

**HOUSING POLICY:
LEGALITY AND WEIGHT
FOLLOWING WEST BERKS v. SoS**

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Introduction



1. Long standing tension between plan led system and national policy
2. Plan led system: S.38(6); NPPF para 1;
3. Role of national policy: SoS at top of tree – formulate national policy to guide plan making and as a material consideration in decision making (s.38(6)); at a local level formulation of policies to take into account national policy
4. Played out in NPPF para 14/212 – 215 – no replacement of s.38(6) but Govt policy was that in s.38(6) exercise weight to be attached to DP policy dependent after a year with degree of consistency with NPPF.
5. In practice this has meant that since 2013 NPPF trumped “out of date” DP in SoS decision making.

Reasons NPPF not unlawful?

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1. Recognised plan led system
2. Gave a year for adopting a DP which was consistent with NPPF
3. No requirement for “in conformity” with – and the statutory scheme enabled LPAs to adopt policies which were different from those in the NPPF for site specific reasons - had to take into account govt policy in NPPF not be bound by it – no conflict therefore with statutory scheme for policy adoption;
4. Paras 212 – 215 phrased in terms of weight only – matter for decision maker and consistent with s.38(6).
5. But came pretty close to rendering meaningless s.38(6) as we have all seen in decision making by the SoS.

Statutory Scheme

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Local Plans

Survey of local areas - s.13 (assessing needs)

Policies - s.17 to take into account s.13.

In formulation “**must have regard to**” national policy - not be bound by or be in GC with – s.19

Policies go through indep examination – s.20. Sound: NPPF182 – meet objectively assessed needs/most appropriate/deliverable.

SoS has power to intervene

Decision Making

s.38(6) – plan led/ OMC

Statutory scheme thus recognises importance of national policy in guiding plan making and decision making but as a guide not a diktat.

Statutory scheme has at its heart: (1) needs; and (2) local policy

Historic national policies on AH and TBC – NATIONAL POLICIES FULFILLED THEIR PROPER ROLE

Circular 6/98 and PPS3 –

Gave criteria or indicative thresholds which LPAs were to take into account.

“They sought to give guidance and influence individual LPAs when drawing up policies in their local plans... appropriate to their respective areas.... Thus the earlier national policies properly discharged the SoS’s function as a central authority bringing some degree of coherence and consistency , whilst respecting the statutory role of LPAs to devise local policies appropriate to their area. The policies provided a framework within which the LPAs could adopt the same thresholds or justify alternative approaches.”

West Berks - background

NPPF47 – 49 - assess and plan to meet AH needs.

NPPF50 – LPAs must set policies for AH (WB12) based on viability (NPPF173) with flexibility for site specific circumstances

NPPF156 – 7 – LPAs had to have plans to positively deliver (and sanctions if not 5 year HLS)

Councils had adopted policies in accordance with statutory scheme and taking into account NPPF which required AH and TBC from small sites (less than 10 units). Viability and needs assessment/ deliverable/ sound. Flexible policies.

Result was that having regard to need and viability, small sites should contribute. NPPF compliant.

The Policy

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Govt then consulted on and adopted an exception from AH and TBC for small sites. To be construed in accord with *Tesco v. Dundee*

"TBC and AH should not be sought from small sites"

Allegedly because of "disproportionate burden" on developers

Key features

- Immediate effect – no time for LPAs to consider whether and how to apply it
- General application - across country
- No exceptions
- Not tied to site specific viability or needs
- Applied even if viability, needs and local decision making said small sites should contribute.

So in decision making, s.38(6) policies said should require AH/TBC on small sites, national policy said should not. Straight clash. SoS decision makers were following SoS national policy and treating DP policies as out of date or superseded.



Grounds of Challenge

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- Inconsistent with statutory scheme
- Failed to take into account obviously material consideration
- Consultation flawed
- PSED
- Rationality

The key issue I am focussing on is Inconsistency with Statutory Scheme but first some generally applicable points on other grounds



Consultation

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- Consultation had asserted “disproportionate burden” but not explained what that was or provided any evidence base as to why disproportionate given the existing policy framework.
 - Disclosure had revealed civil servants saying no evidential base for the new approach but SoS proceeding nonetheless
 - Two points of interest:
 - Failure to provide the evidence base on which the Govt was acting was so unfair as to be unlawful – you have to know what the case “for” the proposal is. WB154/155
 - Failure to conscientiously take into account consultation responses demonstrated through disclosure: do FOIA requests
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PSED

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- No PSED at time of the Policy
 - SoS sought to subsequently rectify error and confirmed the policy and said therefore no relief in exercise of discretion
 - Held:
 - PSED must be carried out at time of policy formulation not retrospectively: WB191- esp for national policy
 - May withhold relief as a matter of discretion if result inevitably the same but warning about after the event rationalisation – WB193
 - Court looked into the PSED in detail to see whether compliance with the requirements – WB197.
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Necessarily Material Considerations



- Case law shows that in policy formulation matters which are so obviously material have to be taken into account in order to comply with the legislative intent – WB166.
- The SoS had taken into account the market housing benefits but not the AH disbenefits WB88 – 90; WB 158-160
- In the context of the Planning legislation, the SoS cannot make policy without taking into account matters which the legislation makes obviously material to the issue.

Words of Warning



- SoS is seeking to appeal West Berks so all I say has the caveat that the HC judgment may not survive
- West Berks was a pretty extreme case – Govt policy telling decision makers not to apply recently formulated NPPF compliant policies.
- West Berks did not address submissions on inconsistency with NPPF directly
- West Berks points on *legality* can only be taken at policy adoption stage – cannot wait and say in a decision of the LPA – SoS policy is unlawful therefore not going to follow it. Therefore early challenges required.
- West Berks is however also important on *weight* and on that there was some common ground in the High Court.

Consistency with the statutory scheme (1)



- The challenge concerned the interaction between the SoS policy and the statutory code for local plans and decision making: WB114
 - Policy making is not a freestanding power – WB115
 - The power to make policy cannot be exercised incompatibly with, or so as to frustrate, the relevant statutory scheme: WB117/118
 - Under statutory scheme, SoS's function is to provide guidance for LPAs to apply to their specific circumstances
 - National policy cannot override an adopted local plan policy or create an exception which invalidates the local plan – WB122

Consistency with statutory scheme (2)



- The policy in this case went far beyond its lawful ambit
 - Does not give guidance but sets thresholds
 - Applied directly and with immediate effect
 - Therefore drawn up “to displace” LP policies – WB126 in contrast to approach in NPPF
 - Created immediate *exemptions* to lawful, NPPF compliant policies: WB129
 - Therefore beyond the scope for such policy for reasons in WB133 and WB134
 - Policy purpose was contrary to the purpose of the Act
 - Policy would tend to lead to unlawful decision making

Looking forward

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Consultation and PSED grounds conventional application of established principles but in an unusual context

Material considerations – confirmation that SoS is not making policy in a vacuum but within a statutory context which dictates what considerations are necessarily material.

In terms of consistency with statute, general principle that SoS's policy must be consistent with the statutory scheme within which the policy will operate

Examples: (1) Starter Homes policy; (2) change of use of agricultural buildings; (3) renewable energy subsidies and renewable energy permitting.

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The Implications

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- The policy not to applied unless CA reverses HCJ
- More broadly:
 - SoS does not have an unfettered policy making power
 - Has to be guided by the statutory scheme and its purposes
 - Has to take into account considerations which the statutory scheme (or NPPF) make necessarily material
- Weight
 - what about where no challenge and comes down to weight to be attached to policy: PSED/consultaiton/ inconsistency/ LA specific facts