Planning Officers Society Enterprises – Minerals and Waste Learning Project

NOTES ON RECENT COURT CASES WITH A BEARING ON THE PREPARATION AND EXAMINATION OF DEVELOPMENT PLAN DOCUMENTS

Source and disclaimer: these notes have been prepared to help members of the Learning Project understand and focus on the core issues raised by the recent High Court and Court of Appeal judgments in the **Blyth Valley** and **Associated British Ports/Hants CC cases**. They are drawn from internal guidance prepared by the Planning Inspectorate for Development Plan Inspectors on the implications of these cases for their work. They do not themselves amount to an authoritative interpretation of the law by either the Planning Inspectorate (PINS) or POS Enterprises Ltd. **Local authorities should not rely on them in framing policies in development plan documents or in the handling of cases they are dealing with. Authorities should as necessary refer directly to the judgments in these cases, and continue to take their own legal advice related to their own circumstances when preparing their own plans and considering applications for development.**

Lester Hicks
MWLP Project Officer
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1) Persimmon Homes (North East) Limited, Barratt Homes Limited, Millhouse Developments Limited

V

Blyth Valley Borough Council

The case involved a 30% overall affordable housing target policy in the core strategy. The Council's case was built on:

1) The need for affordable housing demonstrated by up to date need survey by R Needham – need for 83% of housing to be affordable;
2) The view of Needham based on his extensive experience that 40% would be reasonable given that 83% obviously not viable;
3) A 30% figure applied in an adjoining district council area.

Blyth Valley submitted a statement saying that its Core Strategy (CS) was PPS 3 compliant, even though it was submitted before PPS3 published. The Inspector appears to have accepted this compliance statement at face value. The Inspector agreed with the Council's approach, taking into account that he had no evidence before him that a 30% figure was not viable, the presumption that the Council has submitted a sound document and the fact that the developers who favoured a 10% figure did not produce any viability evidence to support their case.

In the High Court Mr. Justice Collins quashed the policy. Quoting from the judgment *"The question that I have to decide is whether the material before me shows that the starting point, the 30 per cent, is one that is flawed, and flawed because no consideration in reaching it was given to the issue of economic viability."*

"…what is wrong in my view is to allow a policy to be established which may be unsupportable on a proper consideration of all material factors. It seems to me that on the material that I have placed before me, that is the situation in this case. The 30 per cent has been produced on the basis of material which is not supported by the guidance and which ignores a highly material factor, namely the economic viability of the relevant target"

The guidance referred to is the advice in paragraph 29 of PPS3 that the viability of any affordable housing target must be assessed. The Council had issued a statement saying its CS complied with PPS3 when clearly it did not. The practical implication for Inspectors and authorities appears to be that even without the guidance in PPS3 the question of whether an affordable housing target figure is realistic and justified should always addressed by authorities in preparing plan policies and considered by an examining Inspector. Without consideration of viability how do either the authority or an Inspector know whether or not the policy is deliverable?).

Mr. Justice Collins made several comments which essentially endorsed the Inspectorate's procedures including the use of round table sessions and the use of formal evidence if the inspector feels it necessary. He also suggested several possible courses of action for the inspector, including adjourning to receive evidence to enable a reliable figure to be obtained, or substituting a policy that simply refers to a highest reasonable figure rather than a specific percentage.

The High Court allowed leave to appeal to the Court of Appeal because the decision raised matters of wider importance – namely the presumption of soundness and what should be done if government policy guidance is issued after submission of a DPD for examination.

Blyth Valley challenged the High Court judgment in the Court of Appeal when their appeal was dismissed. On the narrow affordable housing point the Appeal

Court judges (Keene, Hughes and Lloyd) all endorsed the judgment of Mr. Justice Collins.

The Court of Appeal accepted that the question of viability was taken into account to a limited extent (for example by R Fordham in saying that 83% affordable housing would not be viable). But what had not been done, and should have been done, was to undertake a study that demonstrates that 30% was viable.

There are three particular points of practical interest for authorities:

(i) Affordable Housing Percentage Figure: Critical Importance of Viability Assessment

The Court of Appeal strongly endorsed Mr. Justice Collins' judgment that an affordable housing target figure has to be supported by a consideration of how viable the target is. In the words of Lord Justice Keene "….*an informed assessment of viability of any such percentage figure is a central feature of the PPS 3 policy on affordable housing. It is not peripheral, optional or cosmetic. It is patently a crucial requirement of the policy*". The viability assessment also needs to take into account the thresholds being considered.

