Case No: C1/2011/0297

Neutral Citation Number: [2011] EWCA Civ 639
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE LINDBLOM
[2011] EWHC 97 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2011

Before:

LORD JUSTICE RIX
LORD JUSTICE RIMER
and
LORD JUSTICE SULLIVAN

- -

Between :

THE QUEEN ON THE APPLICATION OF CALA HOMES (SOUTH) LIMITED	**Appellant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT & ANR	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Peter Village QC, James Strachan and Sarah Hannett (instructed by **Clyde & Co**) for the **Appellant**
Tim Mould QC and James Maurici (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing dates: 5th and 6th May 2011

- -

Judgment
As Approved by the Court

Lord Justice Sullivan :

Introduction

1. The principal issue in this appeal against the order dated 7th February 2011 of Lindblom J dismissing the Appellant's claim for judicial review is whether those responsible for making decisions under the Planning Acts (the Respondent, local planning authorities and the Planning Inspectorate) are entitled to have regard to the Government's proposal to abolish regional strategies, now embodied in clause 89 of the Localism Bill, as a material consideration for the purposes of section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") and section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). The Appellant contends that prior to Royal Assent being given to the necessary legislation, the proposal to abolish regional strategies is not capable of being a material consideration for the purpose of determining planning applications and appeals.

The statutory framework

The development plan

2. Before turning to the facts, it is helpful to set out the statutory framework. The starting point is Part 5 of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act") which came into effect on 1st April 2010, and which deals with "Regional Strategy". Section 70(1) provides that "There is to be a regional strategy for each region other than London." The regional strategy for each region must set out policies in relation to both "sustainable economic growth" and "the development and use of land" in the region: subsection 70(2).

3. Section 38(3) of the 2004 Act, as amended by the 2009 Act, provides that for the purposes of any area in England other than Greater London the development plan is:

> "(a) the regional strategy for the region in which the area is situated, and
>
> (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area."

Development control

4. Section 70(2) of the 1990 Act requires local planning authorities when determining planning applications to "have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations." Section 70(2) also applies to the determination of appeals by the Planning Inspectorate and the Respondent: see Section 79(4).

5. Section 70(2) of the 1990 Act must be read together with Section 38(6) of the 2004 Act, which provides that:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the

> determination must be made in accordance with the plan unless material considerations indicate otherwise."

"Plan led" development control

6. The combined effect of sections 70(2) of the 1990 Act and what is now 38(6) of the 2004 Act was explained by the House of Lords in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 (section 18A of the Town and Country Planning (Scotland) Act 1972 was the counterpart of section 54A of the 1990 Act, the predecessor of section 38(6) of the 2004 Act). The relevant extracts from the speeches of Lord Hope and Lord Clyde are set out in paragraph 28 of Lindblom J's judgment. In summary, section 38(6) creates a presumption in favour of the development plan. Two passages explain how that presumption is to be applied in practice:

> "It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section [38(6)] have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson v Edinburgh Corporation, 1960 S.C. 313, 318, "slavishly to adhere to" it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied will continue, as before, to be a matter for the planning authority."

(Lord Hope at p. 1450 B-D)

> "By virtue of section [38(6)] if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given."

(Lord Clyde at p. 1458 E-F)

Local development documents preparation

7. The role of the regional strategies in the preparation of the second tier of the development plan – the development plan documents – is somewhat more prescriptive. Section 19(2) of the 2004 Act lists in paragraphs (a)–(j) the matters to which the local planning authority must have regard when preparing a development plan document or any other local development document. Those matters include the regional strategy for the relevant region and the regional strategy for any adjoining region (paras. (b) and (d)). Section 24(1) provides that, outside Greater London "The local development documents must be in general conformity with … the regional strategy…".

The Facts

8. The facts are set out in some detail in the judgment of Lindblom J [2011] EWHC 97 (Admin), and a brief summary will suffice for present purposes. In a letter dated 27th May 2010 addressed to all local planning authorities in England, the Respondent said:

> "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."

