Case No: CO/8474/2010

Neutral Citation Number: [2010] EWHC 2866 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2010

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

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

- -
- -

Mr Peter Village QC, Mr James Strachan & Ms Sarah Hannett (instructed by **MacFarlanes LLP**) for the **Claimant**
Mr James Eadie QC & Mr James Maurici (instructed by **Treasury Solicitors Department**) for the **Defendant**

Hearing date: 22/10/10

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Judgment

Mr Justice Sales :

1. This is an application for judicial review of a decision by the Secretary of State for Communities and Local Government, announced in a Parliamentary statement on 6 July 2010, to revoke the Regional Strategies in place at the time of that decision. Regional Strategies are development plans set at a regional level to assist in the implementation of planning policies and in the taking of planning decisions.

2. The application came before me on a "rolled up" basis, requiring consideration first whether permission to bring the judicial review claim should be granted. Having pre-read the papers I took the view that the Claimant had an arguable case such that permission should be granted at the outset of the hearing. Mr Eadie QC for the Secretary of State did not oppose that course. Accordingly, I granted permission and the hearing proceeded as a full substantive hearing on the merits of the Claimant's claims.

Factual background

3. The Claimant is the owner of a plot of 87 hectares of farmland located near Winchester. In February 2004, the Claimant submitted a planning application to build 2,000 residential properties and associated infrastructure and facilities on the site. The local planning authority, Winchester City Council ("the Council"), did not determine the application so the Claimant appealed to the Secretary of State. The appeal was dismissed in February 2006 and a court challenge to that decision was eventually dismissed in December 2007.

4. In July 2006, the Council adopted the Winchester Local Plan. Section 12 of the Local Plan is headed, "Major Development Areas". At policy MDA.2 in that section, the plan identified the site as a "reserve site" to construct 2,000 dwellings and associated infrastructure. A reserve site is a site identified as a possible site for development should a sufficient need arise and if certain conditions are fulfilled. Policy MDA.2 stated, in relevant part, as follows:

> "Development on this 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…"

5. In May 2009, the Regional Spatial Strategy for the South East Region ("the South East Plan") was promulgated under Part 1 of the Planning and Compulsory Purchase Act 2004 ("the PCPA 2004"). The South East Plan sought to provide a regional framework for development in the south east. It identified sub-regions to be the focus for growth and regeneration. It included, among a wide range of regional policies, policies intended to provide for an expansion for regional housing provision between 2006 and 2026 by a net addition of 654,000 dwellings. Of the figure for additional dwellings allocated to Hampshire, 5,500 were to be accommodated in that part of the Winchester area known as the non-PUSH [Partnership for Urban South Hampshire] part of the district, which includes the Claimant's site. This was a requirement for a substantial number of additional dwellings for that area, which increased the prospects

that the Claimant might be able to secure planning permission for the development of its site in accordance with policy MDA.2 in the Local Plan. Accordingly, on 23 November 2009 the Claimant submitted a second planning application to the Council for a substantial residential development on the site.

6. Meanwhile, the national political parties issued policy documents in the course of the general election campaign for the general election to be held in May 2010. The Conservative party, in particular, indicated that if returned to government, it proposed to abolish the regional tier of planning policy guidance set out in Regional Spatial Strategies (the name for regional guidance issued under the PCPA 2004), leaving planning policy guidance to be defined by national and local policies only.

7. On 1 April 2010, the relevant part of the Local Democracy, Economic Development and Construction Act 2009 ("the LDEDCA 2009") - Part 5 (entitled, "Regional Strategy") - came into effect. It replaced the concept of a Regional Spatial Strategy in the PCPA 2004 with that of a Regional Strategy as defined in section 70 of the LDEDCA 2009. It also amended the PCPA 2004 in certain respects.

8. Under the new legislative scheme, Regional Strategies are intended to supply broadly the same regional planning framework as had the Regional Spatial Strategies previously. By virtue of section 70(6) of the LDEDCA 2009, the Regional Strategy for the South East, when that provision came into effect on 1 April 2010, included as a major component the existing South East Plan (the former Regional Spatial Strategy for the region).

9. The Council failed to determine the Claimant's second planning application, so on 19 April 2010 the Claimant appealed once again to the Secretary of State. At the end of April, a public inquiry was fixed for the appeal to take place in September 2010.

