Neutral Citation Number: [2011] EWHC 97 (Admin)

Case No: CO/12056/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2011

Before :
MR JUSTICE LINDBLOM
- - - - - - - - - - - - - - - - - - - -
Between :

Cala Homes (South) Limited	Claimant
- and -	
Secretary of State for Communities & Local Government	Defendant
Winchester City Council	Interested Party

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

Mr Peter Village Q.C., Mr James Strachan & Ms Sarah Hannett (instructed by **Macfarlanes LLP**) for the **Claimant**
Mr Timothy Mould Q.C. & Mr James Maurici (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 17 & 18 January 2011
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Judgment
As Approved by the Court

Mr Justice Lindblom:

Introduction

1. Before the court is a claim for judicial review of (i) a statement made by the Secretary of State for Communities and Local Government ("the Secretary of State") on 10 November 2010 and (ii) the letter, dated 10 November 2010, which the Government's Chief Planner ("the Chief Planner") sent to all local planning authorities, the effect of both being that, in determining applications for planning permission during the period before Regional Strategies are effectively revoked, local planning authorities and Inspectors and the Secretary of State himself should have regard to the Government's stated policy commitment to abolish the regional tier of development plan policy, and to seek the necessary legislative powers for that purpose, as a material consideration for the purposes of section 70(2) of the Town and Country Planning Act 1990 ("the 1990 Act").

2. The claimant, CALA Homes (South) Ltd. ("Cala Homes") contends, first, that the statement and letter of 10 November 2010, which, it is said, effectively incorporate a letter the Secretary of State sent to all local planning authorities on 27 May 2010, are unlawful and, for the purposes of planning decision-making, an immaterial consideration, being a transparent attempt to thwart the application of the law as it stands and the judgment of the court in a previous claim for judicial review, and to subvert the policy and objects of the existing planning legislation; secondly, that even if the statement and letter represent lawful and material planning policy the decision to articulate such policy was irrational; and thirdly, that the Secretary of State has failed to take the steps he ought to have taken to comply with the legislative requirements relating to Strategic Environmental Assessment.

3. The claimant seeks a declaration that it is unlawful for the makers of planning decisions to have regard to the Government's stated intention to enact primary legislation to abolish the Regional Strategies in England as a material consideration in making determinations under the Planning Acts; and an order to quash the Secretary of State's statement of 10 November 2010, the Chief Planner's letter of that date and also the letter of 27 May 2010.

4. The Secretary of State, with the support of the Interested Party, Winchester City Council ("the City Council"), opposes the claim. The City Council was not represented at the hearing, having told the court that it relies on the submissions made by the Secretary of State in resisting the claim.

5. The application for permission to apply for judicial review and the claim itself have been presented to the court together at an expedited "rolled-up" hearing.

The main issues in the claim

6. As I have indicated, there are three main issues in the claim, namely:
   (i) whether, in determining an application for planning permission during the period prior to the effective revocation of Regional Strategies, a planning

decision-maker is obliged to disregard the Government's stated intention to abolish the regional tier of development plan policy and to promote legislation for that purpose, as being incapable in law of constituting a material consideration within the meaning of section 70(2) of the 1990 Act ("Issue (i): unlawful and immaterial consideration");

(ii) whether the issuing of the Statement and the Letter was in any event irrational ("Issue (ii): irrationality"); and

(iii) whether the Secretary of State has failed to comply with requirements relating to the carrying out of Strategic Environmental Assessment ("Issue (iii): Strategic Environmental Assessment").

7. Though the Secretary of State has resisted the claim with full argument on each of those three main issues, it has also been contended on his behalf that the proceedings are an abuse of process and that permission ought, in any event, to be withheld on the grounds of delay.

The facts

The Secretary of State's letter of 27 May 2010

8. On 27 May 2010 the Secretary of State issued to all local planning authorities in England a letter in which he stated:

> "**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 consideration in any decision they are currently taking."

The Secretary of State's statement of 6 July 2010

9. On 6 July 2010 the Secretary of State made a statement in Parliament, in which he said:

> "**Parliamentary Statement**
> **Revoking Regional Strategies**
> Today I am making the first step to deliver our commitment in the coalition agreement to "*rapidly abolish Regional Spatial Strategies and return decision-making powers on housing and planning to local councils*", by revoking Regional Strategies.
> …
> The revocation of Regional Strategies will make local spatial plans, drawn up in conformity with national policy, the basis for local planning decisions. The new planning system will be clear, efficient and will put greater power in the hands of local people, rather than regional bodies.
> …

> The abolition of Regional Strategies will require legislation in the "Localism Bill" which we are introducing this session. However, given the clear coalition commitment, it is important to avoid a period of uncertainty over planning policy, until the legislation is enacted. So I am revoking Regional Strategies today in order to give clarity to builders, developers and planners.
>
> Regional Strategies are being revoked under s79(6) of the Local Democracy Economic Development and Construction Act 2009 ["the 2009 Act"] and will thus no longer form part of the development plan for the purposes of s38(6) of the Planning and Compulsory Purchase Act 2004.Revoking, and then abolishing, Regional Strategies will mean that the planning system is simpler, more efficient and easier for people to understand. …".

10. On the same day the Department for Communities and Local Government issued written advice for local planning authorities about the impact of this purported revocation of all Regional Strategies, in these terms:

> "**Guidance for Local Planning Authorities following the revocation of Regional Strategies**
> The Secretary of State for Communities and Local Government confirmed today that Regional Strategies will be revoked … . In the longer term the legal basis for Regional Strategies will be abolished through the "Localism Bill" that we are introducing in the current Parliamentary session. … This guidance provides some clarification on the impact of the revocation; how local planning authorities can continue to bring forward their Local Development Frameworks …; and make planning decisions in the transitional period. …
>
> **4. How will this affect planning applications?**
> In determining planning applications local planning authorities must continue to have regard to the development plan. This will now consist only of:
> - Adopted [development plan documents];
> - Saved policies; and
> - Any old style plans that have not lapsed.
>
> Local planning authorities should also have regard to other material considerations, including national policy. Evidence that informed the preparation of the revoked Regional Strategies may also be a material consideration, depending on the facts of the case.
>
> Where local planning authorities have not yet issued decisions on planning applications in the pipeline, they may wish to review those decisions in the light of the new freedoms following the revocation of Regional Strategies. The revocation of the Regional Strategy may also be a material consideration. …".

Cala Homes' proposed development

11. Cala Homes is seeking planning permission for a large residential development on land at Barton Farm, near Winchester. The site extends to 87 hectares. It lies in the part of the City Council's area which is not dealt with by the Partnership for Urban South Hampshire ("PUSH"). The scheme finds support in the strategy for the planning of the relevant part of the South-East region in the South-East Plan published in May 2009. The South-East Plan includes policies providing for an expansion of housing provision in the region by a net addition of 654,000 dwellings in the period between 2006 and 2026. Of the total allocation for Hampshire 5,500 dwellings are expected to be accommodated in the non-PUSH part of the City Council's area. Cala Homes' site is identified in Policy MDA.2 of the Winchester District Local Plan Review, adopted by the City Council in July 2006, as a reserve site for a major development of approximately 2,000 dwellings and related infrastructure. Policy MDA.2 states that the development of the site "will only be permitted if the Local Planning Authority is satisfied that a compelling justification for additional housing in the Winchester district has been identified by the Strategic Planning Authorities …". Two identical proposals have been submitted by Cala Homes in the form of applications for permission for a development of 2,000 dwellings on the site. The first application has been put before the Secretary of State by an appeal for non-determination, which will be heard at a public inquiry beginning on 8 February 2011. The City Council is fighting that appeal. The sole contentious issue concerns housing need. The putative reason for refusal which raises this issue states that, "... having regard to its consistent position on the appropriate level of housing numbers for the non PUSH area of Winchester district and the advice that it is able to determine the application without the framework of regional numbers and plans, the Council is not satisfied that the local need for housing amounts to the compelling justification needed to justify the release of this reserve site". For the inquiry beginning on 8 February 2011 the basic agenda will therefore be to consider whether the development proposed is justified by the South-East region's requirement for additional housing, as presently set out in the Regional Strategy.

The first claim for judicial review

12. In August 2010 Cala Homes made an application for permission to apply for judicial review of the Secretary of State's statement of 6 July 2010, contending that the Secretary of State had no power to revoke Regional Strategies in advance of securing legislation in Parliament to amend or repeal the provision for Regional Strategies in Part 5 of the 2009 Act. That application came before Sales J. at a "rolled-up" hearing on 22 October 2010. Sales J. immediately granted permission and proceeded to hear the substantive application.

13. On 10 November 2010, in a handed-down judgment, Sales J. held that Cala Homes' challenge was well founded and that the action of the Secretary of State had been unlawful, for two reasons: first, because the Secretary of State's attempt to use his power under section 79(6) of the 2009 Act to revoke all Regional Strategies in force at that date involved the use of that power for an improper purpose, essentially because the power given by that provision had not been intended by Parliament to be used to effect the abrogation of the Regional Strategy tier of planning policy by executive action; and, secondly, because the Secretary of State's decision to revoke the Regional Strategy for the South-East had been taken without the necessary consideration of whether this change in the development plan was likely to have significant environmental effects,

and was thus in breach of the Strategic Environmental Assessment Directive and Regulations. In paragraph 15 of his judgment Sales J. said this:

> "… The Claimant's challenge is to the Secretary of State's decision of 6 July 2010 to revoke all Regional Strategies, including the South East Plan, rather than to the Secretary of State's letter of 27 May 2010. As explained by Mr Village Q.C. for the Claimant, this is on the basis that if the Secretary of State has no power to revoke Regional Strategies in advance of securing legislation in Parliament to amend or repeal the provision for Regional Strategies in Part 5 of [the 2009 Act], then it is difficult to see how the Secretary of State's letter could be given effect. No detailed argument was addressed to me about what might be the effect of the Secretary of State's letter if the Claimant is successful in its challenge to the decision of 6 July 2010. At all events, it is clear that it is the Secretary of State's decision of 6 July 2010 which is now the operative decision which purports to deprive the South East Plan of significance for the planning decision to be taken on the Claimant's applications and accordingly it is that decision which the Claimant seeks to challenge. …"

In paragraph 49 Sales J. described the issue in the case before him in this way:

> "The issue in the present case is whether the Secretary of State is entitled to use the discretionary power to revoke Regional Strategies contained in section 79(6) of the LDECDA 2009 to effect the practical abrogation of Regional Strategies as a complete tier of planning policy guidance by his decision of 6 July 2010. At the heart of that issue is a tension between section 70(1) of the 2009 Act, which states that "There is to be a regional strategy for each region …", and section 79(6), which provides that the Secretary of State can revoke a Regional Strategy, the statute contemplates that, notwithstanding the terms of section 70(1), there may be occasions on which there is in fact no Regional Strategy in place for a particular region."