9. On the 6th July 2010 the Respondent made a Statement to Parliament in which he said that he was revoking the regional strategies under section 79(6) of the 2009 Act. In judicial review proceedings before Sales J the Appellant challenged the lawfulness of that revocation on two grounds:

> (i) that the power of revocation under Section 79(6) could not lawfully be used to abolish the entire regional strategy tier of the development plan; and
>
> (ii) that there had been no consideration as to whether this change in the development plan was likely to have significant environmental effects, in breach of Directive 2001/42/EC ("the SEA Directive"), as transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations").

10. In a judgment handed down on 10th November 2010 Sales J upheld the Appellant's challenge on both grounds: [2010] EWHC 2866 (Admin). The Respondent did not appeal against the judgment of Sales J, but he immediately issued a statement in Parliament. The full text of that statement is set out in paragraph 17 of Lindblom J's judgment. The statement referred to a letter, also dated 10th November 2010, from the Department for Communities and Local Government's Chief Planner, which was addressed to the Chief Planning Officers of all local planning authorities and to the Planning Inspectorate. That letter said:

> "ABOLITION OF REGIONAL STRATEGIES
>
> I am writing to you today following the judgment in the case brought by Cala Homes in the High Court, which considered that the powers set out in section 79(6) of the Local Democracy, Economic Development and Construction Act 2009 could not be used to revoke all Regional Strategies in their entirety."
>
> The effect of this decision is to re-establish Regional Strategies as part of the development plan. However the Secretary of State wrote to Local Planning Authorities and to the Planning Inspectorate on 27 May 2010 informing them of the Government's intention to abolish Regional Strategies in the Localism Bill and that he expected them to have regard to this as a material consideration in planning decisions.
>
> I am attaching the proposed clause of the Localism Bill that will enact that commitment. The Bill is expected to begin its passage through Parliament before Christmas, and will return decision-making powers in housing and planning to local authorities. Local Planning Authorities and the Planning Inspectorate should still have regard to the letter of the 27th May 2010 in any decisions they are currently taking……..."

At that stage there was no Bill. The proposed clause in the draft Bill attached to the Chief Planner's letter was as follows:

> "1 Abolition of regional strategies
>
> (1) Part 5 of the Local Democracy, Economic Development and Construction Act 2009 (regional strategy) is repealed.
>
> (2) The regional strategies under Part 5 of the Act are revoked."

11. The Claim Form in these proceedings was issued on the 19th November 2010. The Appellant sought a declaration that it "is unlawful for the Respondent (and for local planning authorities and the Planning Inspectorate) to have regard to the Government's stated intention to enact primary legislation in the future to abolish the regional strategies in England as a material consideration in making determinations under the Planning Acts." The Appellant also sought a quashing order in respect of

the Respondent's statement and the Chief Planner's letter, both dated 10th November 2010, and the Respondent's letter dated 27th May 2010, or a declaration that their contents were unlawful.

12. At the hearing before Lindblom J on 17th and 18th January 2011 there were three grounds of challenge:

> (i) that the Government's intention to abolish regional strategies was incapable in law of being a material consideration within the meaning of section 70(2) of the 1990 Act;
>
> (ii) that the issuing of the statement and letter on 10th November 2010 was irrational; and
>
> (iii) that there had been a failure to comply with the requirements relating to Strategic Environmental Assessment in the SEA Directive and the SEA Regulations.

Lindblom J rejected all three grounds. There is no appeal against his decision to reject grounds (ii) and (iii).

13. The Localism Bill had its first reading in the House of Commons on 13th December 2010. On 10th March 2011 it concluded the Committee stage, and we were told that the Report stage was programmed to start on 17th May 2011. On 5th April 2011 the Parliamentary Under-Secretary of State at the Department for Communities and Local Government said in a statement to Parliament that the Government had decided to carry out a strategic environmental assessment of the regional strategies. He said that the assessment was being carried out on a voluntary basis, and explained:

> "We intend to compile an environmental report for each region and to consult on it in line with the process laid down in the Environmental Assessment of Plans and Programmes Regulations 2004. Local authorities and others should find this helpful in identifying issues relevant to their areas and policies or initiatives in the Regional Strategies which are no longer in effect, and it should also help them decide how to proceed with preparing or reviewing their own plans.
>
> This process of environmental assessment will be carried out during the passage of the Bill through Parliament. Subject to Royal Assent, the revocation of each individual Regional Strategy will be commenced after the assessment process has been completed."