10. On 6 May 2010, the general election was held. The outcome was a coalition government between the Conservative party and the Liberal Democrat party. On 20 May 2010, the Coalition Government published "The Coalition: our programme for government". In this document, the Coalition Government announced:

> "We will rapidly abolish Regional Spatial Strategies and return decision-making powers on housing and planning to local councils…"

11. By letters dated 27 May 2010 from the new Secretary of State for Communities and Local Government (the Rt. Hon. Eric Pickles MP) to local planning authorities, the Secretary of State wrote as follows:

> "ABOLITION OF REGIONAL STRATEGIES
>
> I am writing to you today to highlight our commitment in the coalition agreements where we very clearly set out our intention to rapidly abolish Regional Strategies and return decision making powers on housing and planning to local councils. Consequently, decisions on housing supply

> (including the provision of travellers' sites) will rest with Local Planning Authorities without the framework of regional numbers and plans.
>
> I will make a formal announcement on this matter soon. However, I expect Local Planning Authorities and the Planning Inspectorate to have regard to this letter as a material planning consideration in any decisions they are currently taking."

In the light of these developments, on 4 June 2010 the Claimant asked the Planning Inspectorate to suspend the public inquiry. The Planning Inspectorate has acceded to that request and has now re-fixed the public inquiry to take place in February 2011.

12. On 14 June 2010, the Planning Development Control Committee of the Council issued their report on a third planning application by the Claimant in relation to the site made on 27 April 2010 (which duplicated the Claimant's second planning application) and set out their views on the Claimant's second application so that they could be considered at the public inquiry into that application. In the report, the Committee recommended that the applications be refused. The reasons given by the Committee pointed to the significance of the Secretary of State's indication in his letter of 27 May 2010 that Regional Strategies were to be abolished, as follows:

> "CONCLUSION
>
> 11.1 On the basis of housing requirements in the South East Plan there is a short-term requirement for housing land which the application could help to meet, and a longer-term need to plan for a major housing allocation, with this identified as the preferred site. It had therefore been considered that these factors amounted to a 'compelling justification' which should result in the applications being considered acceptable in principle, in accordance with Local Plan policy H.2. However, since that original conclusion the Secretary of State for Communities letter [of 27 May 2010] has been received and is a material consideration. This allows local planning authorities to reach decisions on housing land supply 'without the framework of regional numbers and plans'…
>
> RECOMMENDATIONS
>
> Recommendation A – 09/02412/OUT
>
> That had an appeal for non-determination not been lodged by Cala Homes (South) Ltd on 19th April 2010 then Winchester City Council would have REFUSED Planning Permission for the development of 84 ha at Barton Farm, Winchester for the following reasons:

1. 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. …"

13. On 6 July 2010, the Secretary of State made a statement in Parliament in these terms:

> "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.
>
> Regional Strategies added unnecessary bureaucracy to the planning system. They were a failure. They were expensive and time-consuming. They alienated people, pitting them against development instead of encouraging people to build in their local area.
>
> 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.
>
> Imposed central targets will be replaced with powerful incentives so that people see the benefits of building. The coalition agreement makes a clear commitment to providing local authorities with real incentives to build new homes. I can confirm that this will ensure that those local authorities which take action now to consent and support the construction of new homes will receive direct and substantial benefit from their actions. Because we are committed to housing growth, introducing these incentives will be a priority and we aim to do so early in the spending review period. We will consult on the detail of this later this year. These incentives will encourage local authorities and communities to increase their aspirations for housing and economic growth, and to deliver sustainable development in a way that allows them to control the way in which their villages, towns and cities change. Our revisions to the planning system will also support renewable energy and a low carbon economy.
>
> The abolition of Regional Strategies will provide a clear signal of the importance attached to the development and application of local spatial plans, in the form of Local Development

> Framework Core Strategies and other Development Plan Documents. Future reform in this area will make it easier for local councils, working with their communities, to agree and amend local plans in a way that maximises the involvement of neighbourhoods.
>
> 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 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. It will be firmly rooted in the local community. And will encourage the investment, economic growth and housing that Britain needs.
>
> We will be providing advice for local planning authorities today and a copy has been placed in the house library."

This is the decision to revoke Regional Strategies (including the South East Plan) which is under challenge in these proceedings.

14. On the same day the Department for Communities and Local Government issued written advice for local planning authorities about the impact of the revocation of Regional Strategies. The advice included the following:

> "The Secretary of State for Communities and Local Government confirmed today that Regional Strategies will be revoked (see the attached copy of the Parliamentary Written Statement). 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. New ways for local authorities to address strategic planning and infrastructure issues based on cooperation will be introduced. 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."