The Secretary of State's argument, as summarized by Sales J. in paragraph 50 of his judgment, was this:

> "… [S]ince the Secretary of State has power under section 79(6) to revoke any Regional Strategy, he has power to revoke all Regional Strategies; since he has power to do that, it is said, he has power under section 79(6) to revoke the entire Regional Strategy tier of planning policy guidance if he considers (as he does) that it is not operating in the public interest; the system of Regional Strategy planning guidance may therefore be brought to an end by exercise by the Secretary of State of his powers under section 79(6) without having to wait for the promulgation by Parliament of new legislation to repeal Part 5 of the 2009 Act."

Cala Homes' argument in summary, as recorded by Sales J. in paragraph 51 was that

> "… the exercise by the Secretary of State of his power under section 79(6) for this purpose frustrates the policy of the 2009 Act that, at least in the usual case, there should be a Regional Strategy in place for each

region as a tier of regional planning policy guidance to which regard should be had by planning authorities in operating the planning system."

Sales J. accepted that argument. In paragraph 52 of his judgment he said:

"In my judgment, the Claimant's submission is well-founded. My reasons for arriving at this conclusion are as follows:

i) [The 2009 Act] maintains in place, with some modifications, the whole elaborate machinery set up by Parliament under the PCPA 2004 to create a new statutory tier of regional planning guidance in the form of Regional Spatial Strategies, now renamed as Regional Strategies. … [The] 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 nought 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 denude primary legislation of any practical effect, without having to seek the approval of Parliament for such a course by passing further legislation – it would in my opinion undoubtedly have used much clearer language to achieve that effect and would have given the provision far greater prominence than section 79(6) has, tucked away as a final sub-section in a provision otherwise dealing with revision of Regional Strategies. …

ii) Section 70(1) of the 2009 Act is in clear declaratory terms, stating that "There is to be a regional strategy for each region …". It is difficult to think of a clearer declaration of the statutory purpose of Part 5 of the LDEDCA 2009, that there should indeed be such a Regional Strategy for each region. In my view, section 70(1) can only be given proper effect if the remainder of Part 5 of the 2009 Act is interpreted as creating the machinery designed to promote that statutory purpose. The only significant point of tension on this view of Part 5 is with section 79(6), which allows for a Regional Strategy to be revoked and hence contemplates that for a period there may in the case of some region (perhaps even in the case of all regions) be no Regional Strategy in place. In my judgment, reading section 79(6) in the context of the Part of the 2009 Act in which it appears (introduced, as it is, by section 70(1)), that tension is to be resolved by interpreting section 79(6) as creating a power of revocation (e.g. to take account of unforeseen circumstances which come to light and call in question the desirability of maintaining a particular Regional Strategy in place at a given time), but only with a view to setting in motion the procedures set out in the Act for putting in place a new Regional Strategy as soon as that is administratively practicable, so that the statutory purpose declared in section 70(1) is promoted and given effect once again. On this view section 79(6) does not create a

power for the Secretary of State to decide (as he has done here) that, in principle, all Regional Strategies should be dispensed with. Parliament has itself declared the relevant governing principle in section 70(1) (namely that each region should have a regional strategy) and has given no clear or sufficient indication that that principle may be set aside by virtue of a contrary policy judgment on that question of general principle being made by the executive; …

v) The provisions in Part 5 of the 2009 Act requiring Regional Strategies to be published, making provision for the public to have opportunities to make representations regarding their drafting (including, where appropriate, at examinations in public) and for community involvement in the preparation of such planning policy guidance (see section 75) are all strong indications as to the importance which Regional Strategies are intended to have in the operation of the planning system and for the guidance of the public. These are important means of ensuring public participation in the creation of planning policy and transparency in relation to such policy, and it is not plausible to suppose that Parliament intended that they should be capable of being simply by-passed by action taken by the Secretary of State under section 79(6), which carries with it no procedural protections or requirements at all;

vi) The centrality which Parliament intended Regional Strategies to have in the planning system is underlined by the strong practical effect to be given to them as set out in section [38](3) and (6) of the PCPA 2004 … , when applications for planning permission fall to be determined. Again I do not consider that it is plausible to suppose that Parliament can have intended that the Secretary of State's power in section 79(6) should extend to abrogating the whole system to have in place and give effect to such a primary instrument of planning policy;

vii) This last point is reinforced by the fact that a considerable number of provisions in Part 5 of the 2009 Act … pre-suppose that there is to be a Regional Strategy in place … The provisions … feed from and reinforce the significance of the declaration of the statutory purpose of Part 5 of the 2009 Act set out in section 70(1)".

The first ground of Cala Homes' claim was thus made good.

14. Because the first ground had succeeded the second, which related to the absence of a Strategic Environmental Assessment, did not fall to be decided (see paragraph 54 of Sales J.'s judgment). However, that ground having been fully argued, Sales J. considered it, reaching the conclusion (in paragraph 67 of his judgment) that it too was well-founded. In paragraphs 62 and 63 of his judgment he stated:

"62. All the existing Regional Strategies were made the subject of environmental assessment before they were adopted, no doubt because of

> the practical impact that they would inevitably have by setting part of the framework for decision-making in planning cases. I can see no sound basis for the contention put forward by the Secretary of State that revocation of Regional Strategies does not equally require at least consideration under Regulation 9 whether similar detailed environmental assessment is required. The revocation of a Regional Strategy may have as profound practical implications for planning decisions as its adoption in the first place. Thus the purposive approach to the interpretation of the 2004 Regulations referred to above supports the same conclusion.
>
> 63. I would add that I also consider that there is force in the alternative analyses proposed by [Cala Homes], to the effect that a Regional Strategy is itself a relevant "plan" for the purposes of the 2004 Regulations, and that revocation of that "plan" either amounts to modification of such "plan" (applying a purposive interpretation of the Regulations, since it is difficult in the context of the object of the SEA Directive and Regulations to see why significant but lesser changes to a Regional Strategy should require there to be an environmental assessment, but that if the change takes the extreme form of revocation of the Regional Strategy that requirement should suddenly fall away) or to the adoption of a new relevant "plan", namely the local development plan documents standing alone, to be read without reference to the Regional Strategy." "

15. No appeal was made against the decision of Sales J.

The statement and letter of 10 November 2010

16. Judgment having been handed down by Sales J., the Secretary of State immediately issued the statement, and the Chief Planner sent the letter, which are the subject-matter of the present proceedings.

17. The Secretary of State's statement of 10 November 2010 says:

> "On 6 July 2010, the Coalition Government revoked all regional strategies under section 79(6) of [the 2009 Act]. This action was challenged in the High Court by developer Cala Homes, and the decision today concluded that Section 79 powers could not be used to revoke all Regional Strategies in their entirety.
>
> While respecting the court's decision this ruling changes very little. Later this month, the Coalition Government will be introducing the Localism Bill to Parliament, which will sweep away the last Government's controversial regional strategies. It is clear that top-down targets do not build homes – they have just led to the lowest peacetime house building rates since 1924, and have fuelled resentment in the planning process that has slowed everything down.
>
> On 27 May 2010, the Government wrote to local planning authorities and to the Planning Inspectorate informing them of the Coalition Government's intention to rapidly abolish regional strategies and setting

out its expectation that the letter should be taken into account as a material planning consideration in any decisions they were currently taking. That advice still stands.

Today the Government's Chief Planner has written to all local planning authorities and the Planning Inspectorate confirming that they should have regard to this material consideration in any decisions they are currently taking.

Moreover, to illustrate the clear policy direction of the Coalition Government, the proposed clause of the Localism Bill that will enact our commitment to abolish regional strategies is being placed in the Library. The Bill is expected to begin its passage through Parliament before Christmas.

We are determined to return decision-making powers in housing and planning to local authorities and the communities they serve, alongside powerful incentives so that people see the benefits of building. We will very shortly provide more details about one of the most important such incentives – the New Homes Bonus Scheme, which will come into effect from April. This means that new homes delivered now will be rewarded under the scheme.

The Coalition Government remains firmly resolved to scrap the last Government's imposition of confusing and bureaucratic red tape. This was a clear commitment made in the Coalition Agreement and in the general election manifestoes of both Coalition parties. We intend to deliver on it."

It was in those terms that the Secretary of State informed Parliament of the court's decision and its impact on the Government's policy.

18. The Chief Planner's letter of 10 November 2010 states:

"**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 2009 Act] 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 27 May 2010 in any decisions they are currently taking.
…".

Appended to the Chief Planner's letter was proposed clause 1 of the Localism Bill, which provides:

"**1. Abolition of regional strategies**

(1) Part 5 of [the 2009 Act] (regional strategy) is repealed.

(2) The regional strategies under Part 5 of [the 2009 Act] are revoked."

The present claim for judicial review

19. On 12 November 2010, a pre-action protocol letter was sent to the Secretary of State on behalf of Cala Homes contending that the Secretary of State's letter of 10 November 2010 was unlawful. Responding to that letter, in a letter from the Treasury Solicitor to Cala Homes' solicitors dated 15 November 2010, the Secretary of State expressed the view that the intended proceedings were unmeritorious, and rejected the idea that the original proceedings could properly be used as a means of bringing this further challenge. The new proceedings, it was said, would be an attack on the Secretary of State's letter of 27 May 2010, and were thus both late and an abuse of process because the opportunity to launch such a challenge could and should have been taken in the original claim. Cala Homes accepted neither of those contentions. The claim was issued and served on 19 November 2010. On 25 November 2010 I made an order for interim relief, directing expedition and a rolled-up hearing of the application for permission and, if permission is granted, the substantive claim, and granting a stay of the effect of the Secretary of State's statement and the Chief Planner's letter of 10 November 2010. On 7 December 2010, after a hearing on 3 December 2010 at which the Secretary of State undertook to publish on his web-site a further statement referring to the present claim for judicial review, I set aside the stay and made further directions. I gave my reasons for making that order in a judgment handed down on 16 December 2010.