14. As amended in Public Bill Committee, clause 89 of the Localism Bill now provides:

> "Abolition of regional strategies
>
> (1) The following provisions are repealed –

> (a) sections 82(1) and 83 of the Local Democracy, Economic Development and Construction Act 2009 (effect of regional strategies), and
>
> (b) the remaining provisions of Part 5 of that Act (regional strategy).
>
> (2) Subsection (1)(b) does not apply to –
>
> (a) section 85(1) (consequential provision) of that Act,
>
> (b) Schedule 5 to that Act (regional strategy: amendments) (but see Part 14 of Schedule 24 to this Act), or
>
> (c) Part 4 of Schedule 7 to that Act (regional strategy: repeals).
>
> (3) The regional strategies under Part 5 of that Act are revoked."

Schedule 8 contains a large number of consequential amendments. The provisions of section 89 are to come into force on such day as the Secretary of State may by order appoint: Clause 206(2).

Discussion

15. It is common ground that sections 70(2) of the 1990 Act and 38(6) of the 2004 Act confer a discretion, and that the planning decision-maker (the Respondent, the Planning Inspectorate or the local planning authority) must exercise that discretion so as to promote, and not so as to thwart or run counter to, the policy and objects of the legislation conferring the discretion: see Padfield and Others v Minister of Agriculture Fisheries and Food and Others [1968] AC 997, per Lord Reid at page 1030 B-D.

16. At the heart of the Appellant's case is the submission that the Government's intention to abolish the regional strategies is not, as a matter of law, capable of being a material consideration for the purposes of sections 70(2) and 38(6) because taking into account an intention to abolish regional strategies would subvert or thwart the legislative purpose set out in section 70(1) of the 2009 Act that "there is to be a regional strategy for each region….". Mr. Village QC submitted that Lindblom J had not addressed this issue and had not answered the question: "How does taking into account the Respondent's aspiration to abolish regional strategies promote the object and purpose of the legislation that there should be regional strategies?"

17. The Padfield principle was applied by the Court of Appeal in R v Braintree District Council ex p. Halls (2000) 32 HLR 770. Laws LJ said at page 779:

> "The rule is not that the exercise of the power is only to be condemned if it is incapable of promoting the Act's policy, rather the question always is: what was the decision-maker's purpose in the instant case and was it calculated to promote the policy of the Act?"

18. Mr. Village submitted that in this case the answer to the two-part question posed by Laws LJ was clear:

> (a) the Respondent's purpose was to abolish regional strategies; and
>
> (b) that purpose was not calculated to promote (indeed it was directly contrary to) the policy of the 2009 Act that regional strategies should exist as part of the development plan.

19. If the policy and objects of the legislation were defined solely by reference to section 70(1) of the 2009 Act, then having regard to the proposed abolition of that which section 70(1) requires there to be in every region would be contrary to the policy and objects of the legislation. However, Mr. Mould QC submitted that the policy and objects of the legislation are not defined solely by reference to section 70(1) of the 2009 Act, and that all of the enactments which comprise the legislative scheme – section 70(1) of the 2009 Act, sub sections 38(3) and (6) of the 2004 Act, and section 70(2) of the 1990 Act – must be considered for the purpose of ascertaining the relevant statutory policy and objects. The proposition that there is to be a regional strategy for each region takes one only so far. In order to understand the role of that regional strategy in development control decisions one needs to appreciate that:

> (a) the regional strategy is to be the upper-tier of the development plan;
>
> (b) the decision-maker must have regard not only to the development plan but also to other material considerations when determining planning applications or appeals; and
>
> (c) the decision-maker may grant or refuse planning permission contrary to the development plan if material considerations indicate that it should not be followed.

20. The issue between the parties is a very narrow one: what are the relevant legislative policy and objects? Mr. Village does not dispute the general proposition that a prospective change to planning policy is capable of being a material consideration for the purposes of sections 70(2) of the 1990 Act and 38(6) of the 2004 Act. The weight to be given to any prospective change in planning policy will be a matter for the decision-maker's planning judgment in each particular case. In principle, the means by which it is proposed to effect a change in policy, by new legislation, by amendment under existing legislation, or by administrative action such as the publication of a new Planning Policy Statement (PPS), goes to the weight, not the materiality, of the prospective change. If the change is to be effected by legislation, will Parliamentary approval be obtained, and if so in what form and within what timescale? Subject to the Appellant's Padfield point, a change in policy that is proposed to be effected by legislation is not an immaterial consideration on the day before Royal Assent, and a material consideration on the day that Royal Assent is granted. The stage reached in the legislative process goes to the weight, not the materiality of the proposed change.