15. The Claimant's concern is that if the Secretary of State's revocation of the Regional Strategy contained in the South East Plan is effective, that will materially affect its case on appeal that planning permission should be granted for its development of the site. 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 QC 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 LDEDCA 2009, 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. The Claimant fears that if the housing policies in the South East Plan are to be treated as having no weight, its planning applications and appeal may well fail, since absent the imperative to build a large number of additional dwellings in the non-PUSH area of Winchester to be derived from the South East Plan, there will be no "compelling justification" for the site to be released for residential development as required by policy MDA.2 in the Local Plan.

16. The Claimant issued its claim for judicial review on 9 August 2010, and it has come before the court on an expedited basis. The Claimant relies on two grounds of challenge to the Secretary of State's decision of 6 July 2010. First, it submits that the

Secretary of State's attempt to use his power under section 79(6) of the LDEDCA 2009 to revoke all seven of the Regional Strategies in place at that date (including the South East Plan) as a first step leading to the abolition of Regional Strategies, involves using that power for an improper purpose by undermining the policy of the LDEDCA 2009 that there should – ordinarily at least – be Regional Strategies in place for each region. The Claimant submits that the power for the Secretary of State to revoke Regional Strategies given by section 79(6) was not intended by Parliament to be used to effect the abrogation of the Regional Strategy tier of planning guidance by executive action, which is what the Secretary of State has sought to achieve by his decision. In that regard, the Claimant seeks to pray in aid the well-known principle in *Padfield v Minister of Agriculture, Fisheries and Foods* [1968] AC 997 (see, in particular, 1030 B-D per Lord Reid).

17. Secondly, in the alternative, the Claimant submits that the Secretary of State's decision to revoke the South East Plan was taken in breach of obligations on the Secretary of State contained in the Environmental Assessment of Plans and Programmes Regulations 2004 ("the 2004 Regulations"), which give effect in domestic law to Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (known as the Strategic Environmental Assessment Directive – "the SEA Directive"). In particular, the Claimant submits that before introducing his decision to revoke the South East Plan, the Secretary of State should have reviewed (as required by Regulation 9 of the 2009 Regulations) whether that change in the planning regime was likely to have significant environmental effects and, if it was, should have conducted a detailed environmental assessment before introducing the change.

The legislative framework relevant to the first ground of claim

18. The co-ordination of large-scale planning considerations with local plans setting out the policies of local planning authorities has been a long-standing issue in the planning system. Views differ as to the appropriate level at which planning policies should be set and by whom they should be drawn up and it is no part of the function of this court to express views on such matters so far as may concern the best way to achieve such co-ordination. The role of the court is confined to judging the lawfulness of the action taken by the Secretary of State.

19. The development of the planning system over the last forty years or so in this regard may be briefly summarised as follows. Outside metropolitan areas, the Town and Country Planning Act 1971 provided for two tiers of plans setting out the policies to be given effect (subject to countervailing material considerations) in decisions on applications for planning permission, namely structure plans (setting out strategic policies at a sub-regional level) and local plans. That two-tier system was retained by the Town and Country Planning Act 1990. In addition to these plans, the relevant Secretary of State would also issue statements of national policy. The PCPA 2004 replaced structure plans with a different intermediate level of plan lying between national policies and local plans (now contained in what are referred to as local development documents), in the form of Regional Spatial Strategies.

The PCPA 2004

20. Section 1(1) of the PCPA 2004 provided in relevant part as follows:

“1. **Regional Spatial Strategy**

(1) For each region there is to be a regional spatial strategy (in this Part referred to as the “RSS”).

(2) The RSS must set out the Secretary of State’s policies (however expressed) in relation to the development and use of land within the region.

(3) In subsection (2) the references to a region include references to any area within a region which includes the area or part of the area of more than one local planning authority.

(4) If to any extent a policy set out in the RSS conflicts with any other statement or information in the RSS the conflict must be resolved in favour of the policy.

(5) With effect from the appointed day the RSS for a region is so much of the regional planning guidance relating to the region as the Secretary of State prescribes.

(6) The appointed day is the day appointed for the commencement of this section.”