The evidence of Mr Morris and Mr Ginbey

20. In the first proceedings Mr David Morris, the Deputy Director in the Planning Directorate of the Department for Communities and Local Government with responsibility for development plans, provided evidence on behalf of the Secretary of State. In paragraphs 10 and 11 of his witness statement dated 21 October 2010, under the heading "Uncertainty arising from the reinstatement of Regional Strategies", he said this:

"10. The Secretary of State's letter of 27 May 2010 generated significant correspondence highlighting uncertainty about how to operate where Regional Strategies had not yet been revoked but it was clear that they would be abolished by legislation in the near future. Frequently expressed were:

- inconsistency in decision making by local planning authorities on individual planning applications resulting in planning by appeal;
- PINs having to deal with a greater volume of appeals as a result;
- The Secretary of State having to deal with more recovered and called in appeal cases;
- increase in legal challenges; and
- a slow down in the preparation of local plans as local planning authorities wait for the abolition of Regional Strategies before proceeding with their Core Strategies and other Development [Plans].

11. It is likely that the reinstatement of Regional Strategies before they are abolished by the Localism Bill would raise similar questions and concerns. In particular it would lead to slowing down plan making with knock on effects on delivery of sustainable development. It would also create significant confusion and delay in the development management process. This confusion and delay will harm the credibility of the planning system and is exactly what the Secretary of State was seeking to avoid by making a clean break with Regional Strategies by revoking them on 6 July 2010."

21. Mr Ian Ginbey, the solicitor acting for Cala Homes, in witness statements dated 22 November 2010 and 14 January 2011, demonstrates the contrasting approaches of four local planning authorities to the advice contained in the Secretary of State's letter of 27 May 2010. He shows, by way of example, the difference of approach between that of Crawley Borough Council, which appears to have regarded the letter of 27 May 2010 as carrying only "slight, if not inconsequential" weight because it was merely a statement of intent and had relied upon a legislative process "not expected to conclude until March 2012 at the earliest" and that of Leeds City Council, North Tyneside Council and the City Council, which in its evidence for the forthcoming public inquiry into Cala Homes' appeal, suggests that "little weight should be given to the South East Plan given its proposed abolition".

22. In his witness statement in the present proceedings, dated 10 December 2010, Mr Morris describes the Secretary of State's purpose in making his statement on 10 November 2010 and causing the Chief Planner's letter to be sent to all local planning authorities. Mr Morris states:

"…

4. On 10 November 2010 the Court gave judgment … quashing the [Secretary of State's] decision on 6 July 2010 to revoke Regional Strategies.
5. The [Secretary of State] took the view that he should write immediately to local planning authorities in England in relation to the effect of the Court's decision and its impact on taking forward the Coalition Government's stated policy of abolishing Regional Strategies and returning decision-making powers on housing and planning to local councils. Accordingly, following the handing down of the Court's judgment, on 10 November 2010 the [Secretary of State's] Chief Planner wrote the letter to Chief Planning Officers of local planning authorities in England …

6. Since 10 November 2010 the [Secretary of State] has received a low level of correspondence seeking clarification of the current position as regards the operation of Regional Strategies. …
7. … Following the handing down of the Court's judgment on 10 November 2010, the [Secretary of State] thought it right to notify Parliament of the Court's decision and of its impact on taking forward the Coalition Government's stated policy… . Accordingly, on 10 November 2010 the [Secretary of State] made a written statement in Parliament ….
8. In his written statement, the [Secretary of State] said that the Court's ruling in the judgment handed down on 10 November 2010 'changes very little'. As is clear from the [Secretary of State's] statement, he was seeking to reassure the House that the Government remained committed to its stated policy of abolishing Regional Strategies and seeking legislative powers for that purpose. He informed the House that, in order to illustrate the Government's clear policy direction, he was placing the relevant, proposed clause of the forthcoming Localism Bill in the House Library. I exhibit as 'DM4' a copy of the proposed clause which was placed in the House Library on 10 November 2010. …".

Mr Morris goes on (in paragraph 9 of his witness statement) to reject the assertion made in the present claim that both the Secretary of State's statement and the Chief Planner's letter of 10 November 2010 "represent a transparent attempt to thwart the application of the law as it exists, and the judgment of Sales J.":

> "… That assertion is incorrect. Both the Chief Planner's letter and the [Secretary of State's] statement respect and acknowledge the effect of the Court's judgment. The [Secretary of State] has not sought to appeal from the decision of Sales J. Rather, the [Secretary of State] in his statement and the Chief Planner in his letter informed both Parliament, local planning authorities and the Planning Inspectorate that the [Secretary of State's] guidance given in his letter of 27 May 2010 still stands; and that the Government's intended revocation of Regional Strategies through legislative powers to be sought in the forthcoming Localism Bill was material to planning decisions which local planning authorities and planning inspector[s] are currently taking. The Defendant is advised and believes that guidance to be lawful and respectfully invites the Court so to conclude in its determination of the present Claim."

The Localism Bill

23. On 13 December 2010 the Secretary of State introduced the Government's Localism Bill to Parliament. At this stage it is not clear when the Bill will become law or precisely what form it will take when it does. In its current form, however, it proposes the abolition of Regional Strategies "upon commencement".

The relevant law

The legislative scheme for the planning decision-making

24. When determining an application for planning permission, a local planning authority is required to have regard to two kinds of consideration, namely the development plan so far as is relevant, and other considerations that are "material" (section 70(2) of the Town and Country Planning Act 1990). This duty applies also, in the case of a call-in or an appeal, to the Secretary of State or his inspector as the maker of the decision (sections 77 and 78 of the 1990 Act).

25. Section 38(3) of the Planning and Compulsory Purchase Act 2004, as amended by the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act"), provides that for the purposes of any area other than Greater London the development plan is "the regional strategy for the region in which the area is situated" and "the development plan documents (taken as a whole) which have been adopted or approved in relation to that area".

26. Part 5 of the 2009 Act contains provisions relating to the adoption of Regional Strategies. The statutory scheme for the adoption of "development plan documents" is provided in Part 2 of the 2004 Act. In some areas, by virtue of transitional provisions in the 2004 Act, old-style plans adopted under the now repealed provisions of Part II of the 1990 Act survive as part of the development plan.

Section 38(6) of the Planning and Compulsory Purchase Act

27. In England (as elsewhere in the United Kingdom) the planning system is still "plan-led". In statutory – as opposed to policy – terms, the priority to be given to the development plan in development control decision-making is encapsulated in section 38(6) of the 2004 Act, which provides:

> "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."

28. Section 38(6) must be read together with section 70(2) of the 1990 Act. The effect of those two provisions is that the determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. The provision then equivalent to section 38(6) in the Scottish legislation (section 18A of the Town and Country Planning (Scotland) Act 1972, the counterpart of section 54A of the 1990 Act) was examined and explained by the House of Lords in *City of Edinburgh Council v. The Secretary of State for Scotland* [1997] 1 W.L.R. 1447. In his speech in that case Lord Hope said this (at pp.1449H-1450G):

> "Section 18A of the Act of 1972 … creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972 [the provision in the Scottish legislation equivalent to section 70(2) of the 1990 Act]. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour of development. … It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.
>
> 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

18A, 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.

The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is to review the decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which he was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control."

In his speech Lord Clyde said (at pp.1457H-1459G):

" Section 18A was introduced into the Act of 1972 by section 58 of the Planning and Compensation Act 1991. A corresponding provision was introduced into the English legislation by section 26 of the Act of 1991, in the form of a new section 54A to the Town and Country Planning Act 1990. The provisions of section 18A, and of the equivalent section 54A of the English Act, were:

> " *Status of development plans*. Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

Section 18A has introduced a priority to be given to the development plan in the determination of planning matters. It applies where regard has to be had to the development plan. …

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are

relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provision of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission. … By virtue of section 18A 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 then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. …

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the

> application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

From this analysis it is clear that although section 38(6) requires a local planning authority to recognize the priority to be given to the development plan, it leaves the assessment of the facts and the weighing of all material considerations with the decision-maker. It is for the decision-maker to assess the relative weight to be given to all material considerations, including the policies of the development plan (see per Lord Clyde at pp. 1458C-1459A, and per Lord Hope at p.1450B-H).

The distinction between materiality and weight

29. The law has always distinguished between materiality and weight. The distinction is clear and essential. Materiality is a question of law for the court; weight is for the decision-maker in the exercise of its planning judgment. Thus, as Lord Hoffmann stated in a well known passage of his speech in *Tesco Stores Limited v. Secretary of State for the Environment* [1995] 1 WLR 759 (at p.657G-H):

> "This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

So long as it does not lapse into perversity, a local planning authority is entitled to give a material consideration whatever weight it considers to be appropriate. Under the heading "*Little weight or no weight?*" Lord Hoffmann observed (at p.661B-C):

> "… If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in *Safeway Properties Ltd v Secretary of State for the Environment* [1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it."

30. Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it.

Material considerations

31. What is capable of being a material consideration for the purposes of a planning decision? This question has on several occasions been considered by the courts. The concept of materiality is wide. In principle, it encompasses any consideration bearing on the use or development of land. Whether a particular consideration is material in a particular case will depend on the circumstances (see the judgment of Cooke J. in

Stringer v Minister of Housing and Local Government [1970] 1 W.L.R.1280 (at p.1294G)). In the context of development plan-making and development control decision-taking, the test of materiality formulated by Lord Scarman in his speech in *Westminster City Council v Great Portland Estates Plc* [1985] AC 661 (at p. 669H to p. 670C-E) is whether the consideration in question "serves a planning purpose", which is one that "relates to the character and use of land".

32. Three further propositions are relevant in the present case. First, a statement of national planning policy, however made, is capable of being a material consideration in the determination of a planning application. This was recognized by Lord Hope in the passage of his speech in *City of Edinburgh* which I have set out above (see, for example, the decision of Carnwath J., as he then was, in *R. v. Bolton Metropolitan Council, ex parte Kirkman* [1998] Env. L.R. 560 (at p.567)). Secondly, the provisions of a draft development plan document progressing through its statutory process towards adoption, even while objections to them remain unresolved, can be material considerations in a planning decision. There is abundant authority to this effect (see paragraph P70.09 of the Encyclopedia of Planning Law and Practice). Thirdly, emerging national policy, for example in the form of a draft circular or Planning Policy Statement, can also be a material consideration (see *ex parte Kirkman*, ibid.).

Strategic Environmental Assessment

33. As its full title makes plain, Directive 2001/42/EC ("the SEA Directive") is concerned only with the effects on the environment of "plans and programmes" which fall within its scope and thus require assessment; it relates only to "certain plans and programmes".

34. Article 2(a) of the SEA Directive defines "plans and programmes". Policies as such are not included in the definition. Article 2(a) provides:

> "(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them;
>
> - which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
> - which are required by legislative, regulatory or administrative provisions;"

35. The SEA Directive has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633) ("the SEA Regulations"). No issue arises in these proceedings as to the lawfulness of this transposition.