21. Rather than considering the relevance for development control purposes of possible future changes to planning policy purely in the abstract, it is important to focus on the kind of policies that are in issue in this case. Regional strategies are typically

concerned with the long-term. The South East Plan 2009 sets regional housing requirements for a twenty year period: from 2006 to 2026. To meet those requirements, large-scale residential developments will typically be programmed for implementation over a lengthy period, perhaps 10-15 years. If the decision-maker considers that there are valid site specific or "local" objections to the grant of planning permission, eg. landscape impact or loss of agricultural land, but these objections are said by the applicant for permission to be outweighed by the need to meet the long-term regional housing requirements in the development plan, the decision-maker would, subject to the Appellant's Padfield point, surely be entitled to have regard to the prospect that the sole policy justification for permitting the development may well have ceased to exist long before the development has been completed, and perhaps before it has even been commenced, when deciding whether planning permission should be granted now for such a large-scale and long-term commitment to meet future needs.

22. I accept Mr. Mould's submission that in order to ascertain the policy and objects of the legislation conferring the discretion under section 70(2) of the 1990 Act it is necessary to look beyond the requirement in section 70(1) of the 2009 Act that there "is to be a regional strategy for each region." The regional strategy is the first tier of the development plan; the development plan documents for each area within the region are the second tier. The 2004 Act requires each local planning authority to prepare and maintain "a scheme to be known as their local development scheme", and that scheme must specify "the local development documents which are to be development plan documents": section 15(1) and (2) (aa). These local development documents must "set out the authority's policies (however expressed) relating to the development and use of land in their area": section 16(3).

23. In respect of any area in England outside Greater London the legislative scheme requires there to be both a regional strategy for the region within which the area is situated and the development plan documents for the area. Together they comprise the development plan for that area. If the legislative scheme provided that planning applications were to be determined in accordance with the development plan, then having any regard to the prospect that the development plan might be abolished would be contrary to the policy and objects of the legislation, but the City of Edinburgh case (para.6) above makes it clear that that is not the combined effect of sections 70(2) of the 1990 Act and 38(6) of the 2004 Act. The decision-maker must consider not only the development plan, but also other material considerations. Those considerations may include the fact that the policies in the development plan have become outdated, or are no longer relevant because of a change of circumstances; and those considerations may indicate that the decision should not be in accord with the development plan.

24. This "valuable element of flexibility" (see Lord Clyde's speech in the City of Edinburgh case cited in para. 6 above), given to the local planning authority when determining planning applications, is to be contrasted with the lack of flexibility when the authority is preparing its development plan documents. It must have regard to the relevant regional strategy (among other specified matters), and whether or not it is precluded from having regard to other matters which are not listed in paragraphs (a)-(j) of section 19(2) of the 2004 Act, the end-product, the local development documents, "must be in general conformity" with the regional strategy: see section

24(1) of the 2004 Act. Development plan documents must be submitted for independent examination by a person (in practice a Planning Inspector) appointed by the Respondent, and one of the purposes of that examination is to determine whether the development plan document satisfies the requirement of general conformity in section 24(1). It would be unlawful for a local planning authority preparing, or a Planning Inspector examining, development plan documents to have regard to the proposal to abolish regional strategies. For so long as the regional strategies continue to exist, any development plan documents must be in general conformity with the relevant regional strategy.

25. For these reasons, I do not accept the Appellant's submission that the Government's proposal to abolish the regional strategies is incapable, as a matter of law, of being a material consideration for the purposes of sections 70(2) of the 1990 Act and 38(6) of the 2004 Act. The prospect of a change in planning policy is capable of being a material consideration, and taking account of this particular prospective change would not be contrary to the Padfield principle because the policy and objects of the legislative scheme construed as a whole require those responsible for determining planning applications and appeals to look beyond the development plan, and to have regard to other material considerations. Contrary to Mr. Village's submission, Lindblom J did deal with this issue – what are the policy and objects of the legislation? – in paragraph 47 of his judgment. The Respondent's avowed purpose in promoting clause 89 of the Localism Bill is to abolish regional strategies, but the answer to the two-part question posed by Laws LJ in Halls is that:

> (a) the purpose of the Chief Planning Officer's letter dated 10th November 2010 was to draw local planning authorities' attention to the proposed abolition as, potentially, a material consideration; and
>
> (b) that purpose was calculated to promote the policy and objects of the legislation, that local planning authorities should have regard not merely to the development plan, but also to other material considerations.