21. In this way, section 1(5) (read with the definition of “regional planning guidance” in section 12(3)) provided for a large volume of already existing planning guidance issued by the Secretary of State in relation to the regions to be converted into Regional Spatial Strategies. That conversion took effect on 28 September 2004.

22. Section 2 provided for the creation of regional planning bodies (“RPBs”). By section 3, their functions included keeping the Regional Spatial Strategy for their region under review.

23. Section 5 is entitled “RSS: revision” and appears in a grouping of sections headed “RSS revision”. By section 5, an RPB was required to prepare a draft revision of the Regional Spatial Strategy when it appeared to it necessary or expedient to do so and in certain other circumstances, including if directed to do so by the Secretary of State under section 10(1). Any draft revision of the Regional Spatial Strategy was to be provided to the Secretary of State who, under section 7, could arrange for an examination in public to be held in relation to the draft.

24. Section 9 made provision for the Secretary of State to consider representations on any draft Regional Spatial Strategy and any report of a person holding an examination in public. If, having done so, the Secretary of State proposed to make changes to the draft, he was required to publish his proposed changes and to consider representations made in relation to those changes.

25. Section 10 appeared in the same grouping of sections headed "RSS revision". It provided:

> "**10. Secretary of State: additional powers**
>
> (1) If the Secretary of State thinks it is necessary or expedient to do so he may direct an RPB to prepare a draft revision of the RSS.
>
> (2) Such a direction may require the RPB to prepare the draft revision –
>
> (a) in relation to such aspects of the RSS as are specified;
>
> (b) in accordance with such timetable as is specified.
>
> (3) The Secretary of State may prepare a draft revision of the RSS if the RPB fails to comply with –
>
> (a) a direction under subsection (1),
>
> (b) section 5(1)(b), or
>
> (c) regulations under section 5(7) or 11.
>
> (4) If the Secretary of State prepares a draft revision under subsection (3) –
>
> (a) section 7 applies as it does if the Secretary of State receives a draft revision from the RPB, and
>
> (b) sections 8 and 9 apply.
>
> (5) If the Secretary of State thinks it necessary or expedient to do so he may at any time revoke –
>
> (a) an RSS;
>
> (b) such parts of an RSS as he thinks appropriate.
>
> (6) The Secretary of State may by regulations make provision as to the procedure to be followed for the purposes of subsection (3).
>
> (7) Subsection (8) applies if –
>
> (a) any step has been taken in connection with the preparation of any part of regional planning guidance, and
>
> (b) the Secretary of State thinks that the step corresponds to a step which must be taken under this

Part in connection with the preparation and publication of a revision of the RSS.

(8) The Secretary of State may by order provide for the part of the regional planning guidance to have effect as a revision of the RSS."

Section 10(5) is the provision which is the immediate predecessor of section 79(6) of the LDEDCA 2009, which is central to the arguments on the first ground of challenge in the present case.

26. Section 11 of the PCPA 2004 made provision for the Secretary of State to make regulations in connection with the exercise by any person of functions under Part 1 of the Act (entitled "Regional Functions"). Section 12 set out certain supplementary provisions.

27. Part 2 of the PCPA 2004 is entitled "Local Development". It includes provision at section 15 for a local planning authority to prepare and maintain a local development scheme, to include "local development documents". By section 17, local development documents are required to set out local planning authorities' policies relating to the development and use of land in their area.

28. Section 19(2) provided in relevant part as follows:

"**19. Preparation of local development documents…**

(2) In preparing a local development document the local planning authority must have regard to –

(a) national policies and advice contained in guidance issued by the Secretary of State;

(b) the RSS for the region in which the area of the authority is situated, if the area is outside Greater London; …

(d) the RSS for any region which adjoins the area of the authority; …"

29. Under section 21, the Secretary of State is given powers of intervention if he considers any local development document to be unsatisfactory. Section 24 provided in relevant part as follows:

"**24. Conformity with regional strategy**

(1) The local development documents must be in general conformity with -

(a) the RSS (if the area of the local planning authority is in a region other than London); …

(2) A local planning authority whose area is in a region other than London –

(a) must request the opinion in writing of the RPB as to the general conformity of a development plan document with the RSS;

(b) may request the opinion in writing of the RPB as to the general conformity of any other local development document with the RSS. …

(6) If in the opinion of the RPB a document is not in general conformity with the RSS the RPB must be taken to have made representations seeking a change to the document. …"

30. Section 27 makes provision to empower the Secretary of State to prepare or revise local development documents.

31. Part 3 of the PCPA 2004 is headed "Development". Section 38 in that Part provided, so far as relevant, as follows:

"**38. Development plan**

…

(3) For the purposes of any other area in England than Greater London the development plan is -

(a) the regional spatial strategy for the region in which the area is situated, and

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area. …

(6) 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. …"

32. By virtue of section 70(2) of the Town and Country Planning Act 1990, a local planning authority to whom an application for planning permission is made is required to have regard to the provisions of the development plan when dealing with such application. The operation of that provision means that section 38(6) has application in relation to decisions on applications for planning permission.