36. Regulation 2(1) of the SEA Regulations defines "plans and programmes" as meaning:

> "plans and programmes, … , as well as any modification to them, which –
>
> (a) are subject to preparation or adoption by an authority at national, regional or local level; or

(b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,

(c) are required by legislative, regulatory or administrative provisions

..."

37. Regulation 5(1) provides that assessment is required for plans and programmes described in regulation 5(2) and (3), which provide:

"(2) The description is a plan or programme which –

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

(3) The description is a plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive."

38. Regulation 5(4) and (6) provide:

"(4) Subject to paragraph (5) and regulation 7, where –

(a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

(b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects,

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

…

(6) An environmental assessment need not be carried out –

(a) for a plan or programme of the description set out in paragraph (2) or which determines the use of a small area at local level; or

(b) for a minor modification to a plan or programme of the description set out in either of those paragraphs,

Unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant effects or is the subject of a direction under regulation 10(3)."

39. Regulation 9 provides:

"(1) The responsible authority shall determine whether or not a plan, programme or modification of a description referred to in –

(a) paragraph 4(a) and (b) of regulation 5;

(b) paragraph 6(a) of that regulation; or

(c) paragraph 6(b) of that regulation,

is likely to have significant environmental effects.

(2) Before making a determination under paragraph (1) the responsible authority shall –

(a) take into account the criteria specified in Schedule 1 to these Regulations; and

(b) consult the consultation bodies.

(3) Where the responsible authority determines that the plan, programme or modification is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare statement of its reasons for the determination."

40. In the recent decision of the European Court of Justice in two joined cases, *Terre wallone ASBL (C-105/09) and Inter-Environnement Wallonie ASBL (C-110/09) v Region wallone* the European Court of Justice received from the Belgian Conseil d'Etat a reference for a preliminary ruling on the question whether the action programmes referred to in Article 5 of the Nitrates Directive (Directive 91/676/EEC) concerning the protection of waters against pollution caused by nitrates from agricultural sources required environmental assessment under the Strategic Environmental Assessment Directive (Directive 2001/42/EC). In her Opinion in those cases Advocate General Kokott stated:

"c) The systemic context of the terms 'plan' and 'programme' within the SEA Directive …

36. The rules laid down in the SEA Directive confirm [the foregoing] interpretation of the terms 'plan' and 'programme.'

37. According to Article 2(a) of the SEA Directive, 'plans and programmes' for the purposes of the directive means plans and programmes, including those co-financed by the European Community, as well as any modifications to them, which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions.

38. In that provision the pair of terms is not defined, but merely qualified: for the purposes of the directive 'plans and programmes' means plans or programmes which satisfy certain – additional – requirements.

39. However, the first of those requirements at least makes it clear that the legislative procedure by which the Region of Wallonia's order was adopted does not preclude the application of the SEA Directive, since the first indent explicitly provides for the possibility of plans and programmes being prepared through a legislative procedure. This, moreover, supports the view that measures which, in substance, are of a legislative nature may also be plans or programmes.

> 40. In this context Inter-Environnement Wallonie rightly emphasises a difference from the EIA Directive: Article 1(5) of the EIA Directive explicitly excludes legislative measures form its scope. … The SEA Directive does not provide for that exception, although it is far more likely to affect legislative proposals than the EIA Directive.
>
> 41. The second requirement allays Belgium's fear that every possible law should be the subject of an environmental assessment. A comprehensive obligation to assess the environmental impact of laws is precluded if only because the second indent of Article 2(a) of the SEA Directive extends only to plans and programmes which are *required* by legislative, regulatory or administrative provisions. Freely taken political decisions on legislative proposals are not therefore subject to the obligation to carry out assessments."

It is clear from the court's judgment, given on 17 June 2010, that it accepted as correct the view expressed by the Advocate General in that passage of her Opinion. In paragraphs 35 of its judgment the court stated:

> "The Court finds first of all that action programmes are (i) subject to preparation by an authority at national, regional or local level or prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and (ii) required by legislative, regulatory or administrative provisions."

As the court noted, in paragraph 36 of its judgment,

> "… Directive 91/676 requires such action programmes to be established for all 'vulnerable zones' designated by Member States in pursuance of its provisions and that those programmes must include measures and actions of the type listed in Article 5, which are designed to combat nitrate pollution and which Member States are required to implement and monitor. The competent authorities must also periodically review whether measures and actions are appropriate and, where necessary, revise action programmes."

Issue (i): unlawful and immaterial consideration

Submissions

41. For Cala Homes Mr Peter Village QC submitted that the Secretary of State was now engaging in a transparently unlawful attempt to subvert the application of the statutory framework for the taking of planning decisions, and to thwart the effect of the judgment of Sales J. in the first proceedings, by asking decision-makers to take into account, when acting under the extant legislation, the Government's proposal to seek changes to that legislation in the future. The Secretary of State was now, in effect, inviting local planning authorities to speculate that the law would change with the consequence that Regional Strategies were removed. Relying on the decision of the

House of Lords in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, as well as other decisions in which the same principles were applied, including that of the Court of Appeal in *R. v. Braintree District Council, ex parte Halls* (2000) 32 H.L.R. 770, Mr Village submitted that the powers within a statutory scheme must be interpreted and applied so as to further the policy and purposes of the enabling legislation itself. This was axiomatic. From this general proposition it followed, said Mr Village, that the power to determine planning applications or appeals otherwise than in accordance with the development plan where material considerations indicate otherwise could not be interpreted as permitting the decision-maker to take into account a consideration directly contrary to the purpose and objects of the Act itself, or an aspiration to change the law itself in the future. As Sales J. had discerned in the first proceedings, Parliament had given to Regional Strategies a central role and importance in the planning system in England. Therefore, Mr Village argued, as a matter of law, the Government's ambition to achieve the removal of those strategies could not be a material, or lawful, consideration in a planning decision. Promoting an aspiration at odds with the policy and objects of the existing legislation was an abuse of the statutory discretion to weigh "other material considerations" against the relevant provisions of the development plan, including the relevant Regional Strategy. Mr Village said this was a clear example of *Padfield* unlawfulness. The Secretary of State could not do what he had done without setting at naught the existing statutory framework for development plans. To suppose that the content of the Secretary of State's statement and the Chief Planner's letter represented lawful planning policy was wrong. Under what power the Secretary of State claimed to have made such policy was unclear. It could not have been under the existing legislation, for to have done this would have been in obvious conflict with the policy and objectives of that legislation. Nor could it have been made under prerogative powers; this too would have been unlawful for the same reasons (see *R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 A.C. 513). That the executive desired a change in the law did not affect the application of that law until the change had been sanctioned by Parliament (see *Laker Airways v. Department of Trade* [1977] Q.B. 643, per Lord Denning M.R., at p. 704). Mr Village submitted, therefore, that decision-makers must ignore in its entirety the progress of Localism Bill until it finally passes into law, because until then decisions influenced by the provisions of the Bill will thus have been tainted by a consideration inimical to the purposes of the present legislation.

42. For the Secretary of State Mr Timothy Mould QC submitted, first, that the Government's stated policy commitment to abolish the regional tier of development plan policy and to seek the necessary legislative powers to effect that commitment relates to the use and development of land, serves a planning purpose and thus satisfies the test of materiality identified in the relevant authorities. The policy commitment holds in prospect the removal of the regional component of the development plan. This is no different in principle from emerging development policy, which proposes changes to existing policy. When making development control decisions local planning authorities may have regard to emerging policy, even though it may not ultimately be adopted at all or adopted in the same form as the draft extant at the time of the authority's decision. Secondly, Mr Mould submitted, the fact that the Government must secure statutory powers in order to achieve the removal of the regional tier of policy does not render immaterial its commitment to that objective. This fact goes to weight, not to materiality. The weight may vary, for example, according to the frame

of time in which a particular need referred to in regional policy – such as the need for a given amount of new housing in the relevant part of the region – is expected to be met. Thirdly, to acknowledge as material the Government's intention to abolish the regional tier of planning, far from undermining the plan-led system of development control, is consistent with it. Fourthly, the present case is clearly to be distinguished form the proceedings before Sales J. In the present case the Secretary of State's position is predicated on the continuing currency of a Regional Strategy as an element of the development plan. A consideration is not immaterial because it is capable of justifying a decision otherwise than in accordance with the plan. Fifthly, the assertion made on behalf of Cala Homes that the Government's stated commitment to the abolition of regional planning policy does not constitute national planning policy is incorrect. Clearly that is just what it is. But in any event it is a material consideration.

Discussion

The question to be considered

43. The essential question here is whether the Government's declared intention, or policy, to secure by means of an Act of Parliament the removal of the regional component of the development plan is incapable of being a material consideration for the purposes of a planning decision because that intention or policy "subverts" or "undermines" (as Mr Village put it) the policy and objects of the existing legislation.

44. This question did not arise in the first proceedings. The focus of Sales J.'s decision in the those proceedings, as is clear from paragraphs 15 and 51 of his judgment, was confined to Cala Homes' challenge to the Secretary of State's action in peremptorily revoking all Regional Strategies under section 79(6) of the 2009 Act**.**

45. For practical purposes, I believe the issue does come down, as Mr Mould suggested it did, to the binary question he set out in paragraphs 20 and 21 of his skeleton argument. The first alternative identified by Mr Mould is that planning decision-makers must take no account of the prospect of relevant regional policies ceasing to have effect well within the lifetime of the Regional Strategy in which they are contained, regardless of the scale, nature or timescale for delivery of the development proposed under the planning application and of the local policies of the development plan, which may be more or less favourable to the development than those of the South East Plan. The second alternative is that the decision-maker is allowed to have regard to the prospect of relevant regional policies ceasing to have effect well within the lifetime of the Regional Strategy, and is thus required to judge the significance of, and the weight to be given to, that factor when evaluating relevant development plan policies and any other material considerations, in accordance with the approach described by the House of Lords in *City of Edinburgh*.

46. Mr Village's argument has to confront a considerable task. It goes beyond contending that what is said in the statement and letter of 10 November 2010 and in the Secretary of State's letter of 27 May 2010 is incapable of being material in Cala Homes' case. It invites the court to accept that it can never be material in any case. As Mr Mould submitted, the logic of Mr Village's submissions on this issue leads to the proposition that, until the moment when Regional Strategies are abolished upon the passing into law of the Localism Bill, the Government's intention to achieve abolition is legally

irrelevant and therefore incapable of being given any weight in the making of any planning decision.