Clearly an assessment of viability could be based on the successful application of the relevant percentage figure in the recent past. However, authorities should take care to note that the definition of affordable housing has been changed in PPS3 to exclude low cost market housing. So, if the viability assessment that is being relied on is based on the past application of an affordable housing policy using the old definition, authorities will need to consider whether the changed definition alters that viability assessment. Again in the words of Lord Justice Keene the new definition "…*is narrower and more onerous for developers. No viability exercise carried out on the old basis could be considered to be valid for the purposes of assessing the viability of a particular proportion of affordable housing as defined now in PPS3…"*

<u>This raises the wider danger of trying to fit existing or previously drafted policies into guidance issued or revised later – key definitions and processes may be changed</u>.

(ii) The 'Presumption of Soundness'

The Court of Appeal also considered the question of the "presumption of soundness". The Court pointed out that the 2004 Planning and Compulsory Purchase Act at section 20(5) contains no presumption one way or the other. Similarly, the effect of section 20(2) (b), which provides the Council must not submit a document unless 'they think the document is ready for examination'

cannot be extended to imply a presumption of soundness. Noting that an Inspector may properly find a plan unsound even if there is no convincing evidence to that effect from an objector (because there must be a robust and credible evidence base irrespective of what anyone objecting says) the Court favours the latest neutral wording in PPS12. This states that "the starting point for the examination is the assumption that the local authority has submitted what it considers to be a sound plan". The Court sees this as neutral because it believes that it is obvious that the Council will think this (coupled with the requirements of s20(2)(b)) and such an assumption carries no "presumption" as understood in law. The practical implication is to remove the presumption of soundness as the starting point for the examination.

This reinforces the inquisitorial and challenging role of Inspectors. The judgment says in effect that they cannot assume that a policy is sound simply because no-one has challenged it and they should start from a neutral position rather than from the position that a Council has "got it right". A Council will only have got it right if it is supported by a robust and credible evidence base.

(iii) What should the Inspector do if guidance comes out after submission?

In the High Court various options were canvassed about the issue of how new guidance should be taken into account where it has a bearing on DPDs already submitted for examination. All present seemed to agree that much would depend on the circumstances (including for example what any letter from the Secretary of State accompanying the guidance says) and the nature of the guidance. Possible options, which none of the barristers present challenged, included finding the plan unsound, adjourning and asking the Council to amend to take the new guidance on board, or recommending a change that followed the guidance or drafting an interim policy to apply until the Council brought forward a single issue revision to the submitted DPD.

Conclusions

The critical lessons from **Blyth Valley** seem to be;

(i) that targets and policies in DPDs (not only affordable housing targets) must be supported by clear evidence. Any targets must be rigorously tested – what are they based on, can they be justified and have all material considerations been taken into account. This is in line with and fully reinforces strong messages from PINS for several years about policies being supported by evidence. Particular care is obviously needed where affordable housing targets are provided, but there is clearly a read-across in minerals and waste to the aggregates guidelines and sub-regional apportionments, and to any waste management allocations made in Regional Spatial Strategies;

(ii) as noted above, that new policy statements issued after DPDs have been drafted, but have not completed their examination and been adopted, can change key definitions or procedures followed in drafting those DPDs, risking non-compliance with national policy.

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2) Associated British Ports v Hampshire County Council and Others.

This case involved the issue of whether Dibden Bay should have been specifically referred to as the only possible location for a wharf for importing crushed rock. The Hampshire Minerals and Waste Core Strategy contained a general policy that essentially left the question to be resolved in a subsequent Hampshire Minerals Plan which would identify specific sites and locations.

The challenge by ABP succeeded. Quoting from the judgment in the High Court by Mr. Justice Keith: "*The difficulty with the approach adopted in the Core Strategy is that it did not take account of the need for the Core Strategy itself to set out the strategy for ensuring that the anticipated demand for crushed rock would be met. Since that was the place for tough strategic decisions to be made, it was not right for the critical question – whether the existing facilities were sufficient to cope with the anticipated demand- to be left to a subsequent review of these facilities. Without the core strategy addressing these questions, the Core Strategy left completely up in the air (a) whether a strategy was needed at all for increasing those facilities so that the infrastructure to enable sufficient quantities of crushed rock to be imported could be put in place, (b) if one was needed, whether that strategy should include the establishment of new wharves, (c) if so, how possible sites for those new wharfs should be identified and (d) how which of them should be selected so that in the meantime the broad locations of possible sites could be safeguarded from inappropriate development*"

This judgment reinforces the message from PINS (and already made by the POSe team) that the core strategy is the place where the tough decisions have to be made. This message is not necessarily a comfortable one, but authorities can expect a firm line and robust questioning on this at exploratory meetings and examinations.

POSe – Minerals and Waste Learning Group
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