The LDEDCA 2009

33. Part 5 of the LDEDCA 2009, entitled “Regional Strategy”, came into effect on 1 April 2010. It repeals and replaces sections 1 to 12 in Part 1 of the PCPA 2004 (“Regional Functions”). Section 70 of the 2009 Act provides, so far as relevant, as follows:

> “**70. Regional strategy**
>
> (1) There is to be a regional strategy for each region other than London.
>
> (2) The regional strategy for a region is to set out –
>
> (a) policies in relation to sustainable economic growth in the region, and
>
> (b) policies in relation to the development and use of land in the region. …
>
> (6) On the day on which this section comes into force the regional strategy for a region is to consist of –
>
> (a) the regional spatial strategy for the region subsisting immediately before that day, and
>
> (b) the regional economic strategy for the region subsisting immediately before that day. …”

34. Section 71 provides for Leaders’ Boards for each region to be established which, by virtue of section 72, form part of the “responsible regional authorities” for the region.

35. Section 73(1) provides:

> “**73. Sustainable development**
>
> (1) The responsible regional authorities and the Secretary of State must exercise their functions under this Part in relation to the regional strategy for a region with the objective of contributing to the achievement of sustainable development. …”

36. Sections 74 to 80 form a grouping of sections under the heading, “Revisions of Regional Strategy”. Section 74 provides in relevant part as follows:

> “**74. Review and revision by responsible regional authorities**
>
> (1) The responsible regional authorities must keep the regional strategy for their region under review.

(2) The responsible regional authorities may prepare a draft revision of the regional strategy for their region when it appears to them necessary or expedient to do so. …

(4) The responsible regional authorities must prepare a draft revision of the regional strategy for their region -

(a) at such time as may be specified in regulations made by the Secretary of State, or

(b) when directed to do so by the Secretary of State. … ”

37. Section 75 provides in relevant part as follows:

"**75. Community involvement**

(1) For the purposes of the exercise of their functions in relation to the revision of the regional strategy for their region, the responsible regional authorities must prepare and publish a statement of their policies as to the involvement of persons who appear to them to have an interest in the exercise of those functions. …

(3) The responsible regional authorities must comply with the statement or revised statement in the exercise of the functions referred to in subsection (1)."

38. Section 76 makes provision for an examination in public to be held in relation to revisions of any regional strategy, if thought appropriate. Section 77 imposes obligations on the responsible regional authorities to have regard to certain matters "in preparing a draft revision of the regional strategy for their region".

39. Section 78(1) requires the responsible regional authorities to publish any draft revision of a regional strategy and to submit it to the Secretary of State for approval. Section 78(2) provides that the Secretary of State may approve the draft or modify it and approve it as modified. Before doing this, section 78(3) states that: "The Secretary of State must consult such persons (if any) as the Secretary of State considers appropriate…" and section 78(4) states that, in deciding whether to make any modifications to the draft, the Secretary of State must have regard to certain matters, including representations made to him.

40. Section 79 is the provision which is central to the Claimant's first ground of challenge. It is headed "Reserve powers of Secretary of State". It provides in relevant part as follows:

"**79. Reserve powers of Secretary of State**

> (1) The Secretary of State may revise a regional strategy if the responsible regional authorities fail to comply with -
>
> (a) the requirement under section 74(4)(a), or
>
> (b) a direction under section 74(4)(b). …
>
> (5) The Secretary of State must publish a strategy as revised under subsection (1).
>
> (6) If the Secretary of State thinks it necessary or expedient to do so the Secretary of State may at any time revoke all or any part of a regional strategy."

41. Section 80 is headed "Revision: supplementary" and makes provision for the Secretary of State to make regulations or give directions as to the procedure to be followed in relation to revision of a regional strategy.