The policy and objects of the legislation

47. It is necessary at the outset to consider what the relevant policy and objects of the legislation may be. Mr Village submitted that, at least for present purposes, they were to be discerned in the analysis of Sales J. in paragraph 52 of his judgment in the first proceedings, and in particular in sub-paragraphs ii) and vi). In my view, however, Sales J. was not attempting in those passages of his judgment to capture the whole of the policy and objects of the relevant legislation in the concept of the "centrality" of the Regional Strategies in the English planning system by virtue of section 70(1) and the other provisions in Part 5 of the 2009 Act to which he referred, important as this concept may be. It could hardly be denied that a fundamental part of the policy and objects of the planning legislation is provided by section 38(6) of the 2004. In that provision one finds a cornerstone principle of the statutory framework: the principle that decisions on planning proposals are to be – to use the now familiar expression – "plan-led". Mr Village made plain that it was not accepted on behalf of Cala Homes that the whole policy and objects of the legislation are encompassed in section 38(6). However, he did not submit that the statement and letter of 10 November 2010 went against the principle that planning applications are to be determined in accordance with the development plan unless material considerations indicate otherwise.

The plan-led system

48. Four features of the plan-led system are salient in the decision of the House of Lords in *City of Edinburgh:* first, that both the relevant provisions of the development plan and other material considerations must be taken into account by the decision-maker (see what was said by Lord Clyde in his speech at p. 1457F-H, citing Lord Guest's distinction between having regard to the plan and slavish adherence to it, in *Simpson v. Edinburgh Corporation*, 1960 S.C. 313, at pp. 318-319); secondly, that the development plan has "priority" in the determination of planning applications (see what was said by Lord Clyde at p. 1458B); thirdly, that this "priority" is not to be equated to a "mere mechanical preference", for there remains "a valuable element of flexibility" and if there are considerations indicating the plan should not be followed a decision contrary to its provisions can properly be made (see what was said by Lord Clyde at p. 1458F); and fourthly, that section 38(6) leaves to the decision-maker the assessment of the facts and the weighing of the considerations material to the decision (see what Lord Clyde said at p.1458G-H). This exercise is a practical one. It entails for the maker of the decision the question "whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it" (see Lord Clyde's speech at p. 1459D-H). As was acknowledged by Lord Hope (at p.1450D) it may be, for example, that some of the provisions of the development plan "become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant". When this happens, the balance between the provisions of the plan and the considerations pulling against it is for the decision-maker to strike (ibid.).

Policy as a material consideration

49. I agree with Mr Mould in his submission that the present case is best considered on the conventional principles relating to material considerations in planning decisions.

50. The power of a minister to issue a statement articulating or confirming a policy commitment on the part of the government does not derive from statute. As was noted by Cooke J. in *Stringer* (at p.1295), section 1 of the Town and Country Planning Act 1943 imposed on the minister a general duty to secure consistency and continuity in the framing and execution of a national policy for the use and development of land. Although that duty was repealed by the Secretary of State in the Environment Order 1970, Mr Mould submitted, and I accept ,that it still accurately describes the political responsibility of the Secretary of State for planning policy. The courts have traditionally upheld the materiality of such policy as a planning consideration. In his speech in *Tesco Stores Limited* (at p. 777F) Lord Hoffmann acknowledged that the range of policy the Secretary of State may promulgate is broad. The example cited by Lord Hoffmann was "a policy that planning permissions should be granted only for good reason". In *ex parte Kirkman* Carnwath J. said (at pp. 566 and 567):

> "… A distinction must be drawn between (1) formal policy statements which are made expressly, or are by necessary implication, material to the resolution of the relevant questions, (2) other informal or draft policies which may contain relevant guidance, but have no special statutory or quasi-statutory status.
>
> Even though the planning Acts impose no specific requirement on local planning authorities to take account of Government policy guidance, it is well established that it should be treated, so far as relevant, as a material consideration (see *Gransden v. Secretary of State, ex parte Richmond L.B.C.* [1996] 1 W.L.R. 1460, 1472). Given the Secretary of State's general regulatory and appellate jurisdiction under the Acts, his policies, and those of the Government of which he forms part, they can no doubt be regarded as "obviously material" within the *Findlay* tests. The same can be said of his policies in respect of the Environment Protection legislation …"

In *Re Findlay* [1985] A.C. 318, to which Carnwath J. referred there, Lord Scarman approved (at p. 333) as a "correct statement of principle" the following observations made by Cooke J. in *Creed N.Z. Inc. v. Governor-General* [1981] 1 N.Z.L.R. 172 (at p. 183):

> "… What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken unto account, or even that it is one which many people, including the Court itself, would have taken into account if they had to make a decision."

and

> "… There will be some matters so obviously material to a decision on a particular project that anything short of direct consideration by the ministers … would not be in accordance with the intention of the Act."

51. Mr Mould suggested that the boundaries of what is truly to be regarded as national planning policy may not be entirely distinct. This I think is right. What is clear, however, is that the statement and letter of 10 November 2010 and the letter of 27 May 2010 manifest, as Mr Mould submitted, a political intent. It is a political intent of

relevance to planning throughout England. Whether it is properly described as "policy" is, in my judgment, of no consequence for its materiality, though the question might go to its weight.

52. Because planning decision-making is a process informed by policy, prospective changes to the policy framework itself may logically be seen as relevant to a planning decision. They engage the public interest. And they are germane to the character and the use of land. This proposition sits well, in my view, with the latitude the court has traditionally given to the ambit of what may be material in a planning decision. And if changes to the matrix of national policy, as they emerge in draft circulars or draft Planning Policy Statements, and changes to local policy, as they come forward in draft development plan documents, can be material considerations, their weight being contingent on the stage they have reached in their progress towards finality, why should the same not be so of changes to the composition of the development plan promised by legislative proposals? I see no distinction in principle. Pragmatism and common sense support this approach.

53. Analogous, in principle, is the question whether financial considerations can be material in a development control decision. As was held by the Court of Appeal in *R. v. Westminster City Council, ex parte Monahan* [1990] 1 Q.B., they can be. Nicholls L.J. (at p. 120D) regarded as "self-evident" the idea that "a planning authority may properly take into account as a material consideration … the practical consequences likely to follow if permission for a particular development is refused …". In his judgment Kerr L.J. (at p.111C-E) said this:

> "… In my view, for the reasons which follow, I have no doubt that the respondents' approach is correct in principle, and I would summarise it in the following way. Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world. It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. Virtually all planning decisions involve some kind of balancing exercise. …. [Provided] that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation."

Substituting for financial considerations in *Monahan* the prospect in the present case of statutory changes to the composition of the development plan, in a system oriented towards the making of decisions generally in accordance with the plan, gives rise, in my view, to no problem in principle. For some of the policies involved the horizon in time may still be as many as 15 or more years away. The period covered by the South-East Plan, for instance, runs to 2026. The Government's intended reforms in the Localism Bill could be on the statute-book within the next 12 months. This being so, it seems to me to make perfectly good sense for authorities, Inspectors and the Secretary of State to be free to take into account the potential removal of Regional Strategies in

the decisions they will in the meantime still have to make. To hold otherwise would, I think, be unreal.

54. I am therefore unable to accept that material planning considerations do not, and as a matter of law must not, embrace a government's intention to reform the composition of the development plan itself. And I cannot see why the principle that such a consideration is capable of being material in a planning decision should exclude the intention to take away, through legislation designed for the purpose, an element of the development plan which for the time being is properly to be regarded as "central". Whether in any particular case this factor is indeed material to the decision being made and, if it is, the weight to be given to it will always depend on the decision-maker's own judgment, which is ultimately subject to review by the court on public law grounds.

Previous legislative reform

55. So far as I am aware, the present case has no precedent in any decision of the court relating to the disputed materiality of forthcoming legislation aimed at reforming the planning system. When I queried this, Mr Mould referred to, and distinguished, the decision of Hutchinson J. *in Devon County Council v. Secretary of State for the Environment* [1990] J.P.L. 40. In that case one of the issues the judge had to deal with was whether an Inspector should have had regard to the changes in ministerial policy leading to the introduction of section 54A of the 1990 Act (the provision which has since been replaced by section 38(6) of the 2004 Act). It was argued by the applicants that the Inspector ought to have had regard to guidance as to the effect the enactment of the new section 54A would have, which was to be derived from statement made by the Minister of Housing and Planning in the House of Commons on 19 June 1991 and from Circular 14/91. Hutchinson J. held (at p.46):

> "… that the Inspector was not obliged to have regard to section 54A before it came into force … . Her correct course, I consider, was to have regard to current statutory provisions and to the guidance to be derived from any circulars published prior to her decision, in particular [Circular] 14/91. One piece of guidance that circular gave was that current circulars already reflected the spirit of the new provision; another was that section 54A *was to* be brought into effect about two months after July 25 and that "*In future* it will mean that determination is to be in accordance with the plan unless etc …" This language is, I am satisfied, if anything an encouragement not to give effect to changes dependent wholly on the new section: but it is coupled with encouragement to recognise that existing policy is, matters of nuance apart, broadly consistent with that embodied in the section."

In the event, this finding was not critical to the outcome of the case. And, in any event, it would not dispose of the issue raised in the present proceedings. But I see nothing inconsistent in Hutchinson J.'s judgment with the conclusions to which I have come.

The content of the statement and letter of 10 November 2010

56. To gain a true understanding of the Secretary of State's statement and the Chief Planner's letter of November 2010 one must take care not to read more into them than they actually say.

57. From a fair reading of the statement and letter five points come out.

58. In the first place, it is to be noted that neither the Secretary of State's statement of 10 November 2010 nor the Chief Planner's letter of the same date, nor indeed the Secretary of State's letter of 27 May 2010, says anything one could sensibly read as misrepresenting or seeking to alter the priority to be given to the development plan, of which the Regional Strategy forms part. Both in substance and in the language they use the statement and letter seem to me to be congruent with the established principles of development control in the plan-led system. The only reference they make to the statutory position of the Regional Strategies after Sales J.'s judgment is accurate. This occurs in the first sentence of the second paragraph of the Chief Planner's letter. It is explicitly acknowledged there that the effect of Sales J.'s decision is to re-establish Regional Strategies as part of the development plan. By virtue of section 38(3) of the 2004 Act, this is the status they will continue to enjoy unless and until they are removed by the forthcoming "localism" legislation. In the period preceding the revocation of Regional Strategies by that route, decision-makers are advised to have regard to the Government's commitment to their removal and its intention to secure their abolition by statute, as material considerations under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. No attempt has been made to deny the "centrality" Parliament has given to Regional Strategies in the planning system, or their role as "a primary instrument of planning policy". No dissent is expressed from Sales J.'s description of Parliament's purpose in enacting the "whole elaborate structure" for regional planning policy in the 2004 Act, and maintaining it in place under the 2009 Act. The Secretary of State's statement indicates that, although the Government thinks Sales J.'s decision "changes very little", it respects that decision.