26. If the Chief Planning Officer's letter had advised local planning authorities to ignore the policies in the regional strategies, or to treat them as no longer forming part of the development plan, or to determine planning applications otherwise than in accordance with them because the Government proposed to abolish them, or if it had told decision-makers what weight they should give to the Government's proposal, then such advice would have been unlawful. Laker Airways Ltd. v Department of Trade [1977] 1 QB 643, is an example of policy guidance which was unlawful because it was contrary to the statutory objectives laid down for the Civil Aviation Authority by section 3 of the Civil Aviation Act 1971: see per Lord Denning at p. 704 A-F. As Lindblom J explained in paragraphs 58-62 of his judgment, it is necessary to look at what the Chief Planner's letter actually said. It expressly stated that the effect of the decision of Sales J was "to re-establish regional strategies as part of the development plan", and said that decision-makers should have regard to the proposed abolition of regional strategies as a material consideration in planning decisions. No doubt the letter could have said more, but it must be remembered that the letter was addressed to the Chief Planner's fellow professionals: the Planning Inspectorate and the Chief Planning Officers of the Local Planning Authorities in England. The Chief Planner did not need to remind those to whom he sent the letter that re-establishing regional strategies as part of the development plan meant that planning applications had to be

determined in accordance with the regional strategies unless material considerations indicated otherwise.

27. The advice that decision-makers "should still have regard to the letter of 27th May 2010 in any decisions they are currently making" might well have been misleading if it had been addressed to a less expert audience. Mr. Mould accepted that in the great majority of cases, the letter dated 27th May 2010 will be of no relevance whatsoever because regional policy will not be in issue at all, or will at best be of marginal significance. The Planning Inspectors and Chief Planning Officers who received the letter would have been well aware of this, and would have sensibly interpreted the letter as referring only to those decisions in which, in their judgment, regional policy was a significant issue. The letter says nothing about the weight to be given to the proposed abolition of regional strategies. Given the very early stage that the proposal has reached in the legislative process, and the fact that revocation of any individual regional strategy will be subject to the SEA process, many Planning Inspectors and Chief Planning Officers may well consider that they should give little, if any, weight to the proposed abolition of regional strategies in the decisions that they are currently taking. That position will change if the proposal progresses, or fails to progress, through the legislative and environmental assessment process, but those responsible for taking planning decisions are familiar with the general proposition that the weight to be given to emerging policy is contingent on its progress towards finality: see para. 52 of the judgment of Lindblom J. In summary, the Chief Planner's letter dated 10th November 2010 might have been better and more fully expressed, but what it did say was not unlawful.

28. However, the written submissions of Stevenage Borough Council which was given leave to intervene have identified one respect in which the reference in the letter to "any decisions" was potentially confusing. Stevenage is preparing its development plan documents. Those documents include a Core Strategy which has been submitted for independent examination. The Planning Inspectors' report is awaited. There has been correspondence between Stevenage and the Planning Inspectorate as to the effect of the purported "abolition" of regional strategies in July 2010, and their "reinstatement" in November 2010 following the decision of Sales J. The detail of that correspondence is not relevant for present purposes, but the fact that there was an exchange of correspondence demonstrates the need to make it clear that the reference in the letter to "any decisions" is a reference to development control decisions; it is not a reference to decisions by local planning authorities and the Planning Inspectorate in the preparation and examination of development plan documents: see para. 24 (above).

29. I have referred to the terms of the Chief Planner's letter rather than the Respondent's Statement to Parliament on 10th November 2010. It is unnecessary to consider the Statement because it refers, and does not add anything of substance, to the Chief Planner's letter. More important, it would not be appropriate to examine the statement in any detail because to do so would run the risk of the Court overstepping the line between the mere receipt of evidence of the proceedings of Parliament and the "questioning" of those proceedings: see the discussion of the ambit of Parliamentary privilege in Office of Government Commerce v Information Commissioner [2008] EWHC 774 (Admin), per Stanley Burnton J (as he then was) at paragraphs 30-50. A

quashing order in respect of the Respondent's Statement to Parliament would have been out of the question.