42. Section 81 provides in relevant part as follows:

> "**81. Implementation**
>
> (1) The responsible regional authorities must produce and publish, and from time to time revise, a plan for implementing the regional strategy for their region.
>
> (2) The responsible regional authorities must for each period of twelve months prepare a report on the implementation of the regional strategy for their region. …"

43. The LDEDCA 2009 also made certain consequential amendments to provisions in the PCPA 2004 to replace references to Regional Spatial Strategies (e.g. in section 19(2)(b) and section 38(3) of the 2004 Act) with references to Regional Strategies.

44. Mr Village for the Claimant sought to rely on the Explanatory Notes for section 70 and section 79 of the LDEDCA 2009 as an aid to the interpretation of those provisions. The Explanatory Notes included the following statements at paragraphs 156 and 169 regarding section 70 and section 79 respectively:

> "Section 70 – Regional Strategy
>
> 156. This section provides for a regional strategy in each region other than London. A regional strategy must set out policies in relation to sustainable economic growth, development and the use of land within the region and can include different policies for different areas within the region. …
>
> Section 79 – Reserve powers of Secretary of State

> 169. This section sets out the Secretary of State's reserve power to revise a regional strategy in whole or in part, where the responsible regional authorities fail to do so at the time specified in regulations or directions. It also sets out the Secretary of State's reserve power to revoke a regional strategy where the Secretary of State thinks it necessary or expedient to do so."

45. In my view, these parts of the Explanatory Notes simply paraphrase the effect of sections 70 and 79 in a summary way. I did not find them helpful as an aid to resolving the issue of interpretation of the 2009 Act to which the Claimant's first ground of claim gives rise.

The first ground of claim: Padfield

46. There was no significant dispute between the parties regarding the relevant principle of law to be derived from the decision of the House of Lords in *Padfield*. The case concerned the exercise of a statutory discretion by the relevant Secretary of State as to whether to appoint a committee of investigation and to refer to it a complaint regarding the operation of a milk marketing scheme. The Secretary of State refused to appoint such a committee. The House of Lords held that he acted unlawfully in exercising his discretion in that way, since by doing so he frustrated the policy of the relevant statute which contained that discretionary power. The classic statement of the relevant principle is by Lord Reid at [1968] AC 997, 1030B-D:

> "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 1032G-1033A per Lord Reid and 1060G per Lord Upjohn).

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.

48. Mr Village drew my attention to and sought to rely upon other cases which illustrate the application of the *Padfield* doctrine in certain other statutory contexts: *R v Braintree District Council, ex p. Halls* (2000) 32 HLR 770; *Laker Airways Limited v Department of Trade* [1977] QB 643, especially at 698 and 704; and, in particular, *Congreve v Home Office* [1976] 1QB 629, especially at 649F, 651B-D, 651H, 655C-D and 659B-C. In my judgment, beyond providing further illustrations of the *Padfield* principle in operation, the reasoning in these authorities depended (unsurprisingly) on the detailed statutory and legal context applicable in each of them respectively and they do not assist in resolution of the issue which arises in the present case.

49. 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 LDEDCA 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 any Regional Strategy. Since 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.

50. Mr Eadie submits that since 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.

51. Mr Village for the Claimant, on the other hand, submits 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.

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

    i) The LDEDCA 2009 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 re-named as Regional Strategies. I refer to some particular features of the regime set out in Part 5 of the 2009 Act below, but 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 grant the Secretary of State power 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. A contrast may be drawn in that regard between the location of section 79(6) in Part 5 of the 2009 Act and the prominence given to section 70(1) as the leading provision in Part 5, which sets the scene for the provisions which follow in that Part and is the basis for the whole elaborate framework which that Part puts in place. A number of subsidiary points may be made in support of this fundamental point, as set out below;

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;

iii) Section 79(6) appears in the Part of the 2009 Act entitled "Regional Strategy"; in a grouping of sections headed "Revisions of regional strategy"; and is followed in the statutory scheme by a provision (section 80) headed "Revision: supplementary" (which suggests that the provisions which have preceded it in the statute have all been concerned with the revision of Regional Strategies). These features of the statutory scheme all indicate that section 79(6) is a provision standing within a regime aimed at regulating the revision of