59. Secondly, neither the statement and letter of 10 November 2010 nor the letter of 27 May 2010 specifies how much weight local planning authorities or Inspectors should give to relevant provisions of Regional Strategies pending their abolition, let alone suggests that no weight, or minimal weight, is given to them. Weight is left to the decision-maker. Authorities will no doubt differ in their views on this. They will know, however, that the Secretary of State has not sought to impose a view of his own.

60. Thirdly, whether or not the Government's commitment to the removal of the regional tier of the development plan is properly described as national planning policy – a question debated at some length in argument – it is consistently referred to as an "intention" in the Secretary of State's statement and the Chief Planner's letter of 10 November 2010. So it was in the letter of 27 May 2010. Realizing this intention through new legislation is plainly the course the Government is going to pursue. This too is spelt out in simple, factual terms in both the statement and the letter.

61. Fourthly, the Government's desire to abandon regional frameworks for the supply of new housing is also made plain. As the Chief Planner's letter of 10 November 2010 makes plain, after the abolition of Regional Strategies is achieved, if it is, by the new legislation, decisions on housing supply will be made at the local level on the basis of local assessments of need.

62. Fifthly, in the meantime, the Secretary of State clearly wishes decision-makers to be aware of the Government's determination to reform the planning system by removing regional strategic planning from it, and he wishes them to take this into account as a

material consideration when they make "planning decisions". What are "planning decisions" in this context? Primarily at least, said Mr Mould, they were decisions in the sphere of development control, but the advice the Secretary of State had given could equally well apply to local planning authorities in the exercise of their functions in the preparation of development plans. This I accept.

The relationship of the statement and letter of 10 November 2010 to the policy and objects of the legislation

63. I do not consider the intent or the effect of the statement and letter of 10 November 2010 to be subversive of the policy and objects of the existing planning legislation.

64. Neither the Secretary of State's statement nor the Chief Planner's letter conflicts with the priority of the development plan in planning decision-making recognized by the House of Lords in *City of Edinburgh*. And neither is inconsistent with the continuing "centrality" of the Regional Strategies in the planning system, the "strong practical effect" of those strategies or their role as "a primary instrument of planning policy". These are the three concepts referred to by Sales J. in paragraph 52 vi) of his judgment in the first proceedings.

Development control

65. I do not consider that what the Secretary of State said in his statement and the Chief Planner said in his letter requires local planning authorities when carrying out their planning functions, or Inspectors when deciding or reporting on appeals, to behave in any way inconsistently with the statutory and policy principles governing the operation of the plan-led system of development control. Decision-makers have not been encouraged to act otherwise than completely in accordance with the principles set out by Lords Clyde and Hope in *City of Edinburgh*. Those principles are not threatened.

66. When dealing with a proposal for development to which policy in an adopted Regional Strategy relates, authorities and Inspectors must continue to heed the statutory priority due to the plan of which that strategy will still be a part. The Secretary of State has not sought to dissuade authorities and Inspectors from doing just that.

67. The weight to be given to relevant provisions of Regional Strategies pending the legislative process will be for decision-makers to gauge. Until the end of that process is reached Regional Strategies will remain in place as part of the development plan, commanding such weight for the purposes of particular decisions as authorities, Inspectors and the Secretary of State may reasonably judge to be right. Mr Village pointed to the submission made in paragraph 11 of the Secretary of State's summary grounds in the first proceedings that, in the absence of a timely challenge to the letter of 27 May 2010, it would be "unrealistic" to suppose local planning authorities and Inspectors would "give anything other than great weight to the letter as a material consideration". That may be so. But, as Mr Mould recognized, this was not, and is not, for the court to decide. The same goes for the statement and letter of 10 November 2010. Weight lies not with the court to resolve but with the maker of the decision itself.

68. The work that informed the preparation of those strategies could be relevant too. And this may remain so even after the strategies themselves have gone. When, in July 2010, the Secretary purported to revoke all the Regional Strategies using section 79(6) of the

2009 Act he issued guidance for local planning authorities, which, under the heading "4. How will this affect planning applications?", stated:

> "… Evidence that informed the preparation of the revoked Regional Strategies may also be a material consideration, depending on the facts of the case."

As Mr Mould acknowledged on behalf of the Secretary of State, assessments of housing need underpinning the provisions of a Regional Strategy will not vanish when the imprimatur they had earned as policy is removed. Housing needs will not disappear overnight. It will be for the Government to decide how, in the future, those needs are to be addressed in policy documents formulated within the framework established by Parliament.

Plan-making

69. So far as plan-making is concerned, I believe Mr Mould was correct in submitting that the letter and statement of 10 November 2010 do not compromise the duty of a local planning authority under section 19 of the 2004 Act, as amended, to have regard to "the regional strategy for the region in which the area of the authority is situated …" when preparing a development plan document or any other local development document (section 19(2)(b)). This duty does not exclude the discretion to have regard to other considerations. Other considerations could, for example, include the national government's commitment to reforming the planning system by the removal of regional planning policy altogether. Similarly, in my judgment, the duty of an authority under section 24(1) of the 2004 Act to prepare their local plan documents "in general conformity" with the relevant Regional Strategy is not prejudiced by the Government's intention to dispense with such strategies. While Regional Strategies subsist a local planning authority will have to make sure to discharge its duty to achieve general conformity with them. Failure to do this would expose the offending plan to the risk of challenge in the courts. An authority preparing a plan is no more at liberty to override its duty under section 24 (1) of the 2004 Act than it is to disregard its duty under section 38(6) when determining an application for planning permission. The statement and letter of 10 November 2010 has not warranted, let alone incited, any such breach. Neither has the Secretary of State's letter of 27 May 2010.

Padfield

70. In my judgment, as Mr Mould submitted, the circumstances of the present case are not parallel to those of *Padfield* or to those of the first proceedings.

71. *Padfield* concerned the exercise of a statutory discretion by the Minister of Agriculture, Fisheries and Food in deciding whether to appoint a committee of investigation and to refer to it a complaint about the operation of a milk marketing scheme. The House of Lords held that the Minister had acted unlawfully in refusing to appoint such a committee, because by doing so he frustrated the policy of the relevant statute in which the discretionary power was contained. Lord Reid, in a well-known passage of his speech (at p 1030B-D), to which Sales J. referred in his judgment in the first proceedings (at paragraph 46), said this:

> "It is implicit in the argument for the Minister that there are only two possible interpretations of [the provision setting out his discretionary power] – either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right.

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act."

(see also p. 1032G-1033A, per Lord Reid, and p. 1060G. per Lord Upjohn).

72. I agree with Sales J.'s observation (in paragraph 48 of his judgment) that the similar reasoning of the court in other cases relating to other statutory contexts, such as *R. v. Braintree District Council, ex parte Halls* (2000) 32 HLR 770, *Laker Airways Limited v. Department of Trade* [1977] QB 643 and *Congreve v Home Office* [1976] 1 Q.B. 629, whilst illustrating how the principle in *Padfield* has been applied, necessarily depended on the context.

73. I do not think Mr Village's argument gains any strength from the decisions in those cases. Two of the passages in the judgments cited by Mr Village perhaps stood out: first, the dictum of Lord Nicholls of Birkenhead in *Fire Brigades Union* (at p.576A-B):

> "… The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review.";

and, secondly, the distillation of the rule in *Padfield* in the judgment of Laws L.J. in *ex parte Halls* (on p.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?"

74. The cases to which Mr Village referred were all concerned, in one way or another, with executive action under statutory or prerogative powers, the effect of which was to frustrate the legislative purpose of an Act of Parliament. *Padfield* itself was a case involving a refusal to exercise a discretion to investigate an imbalance in the price paid for milk. *Laker* involved a minister exercising his discretion to prevent an airline operating from airports in the United Kingdom. *Fire Brigades Union* concerned a scheme for compensation which affected the members of the applicant trade unions. Each case turned on the particular statutory scheme in question. None resembled the legislative context in the present case. As Sales J. stated in his judgment in the previous claim (in paragraph 47):

> "It is clear from *Padfield* that identification of the policy and objects of an Act of Parliament is an exercise in the interpretation of that Act. The question whether the exercise of some discretionary power conferred by a statute is impliedly limited in some respect by reference to the policy and objects of that statute will depend upon the construction of the relevant power in the context of the statute as a whole. The answer in any case will depend upon the specific terms and the particular and detailed scheme of the statute in question."

75. I do not think one can equate the actions of the Secretary of State in the present case to the kind of transgression committed by the minister in *Padfield*. It cannot be in contest that the Government is entitled to adopt the intention, or policy, of seeking, through appropriate legislative measures, the abolition of Regional Strategies. For its part, the Government accepts that Parliament will in due course decide whether and in what form that intention or policy is translated into the law in the provisions of the Localism Act. In this essential respect I believe the present case is to be distinguished from the first proceedings. Those proceedings required the court to consider an executive decision to remove at a stroke an element of the development plan. The case now before the court is very different. The Secretary of State announced in May 2010 the Government's commitment to changing the planning system in England by removing the regional strategic component, and has affirmed in November the Government's intention to achieve this aim not by executive decision but by primary legislation. Advice reflecting that intention has been given to planning decision-makers to guide them in the making of their decisions. No executive action of the type impugned in *Padfield* has been taken by the Secretary of State in this case.

The consequences

76. It seems to me, therefore, that Mr Village's submissions on this issue face two difficulties which they do not overcome. Their first difficulty, as I see it, is that they are based on an incorrect understanding of what the Secretary of State has actually done. The Secretary of State has not enjoined local planning authorities to assume that Regional Strategies have already been revoked, or to ignore their provisions in so far as they bear on the particular decision in hand. What he has done is to advise authorities, when making decisions to which such regional policy is relevant, to take into account the fact that the Government intends to promote, through legislation, a reform of the existing planning system in England, the effect of which would be to remove Regional Strategies as an element of the development plan. The second difficulty for Mr Village's argument is that there is, in my judgment, no inconsistency between, on the one hand, the concept of Regional Strategies forming a central element of the statutory system, and, on the other, the concept that local planning authorities and Inspectors and the Secretary of State himself, as decision-makers, may take into account the fact that the national administration now in power has decided to go about abolishing Regional Strategies by means of an Act of Parliament. That Regional Strategies are at present central in the planning system does not render irrelevant and unlawful, for the purposes of a planning decision, the Government's intention to reform the system by removing them from it.