30. Mr. Village submitted that if the proposed abolition of regional strategies was legally capable of being a material consideration, planning decision-makers would be free to give a regional strategy no weight at all, and thus to subvert the statutory scheme by effectively "sidelining" the development plan. In my judgment, that concern is overstated. Although the weight to be given to any particular material consideration is a matter for the decision-maker, the decision-maker must not "lapse into Wednesbury irrationality", see Tesco Stores Ltd. v Secretary of State for the Environment [1995] I WLR 759, per Lord Hoffmann at page 780 F-G; see also Lord Keith at page 764 H.

31. In most cases the constraint of Wednesbury rationality will be a very light rein because the Courts normally give a very wide latitude to planners' judgments as to the weight to be given to planning considerations. However, it is proposed that this particular change of policy will be effected by legislation, so the proposal is subject to two legal obstacles:

    (a) Parliamentary approval; and

    (b) the SEA process.

32. Although the point was not raised on behalf of the Appellant, I asked the parties for their submissions as to whether it might be irrational for any decision-maker to give any significant weight at this stage to the proposed abolition of regional strategies because to do so would require the decision-maker to prejudge:

    (a) Parliament's acceptance of the proposal; and

    (b) the outcome of the SEA process.

    It would be inappropriate for any decision-maker to consider in any detail what Parliament's response to the Government's proposal might be, because to do so might involve them in questioning the proceedings of Parliament: see the Office of Government Commerce case (para 29 above). Moreover, even if clause 89 is enacted in its present form, it could not lawfully be assumed that revocation of any individual regional strategy is bound to occur regardless of the outcome of the process of environmental assessment, because to make such an assumption would be contrary to the requirement of the SEA Directive and the SEA Regulations: that a decision to revoke may not be made until the process has been completed.

33. Mr. Village submitted that if the proposed abolition was a material consideration it would be irrational to give it any weight at this stage. However, Mr. Mould's submissions have persuaded me that where the issue is one of weight rather than materiality, "never say never" is the appropriate response to a submission that, as a matter of law, any decision-maker in any case would be bound to give no significant weight to a potentially material factor. Mr. Mould fairly acknowledged that even within the minority of cases in which the proposed abolition of regional strategies will be relevant, there may well be very few cases in which it would be appropriate at this stage of the Parliamentary and SEA process to give any significant weight to the

proposal. But the Chief Planner's letter is concerned with the whole of the period prior to the enactment of the Localism Bill (if it is enacted), and the position will change as it progresses, or fails to progress. Even now there might be finely balanced cases where the very slight prospect of a very substantial policy change might just tip the balance in favour of granting or refusing planning permission. Mr. Mould gave the hypothetical example of a large-scale residential proposal (which he referred to as a "new town", but the point would equally apply to a proposed extension of an existing settlement), which is proposed to be developed over the next 15-20 years, to which there are very strong site-specific objections, and where the sole justification for granting planning permission is the need to meet the requirement for residential development over the next 20 years in the regional strategy. In such a case it would not be irrational for the decision maker to give some weight to the prospect, however uncertain, that the regional policy justification for granting permission for such a long-term proposal may cease to exist within the short term. In such a case, to give even very little weight to the prospect of a change in policy might be to give that factor "significant" weight, significant in the sense that it might tip the balance in favour of refusing permission. This hypothetical example may well be an extreme case, but it does illustrate why it would not be safe for the Court to assume that at this stage there are no circumstances in which any decision-maker could rationally give some weight to the proposed abolition of regional strategies. In view of the uncertainty created by the legal obstacles referred to above (para. 31) any decision-maker who does think it appropriate to give some weight to the Government's proposal when determining an application or an appeal would be well-advised to give very clear and cogent reasons for reaching that conclusion, but that does not mean that there could be no case whatsoever in which any decision-maker might be able to give such reasons.

Conclusion

34. I would dismiss this appeal.

Rimer LJ:

35. I agree

Rix LJ:

36. I also agree