Regional Strategies and directed at promoting the governing object of Part 5 as set out in particular in section 70(1) (to ensure that a Regional Strategy appropriate to the region in question should be maintained in place, subject to revision over time). There is no clear or sufficient indication that section 79(6) is intended by Parliament to stand outside the regime for revision of Regional Strategies, nor that it is intended to create a far more radical power to allow for the effective abrogation of that regime. This point is reinforced by consideration of the position of section 10(5) of the PCPA 2004 (the predecessor provision of section 79(6) of the 2009 Act), where it is followed by further sub-sections ((6), (7) and (8)) all dealing with modes of effecting revisions of Regional Strategies. Since section 79(6) is in identical terms to section 10(5) of the 2004 Act, there is a presumption that Parliament did not intend to change the effect of the provision.

iv) Section 79 is headed "Reserve powers of Secretary of State". It replaced section 10 of the PCPA 2004, which was headed "Secretary of State: additional powers". In my view, those headings tend to indicate that the powers contained in the provisions in question are subordinate to the general scheme of the relevant parts of those Acts dealing with regional planning guidance. In neither statute is the power now contained in section 79(6) of the 2009 Act set out under a heading that clearly announces that it is to take effect as a wholly distinct and fundamental power to abrogate the Part of the legislation in which it appears;

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 36(3) and (6) of the PCPA 2004 (as amended by the 2009 Act), 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 (including provisions which impose explicit duties on various persons to do things) pre-suppose that there is to be a Regional Strategy in place (generally referred to as "*the* regional strategy …" [my emphasis]): see in particular section 73(1), section 74(1), section 75(1),

section 76(1) and section 81(1). I consider that section 81(1) is a particularly strong indicator in that regard, because it imposes an obligation on the responsible regional authorities to produce and publish a plan for implementing the Regional Strategy for their region. It is theoretically possible to read these various provisions as implicitly qualified, when they refer to "the regional strategy", by the words "(if there is one)", and in some circumstances it will be necessary to read them in this way where the Secretary of State lawfully exercises his power under section 79(6) to revoke a Regional Strategy. However, since there is nothing to spell this out explicitly, the drafting of these provisions gives the strong impression that one is usually to expect there to be a Regional Strategy in place. The provisions thus 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).

53. I therefore consider that the Claimant's first ground of claim has been made out and that the Secretary of State's decision of 6 July 2010 falls to be quashed on that ground.

Second ground of claim: absence of environmental impact assessment

54. Since the Claimant has succeeded on its first ground of claim, the second ground of claim does not arise, since there has been no effective change in any planning guidance brought about by the Secretary of State's decision. However, the Claimant's second ground of claim was fully argued on both sides, and it is appropriate to deal with it here.

55. There is no suggestion that the 2004 Regulations fail properly to implement the SEA Directive, so it is appropriate to focus on the Regulations. The Regulations are drafted using terms drawn from the SEA Directive and to give effect to that Directive, so they are to be interpreted conformably with the Directive in the usual way.

56. Regulation 2(1), so far as is material, defines "plans and programmes" to mean:

> "plans and programmes … as well as any modifications to them, which – (a) are subject to preparation or adoption by an authority at national, regional or local level …" (drawing on the definition in these terms provided by Article 2(a) of the SEA Directive)."

57. The SEA Directive, and hence the 2004 Regulations, are to be interpreted in a purposive manner so as to promote the intended objects of the Directive (in particular, according to recital (4) of the Directive, to provide for environmental assessment as "an important tool for integrating environmental considerations into the preparation and adoption of certain plans and programmes which are likely to have significant effects on the environment in the Members States, because it ensures that such effects of implementing plans and programmes are taken into account during their preparation and before their adoption"). The adoption of a generous purposive approach to the application of the SEA Directive (and hence of the 2004 Regulations)

is supported by analogy from the judgment of the ECJ concerning interpretation of the Environmental Impact Assessment Directive, in Case C-72/95 *Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*, judgment of 24 October 1996, at para. 31.

58. Regulation 5(4)(b) provides that where a plan or programme is to be adopted which "sets the framework for future development consent of projects …" the responsible authority shall ensure that an environmental assessment is carried out in accordance with Part 3 of the Regulations during the preparation of the plan or programme and before its adoption. The responsible authority for the purposes of the present argument is the Secretary of State. Regulation 9(1)(a) provides that the responsible authority shall determine whether or not a plan, programme or modification of a description referred to in regulation 5(4)(b) "is likely to have significant environmental effects" (this is sometimes referred to as an obligation to undertake a screening assessment).