77. One must remember the context, in the present case, in which the policy and objects of the legislation are engaged. The context here is the making of planning decisions. The fundamental policy and object of the legislation in this context is that decisions will be made not simply in accordance with the development plan but in accordance with the development plan unless material considerations indicate otherwise. The statement and letter of 10 November 2010 are in no way inconsistent with this principle. Nor can they be seen as being in any way inconsistent with the principle that Regional Strategies are, and until they are removed will remain, central in the statutory system. Though Regional Strategies are, as Sales J. put it, "a primary instrument of planning policy", this does not mean, and never has, that their policies must automatically be followed when a planning decision is made. Changes in circumstances since the adoption of the relevant strategy, including, for example, a change in national planning policy, can suggest a different outcome. In this respect Regional Strategies are to be treated in exactly the same fashion as other elements of the statutory development plan. This has not changed.

78. I therefore believe Mr Mould was correct in his submission that the Secretary of State was entitled to advise authorities that the proposed revocation of Regional Strategies was to be regarded as a material consideration in their planning decisions. For the Secretary of State to do this was not to subvert the policy and objects of Part 5 of the 2009 Act or, more generally, the policy and objects of the existing planning legislation as a whole. On the contrary, it was entirely consistent with the principles which underpin the statutory framework.

Conclusion

79. For the reasons I have given, I conclude that this ground of the claim must fail.

Issue (ii): irrationality

Submissions

80. Mr Village submitted that it was, in any event, irrational of the Secretary of State to have made his statement and to have caused the Chief Planner to issue his letter of 10 November 2010, against the background of the uncertainty acknowledged by Mr Morris in his witness statement of 21 October 2010: uncertainty which the Secretary of State's letter of 27 May 2010 had created and which his statement of 6 July 2010 revoking Regional Strategies had been designed to overcome. The effect of the statement and letter of 10 November was to replicate conditions harmful to the credibility of the planning system. The rational thing for the Secretary of State to have done would have been to publish guidance or a direction stating that planning decision-takers should continue to act in accordance with the law as it stands, under which Regional Strategies are required to exist and to form part of the development plan; that the Government's aspiration to abolish Regional Strategies was not a material consideration and would not be until Parliament had given its blessing to that change in the law; that the timescale for such a change was unclear; and that in any case it could not come about without the requirements of Strategic Environmental Assessment being complied with. But the Secretary of State had not done that. In any event, Mr Village submitted, the statement and letter of 10 November 2010 were an absurd response to the judgment of Sales J.. If regard were had to the imperatives of good administration, the action the Secretary of State had taken on 10 November 2010 could only be seen as

perverse. The confusion it had caused, evident as it was in the correspondence, had been entirely foreseeable.

81. Mr Mould submitted that, if the Secretary of State's argument on the previous issue is correct, the court could not hold that the Secretary of State had acted irrationally or perversely in stating the Government's intention. If knowledge of that intention had given rise to uncertainty or confusion as to the role of Regional Strategies in the making of planning decisions (which the Secretary of State did not concede) this did not make the intention itself immaterial or the Secretary of State's statement irrational. As Mr Morris had made plain in his witness statement in the present proceedings (dated 10 December 2010), since the Secretary of State's statement and the Chief Planner's letter had been issued on 10 November 2010 the amount of correspondence seeking clarification of the current position had only been "low".

Discussion

82. Upon receiving Sales J.'s judgment in the first proceedings the Secretary of State could have elected to make no statement at all about the Government's position. Another option would have been to issue a statement saying nothing about what the Government now intended to do, saying simply that it did not intend to appeal and adding that, as a result of the court's decision, Regional Strategies had been restored to their rightful place within the statutory development plan and would once again be, as Sales J. had found, a "primary instrument of planning policy", central to the planning system in England. Both of those responses to his defeat in the first proceedings were open to the Secretary of State. Either might have been reasonable. But the Secretary of State chose a different course.

83. The court is not concerned with what, hypothetically, the Secretary of State might have done; it is concerned only with what, in fact, he did. The question to be considered here is not whether something the Secretary of State did not do – and perhaps did not even contemplate – would have been more appropriate, but whether the action he took was inappropriate to the point of being perverse.

84. Whenever a government embarks on wide-ranging reform of the planning system some inconsistency in day to day decision-making is liable to arise and to persist until the reform is enacted as law. This perhaps is inevitable. Even when the scope of the changes is clear, and a timescale for their being enacted is set, the uncertainty will not be entirely dispelled. Ministers and those who advise them will be aware of this. The Secretary of State will be conscious of the need to ensure, so far as he reasonably can, consistency and predictability in decision-making. From time to time he will publish guidance designed to promote this objective. The Current PPS1 ("Delivering Sustainable Development") is an example. The Secretary of State's role in all this is, essentially, political and proactive. It goes beyond his statutory powers to call in applications, to recover appeals and to make directions under the General Development Procedure Order. Writing to local planning authorities to guide them in the handling of proposals submitted to them with is another step he can quite properly take. This may be seen as one facet of the general supervision of the planning system exercised by the Secretary of State.

85. In this instance, Mr Morris, in the paragraphs of his witness statement which I have quoted above (in paragraph 22) has explained why the Secretary of State went about

informing Parliament and local planning authorities of the Government's position in the light of the decision of the court in the first proceedings. This seems to me to demonstrate a rational basis for the Secretary of State's decision to make the statement he did on 10 November 2010, and for his having issued corresponding advice to local planning authorities in the Chief Planner's letter.

86. In my view, therefore, the Secretary of State can be acquitted of having acted irrationally. It was, I consider, at least desirable – if not, indeed, obviously necessary – for the Government's position to be made known once Sales J.'s decision came into the public domain. If the Secretary of State thus ran the risk of reviving the kind of uncertainty he had previously, in July, sought to end, the statement he made was not perverse because of that. Had he refrained from acting as he did at that stage, I think such criticism might have carried more force.

87. By 10 November 2010 the Government's attempt to revoke Regional Strategies by executive action had been reviewed by a judge and had failed. The letter of 27 May, however, had not. Either it stood or its purpose was spent. But, at any rate, the statement and letter of 10 November 2010 dealt with the situation which had by then come about. They went beyond merely repeating what had been said in May. They told their audience what the Government was now going to do. They provided advice. Their content was, in my judgment, sufficiently clear and direct. It was also, as I have held, legally sound.

88. In my judgment, therefore, it was not irrational for the Secretary of State to draw attention to the matters referred to in his statement and the Chief Planner's letter of 10 November, and to provide the advice he gave.

Conclusion

89. It follows that this ground of the claim does not succeed.

Issue (iii): Strategic Environmental Statement

Submissions

90. Mr Village submitted that Sales J had been entirely right in what he had said about the operation of the Strategic Environmental Assessment Regulations in his judgment in the first proceedings (in paragraphs 54 to 67). There were, said Mr Village, three respects in which the need for a Strategic Environmental Assessment might be considered to have arisen in the present case. They were not necessarily mutually exclusive. First, the statement and letter of 10 November 2010 themselves amounted to a modification of the statutory development plan (as defined in section 38(3) of the 2004 Act). Secondly, the statement and letter constituted modifications of the Regional Strategies themselves. And thirdly, that the Government's intention or policy to introduce legislation was itself a plan or programme. A modification to a plan or programme is subject to screening. Mr Village invoked the well-known dictum in paragraph 31 of the judgment of the European Court in *Kraaijeveld (Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* (Case C-72/95)) to the effect that the language of the EIA Directive indicated "a wide scope and a broad purpose". So too, said Mr Village, did the words of the SEA Directive and the SEA Regulations. A purposive approach to the construction of their provisions was

appropriate. Sales J. had concluded, rightly, that the revocation of a Regional Strategy was a modification for the purposes of the Strategic Environmental Assessment Directive and Regulations. Likewise in the present case, submitted Mr Village, the statement and letter issued on 10 November 2010 had indeed been intended to modify the development plan. The modification was inherent in decision-makers having being encouraged to reduce the weight they gave to Regional Strategies. It fell within the relevant part of the definition in regulation 2. The concept of an "administrative provision" in that regulation would encompass the Coalition Agreement. In any event, if the Secretary of State had lawfully made new planning policy by the production of his statement and the Chief Planner's letter of 10 November 2010, such policy would constitute either a modification of the existing "plan or programme" under that legislation or the introduction of a new one. Either way, a decision on the need for a Strategic Environmental Assessment had been called for under the 2004 Regulations. No such decision had been made. Not only that: the Secretary of State had also failed to identify the process by which the need for such an assessment of the proposed abolition would be considered.

91. Mr Mould submitted that this ground of the claim was misconceived. Neither in his letter of 27 May 2010 nor in the statement and letter of 10 November 2010 had the Secretary of State purported to modify any Regional Strategy or any development plan. All he had done was to provide and identify an additional material consideration for a decision-maker. This could not conceivably engage the requirements of the legislation governing Strategic Environmental Assessment. No "plan or programme" was thus being generated, or modified. And, for the purposes of a development control decision, the existence of the question whether the proposed revocation of Regional Strategies would require Strategic Environmental Assessment went only to the weight – not the materiality – of the prospect of those strategies being revoked. The decision of the European Court in *Terre wallone ASBL* and *Inter-Environnement Wallone ASBL* provided a complete answer to Mr Village's submissions.

Discussion

92. To be decided here is whether the statement and letter of 10 November 2010 are vitiated by their not having been screened for Strategic Environmental Assessment. The question whether any of the provisions of the Localism Bill, which has been laid before Parliament since the present proceedings were begun, requires, or ought to have been screened for, Strategic Environmental Assessment is not before the court. This is a matter which, if formally raised, would have to be the subject of a further claim for judicial review. I accept Mr Mould's submission that the fact that this question exists goes only to the weight to be attached to the Bill as a material consideration.

