering a number of measures to reduce disproportionate costs placed on smaller development.

They also noted that the policy might result in some local reduction in affordable housing but that their assessment of the data showed this to be a minor element and that they envisaged building more new affordable homes over the next Parliament than at any equivalent period in the last 20 years.

Whilst, therefore, the Equality Statement published by the Minister was considered to take a broad brush approach, the Court of Appeal concluded that Section 149 had been satisfied in all the circumstances.

Practical implications

For the time being, the effect of the ministerial statement is still a material consideration for local authorities and other planning decision takers to take into account.

The non-requirement for affordable housing for sites of ten units or less, or having an area of 1,000 square metres or less, is something which applicants for planning permission are entitled to argue for, and they are entitled also to argue that a Vacant Building Credit should be afforded to them.

However, the weight that would be given to the ministerial statement is clearly limited by the expectation that the Supreme Court will consider it, and only then would there be a decision which would ultimately determine whether or not the Secretary of State acted lawfully in formulating the policy in the first place.

In the meantime, the industry will no doubt be closely watching for that outcome. In the meantime, it appears open to developers to explore local approaches with planning authorities whereby at least some weight could be given to the policy on a case by case basis, albeit with timing factors and judicial review risk assessment firmly kept in mind. Even if full weight cannot be given to the policy pending a Supreme Court decision, there are at least now some grounds for considering the policy to have been lawfully made with the benefit of the Court of Appeal's analysis.

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