59. Regulation 8(1) provides, so far as relevant, as follows:

> "A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted … (b) … before the determination has been made under regulation 9(1)."

60. It is common ground that no screening assessment or more detailed strategic environmental assessment under Part 3 of the 2004 Regulations has been carried out in relation to the decision of the Secretary of State of 6 July 2010 to revoke the South East Plan. It is also common ground that a plan, programme or modification the adoption of which may have significant environmental effects should be the subject of a screening assessment, even if it is thought on the face of it that the environmental effects may be beneficial: see footnote to Annex 1(f) to the SEA Directive and, by analogy with the Environmental Impact Directive, *R (Barker) v London Borough of Bromley* [2001] EWCA Civ 1766 at para. [65]. It may be that on fuller and closer inspection the beneficial effects may be found not to exist or that the beneficial effects in relation to one aspect of a policy may imply that other, detrimental effects will occur in relation to other aspects of the policy or other locations. (It may be noted in this case that the Secretary of State considers that revocation of the Regional Strategies, leaving planning controls to be determined primarily at local level, may promote more extensive house-building overall).

61. In my judgment, the "development plan" as defined in section 38(3) of the PCPA 2004 (as amended) is a relevant plan for the purposes of the 2004 Regulations. It is that "development plan" which is the principal (composite) instrument to be applied to determine (subject only to countervailing material considerations) the outcome of applications for planning permission, and so falls within regulation 5(4)(b). The "development plan" defined in section 38(3) includes as a component "the regional strategy for the region in which the area is situated", alongside other development plan documents adopted or approved in relation to that area. The Regional Strategy may play a decisive role for the outcome of any particular planning application (a point which the facts of the present case go some way towards illustrating – the revocation of the South East Plan is likely to have an immediate impact upon

determination of planning applications: see paragraphs [11] and [12] above). Any significant change in the content of a Regional Strategy capable of having a material impact upon planning decisions may therefore qualify as a modification of the relevant "development plan" applicable in relation to a particular area. Revocation of a Regional Strategy will amount to such a significant change, and so will qualify as a modification of the relevant "development plan" which leaves only the relevant "development plan documents" referred to in section 38(3)(b) of the PCPA 2004 in place to provide the substantive content of the "development plan".

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 the Claimant, 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 a 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.

64. On a straightforward reading of the 2004 Regulations in the present context, therefore, I consider that the Secretary of State acted unlawfully by purporting to revoke the South East Plan Regional Strategy without first at least conducting a screening assessment under Regulation 9.

65. Against this, Mr Eadie sought to argue that no assessment is required under the 2004 Regulations before the revocation of a Regional Strategy takes effect, because it will leave in place local "development plan documents" which will themselves have been the subject of relevant environmental assessment. I do not accept this argument. In my judgment, it overlooks the immediate practical impact that revocation of a Regional Strategy may have in the planning process arising out of the interaction which is usually to be expected between a regional strategy and a local development plan (see section 19(2) and section 24 of the PCPA 2004, and especially since under section 38(3) of the 2004 Act they have to be read together) and of which a practical illustration is afforded by the facts of the present case (see paragraphs [11] and [12] above). It also overlooks the fact that the environmental assessment for a local plan may have been conducted some years before the change effected by the revocation of the Regional Strategy and may, indeed, have been conducted having regard to the interaction between the local plan and the relevant Regional Strategy in place or in draft at the time when the local plan was adopted.

66. In further support of his argument, Mr Eadie argued (in a note submitted to the court, with my permission, after the close of the hearing) that “there is no way in which [a strategic environmental assessment] could be done on the revocation of a [Regional Strategy]”. I have difficulty in accepting this. I do not see why, in a case where the Secretary of State can lawfully exercise his power of revocation contained in section 79(6) of the 2009 Act, he should not first give notice that he is minded to do that and then arrange for such environmental assessment as might be required in relation to that proposed change in the planning regime to be carried out. If, as I am told, environmental assessments were carried out in relation to the adoption of the existing Regional Strategies, I do not see that there is any insuperable difficulty in conducting such assessments as may be appropriate if they are to be revoked. Certainly, I am far from being persuaded that there is any difficulty involved of a character that could affect the proper application of the 2004 Regulations and the SEA Directive in accordance with their terms and as interpreted above.

67. For these reasons, had it been necessary to reach this stage of the analysis, I would have found that the Claimant’s second ground of challenge to the decision of 6 July 2010 is also well-founded.