93. Although, prior to the adoption of the Commission's 1996 Proposal (COM(96) 511), it had been contemplated that the SEA Directive might apply to "policies" as well as to "plans and programmes", the Proposal itself, in its Explanatory Memorandum explained that it was intended to apply only to "plans and programmes". Paragraphs 1.2 and 1.3 of the Explanatory Memorandum stated:

> "1.2 The Proposal … [is] restricted to the plan and programme level of decision-making. It does not apply to the more general policy level of decision making at the top of the decision-making hierarchy. Whilst it is important that general policy decisions take account of the environment, the procedural requirements of the present

> Proposal may not be a suitable way of achieving this goal. General policy decisions develop in a very flexible way and a different approach may be required to integrate environmental considerations into this process …
>
> 1.3 The Proposal is restricted to town and country planning plans and programmes and to plans and programmes which are adopted as part of the town and country planning decision-making process for the purpose of setting the framework for subsequent development consent decisions which will allow developers to proceed with projects. Such town and country planning plans and programmes define the use of land and contain provisions on nature, size, location or operating conditions of installations or activities in different sectors relevant to town and country planning …"

One sees there the deliberate decision to exclude from Strategic Environmental Assessment "the more general policy level of decision". In the same vein, the Commission's guidance "Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment" states in paragraphs 3.4, 3.5, 3.6 and 3.15:

> "3.4. In considering the concept of 'project' under the EIA Directive in case C-72/95 *Kraaijeveld*, the ECJ noted that the Directive had a wide scope and a broad purpose. In view of the language used in Directive 2001/EC/EC, the related purposes of that Directive and the EIA Directive, and the conceptual similarities between them, Member States are advised to adopt a similar approach in considering whether an act is to be considered a plan or a programme within the scope of Directive 2001/42/EC. The extent to which an act is likely to have significant environmental effects may be used as one yardstick. It may be that the terms should be taken to cover any formal statement which goes beyond aspiration and sets out an intended course of future action.
>
> 3.5. The kind of document which in some Member States is thought of as a **plan** is one which could include, for example, land use plans setting out how land is to be developed, or which sets out how it is proposed to carry out or implement a scheme or a policy. This laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development …
>
> 3.6. In some Member States, **programme** is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as programme. In this sense, 'programme' would be quite detailed and concrete. … But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy' – the sense in which 'plan' was

> used in the previous paragraph. In town and country planning in Sweden, for instance, the programme is thought of as preceding a plan and as being an inquiry into the need for, and appropriateness and feasibility of, a plan.
> ...
>
> 3.15 Another important qualification for a plan or programme to be subject to the Directive is that it must be required by legislative, regulatory or administrative provisions. If these conditions are not met, the Directive does not apply. Such voluntary plans and programmes usually arise because legislation is expressed in permissive terms, or because an authority decides to prepare a plan on an activity which is unregulated. On the other hand, if an authority is not required to draw up a plan unless certain preconditions are met, it would probably be subject to the Directive once those preconditions had been met …. It is of course open to Member States, in respect of their own national systems, to go further than the minimum requirements of the Directive should they so desire."

Here too the distinction is drawn between a plan or programme on the one hand and a mere scheme or policy on the other. It is an important distinction. It informs the whole approach to Strategic Environmental Assessment under the legislation. It is demonstrated, for example, in the decision of the European Court in *Terre Wallone ASBL* and *Inter-Environnement Wallonie ASBL*.

94. On a straightforward reading of the relevant provisions of the SEA Directive and the SEA Regulations, the proposition that the Government's stated policy commitment to the abolition of Regional Strategies constitutes a "plan or programme" or a "modification" susceptible to Strategic Environmental Assessment seems to me to be ill-founded.

95. For a need to undertake Strategic Environmental Assessment to arise there must be a relevant "plan or programme" or a "modification" of such a "plan or programme". Under the provisions of the SEA Directive, mirrored as they are in the SEA Regulations, a "plan or programme" subject to Strategic Environmental Assessment is not any plan or programme, but one that is "required by legislative, regulatory or administrative provisions".

96. In the present case there has been neither any subtraction from nor any adjustment to the statutory development plan. Nothing has been done to any Regional Strategy. There has been no "modification" such as might attract the need for Strategic Environmental Assessment. The Secretary of State's statement of 10 November 2010 and the Chief Planner's letter may be an expression of government policy. But they do not purport either to revoke or to modify any of the Regional Strategies which have been adopted, or any development plan. In my judgment therefore, Mr Mould was right to submit that the argument advanced by Mr Village, so far as it related to the first and second of the three respects in which he contended the Secretary of State's statement and the Chief Planner's letter may give rise to the need for a Strategic Environmental Assessment, is basically flawed.

97. In my view, the conclusion stated by the Advocate General in paragraph 41 of her Opinion in *Terre Wallone* and *Inter-Environnement Wallone* ASBL, with which the court did not disagree, would plainly cover the Secretary of State's statement and the Chief Planner's letter of 10 November.

98. National planning policy does not constitute a "plan or programme" for the purposes of the SEA Directive and the SEA Regulations, unless it is specifically required by "legislative, regulatory or administrative provisions". Thus National Policy Statements for the planning of waste management (at present PPS10 in England and TAN21 in Wales), because they are required by Article 7 of the Waste Framework Directive, are within the reach of Strategic Environmental Assessment.

99. Advice given by or on behalf of the Secretary of State that an intention or policy of the Government is a material consideration in a planning decision is not a "plan or programme" or a "modification" of a plan or programme; it is merely advice. The same may be said of the policy itself, whether it came into existence when announced in the Coalition Agreement or only in the statement and letter of 10 November 2010. Neither the policy nor the advice takes the form of a "plan or programme". Whether or not the statement and letter are to be regarded as national planning policy, they clearly do express "freely taken political decisions on legislative proposals". Furthermore, they were not "required" by any legislative, regulatory or administrative provision.

100. I do not propose to revisit the question on which Sales J. stated his view in a fully reasoned, albeit obiter, analysis in paragraphs 54 to 67 of his judgment, namely whether the revocation of a Regional Strategy is to be regarded on a purposive construction of the SEA Directive and the SEA Regulations as a "modification" of a "plan", and thus falls to be dealt with under that legislation. That issue is not before me in the present proceedings.

Conclusion

101. It follows that on this ground too the claim must fail.

Abuse of process and delay

Submissions

102. Mr Mould submitted that, if Cala Homes had wanted to challenge the lawfulness of the advice given by the Secretary of State in his letter of 27 May 2010, it should have done so directly and promptly. It had done neither. The present claim should be rejected as an abuse of the process and on the grounds of delay. Both the Secretary of State's statement and the Chief Planner's letter of 10 November 2010 effectively repeated the substance of what the Secretary of State had said in May. Despite having had the opportunity to do so, Cala Homes had not attacked the letter of 27 May in its first claim for judicial review. As was plain from paragraph 15 of Sales J.'s judgment, the court itself had wanted to understand what Cala Homes' position was. Although a challenge to the letter of 27 May 2010 had been eschewed in those proceedings because, it was said, the Secretary of State's statement of 6 July 2010 had become the "operative decision", it ought to have been plain to Cala Homes that the effect of its claim succeeding would be a return to the status quo established by the letter of 27 May 2010. To attempt now to litigate matters which ought to have been raised in the

first proceedings amounted to an abuse of process, was in any event far too late, and was harmful to good administration. It could readily be inferred that the lack of a timely challenge to the letter of 27 May 2010 had given rise to prejudice; for some five months decisions had been made on the basis of what was said in that letter.

103. Mr Village submitted that the Secretary of State's argument on abuse of process and delay was misconceived. The statement made by the Secretary of State on 6 July 2010 superseded the advice given about the materiality of Regional Strategies in the letter of 27 May. Regional Strategies were now gone. The premise of the letter of 27 May had been that Regional Strategies remained in place. In launching their claim in the first proceedings Cala Homes had moved against the substantive decision. This had been acknowledged by Sales J. in paragraph 15 of his judgment, where he referred to the statement of 6 July 2010 as now being the "operative decision". Aiming the attack against that decision was consistent with the reasoning of Laws J. (as he then was) in *R. v. Secretary of State for Trade and Industry, ex parte Greenpeace Ltd* [1998] Env. L.R. 415 (at p. 424). Between 6 July and 10 November 2010 the letter of 27 May was of no effect. Time did not run for any legal challenge to it. No prejudice to the Secretary of State or to any other party had resulted from its not being challenged. Its unlawfulness was renewed by the statement and letter of 10 November 2010. Alternatively, the unlawfulness had continued throughout and was continuing still. Either way, to bring it within this claim for judicial review, was neither an abuse of process nor too late.

Discussion

104. The Secretary of State's letter of 27 May 2010 indicated that a "formal announcement" was going to be made "soon". In my judgment, Mr Village was right to submit that the formal announcement came in the Secretary of State's statement of 6 July 2010. That statement superseded the advice on the materiality of Regional Strategies given in the letter of 27 May. It purported to revoke strategies. The May letter had been predicated on Regional Strategies continuing to exist. In the July statement no mention was made of the May letter. It is reasonable to conclude that the reason for this was that the advice provided in May was now redundant. There was no need for Cala Homes, or anybody else who was aggrieved by the Government's revocation of Regional Strategies, to resort to litigation to challenge that advice. The substantive decision at this stage, and the appropriate target for judicial review, was the action taken by the Secretary in July. Cala Homes went ahead with such a challenge. In doing so, they followed the elementary principles to be seen in the court's decision in *Greenpeace*. In his judgment in that case Laws J. said this (at p.424):

> "In *Gooding* and *Adams* there were concrete decisions, not just a "continuing practice", which were undoubtedly susceptible to the judicial review jurisdiction and which on the face of their pleadings the applicants sought to assault. Yet in each case the court held there was delay arising out of the applicants' failure to challenge an earlier executive act or acts. These authorities do not enter into any analysis of the proper construction of Order 53, r.4(1), but as it seems to me they lend implicit support to the approach urged by the respondents, and I would construe the rule accordingly. In my judgment, however, even if Order 53, r.4(1) is to be interpreted more conservatively, so that "the date when grounds … first ar[i]se" is never earlier than the date when the impugned decision is taken, *Eurotunnel*, *Gooding* and *Adams* exemplify a common principle,

> whose nature is not dependent upon an appeal to the rules relating to delay. It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late. [Counsel for the applicant] did not seek to deny that there exists a discretion to refuse leave, or relief, in such a case whether or not it falls within the terms of Order 53, r.4(1) or section 31(6). This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adapt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion – whether so directed by rules of court or not – will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened, but strengthened, by such a discipline. It invokes public confidence and engages the law in the practical world. And it is administered, of course, case by case …".

105. I do not consider that there has been any breach of those principles in the present case. Only after the Secretary of State had failed to convince the court that his action in July was lawful and the Regional Strategies were restored did he resume the stance he had adopted in May. Between 6 July and 10 November 2010, therefore, the advice in the letter of 27 May 2010 was of no practical effect. After 10 November the May advice was reinstated and amplified. Incorporated as it was into the letter sent by the Chief Planner to all local planning authorities, it has since then remained in place. There has been no complaint from the Secretary of State as to any delay or lack of promptness on the part of Cala Homes in launching its challenge to the statement and letter of 10 November 2010. There hardly could be. The claim was lodged within two weeks of the action it asks the court to review.

Conclusion

106. I therefore reject Mr Mould's submissions on abuse of process and delay.

Overall conclusion

107. For the reasons I have given, whilst I grant permission, the claim itself must be dismissed.