Neutral Citation Number: [2010] EWCA Civ 897

Case No: C1/2010/0044

**IN THE HIGH COURT OF JUSTICE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM HIGH COURT, QUEENS BENCH DIVISION,**
**ADMINISTRATIVE COURT**
**MR JUSTICE PITCHFORD**
**CO/5036/2009**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2010

**Before :**

**LADY JUSTICE ARDEN**
**LORD JUSTICE CARNWATH**
and
**LORD JUSTICE STANLEY BURNTON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **BARRATT DEVELOPMENTS PLC** | **Appellant** |
| **- and -** | |
| **THE CITY OF WAKEFIELD METROPOLITAN DISTRICT COUNCIL & ANR** | **Respondents** |

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Peter Village QC & David Loveday (instructed by Macfarlanes Solicitors) for the Appellant
**Vincent Fraser QC** (instructed by **The City of Wakefield Metropolitan District Council**) for the Respondents

Hearing date : 6th July, 2010

- - - - - - - - - - - - - - - - - - - - -

Judgment
As Approved by the Court

**LORD JUSTICE CARNWATH :**

**Background**

1. The claimants ("Barratt") are a well-known house-building company. In these proceedings, they challenge policy CS6 in the Council's "Core Strategy", which lays down requirements for "affordable housing". Pitchford J dismissed their application for judicial review. He gave permission to appeal on the basis that the case raised an issue of general importance.

2. The material parts of the Core Strategy, as amended on the recommendation of the inspector, are as follows:

> "b. All proposals for additional housing, including those for a mix of uses, above identified size thresholds must make provision for sufficient affordable housing to meet identified needs. Unless otherwise agreed with the Council, affordable dwellings should be provided on the application site and 30% of new dwellings on developments across the district which meet the following thresholds should be dwellings which can be defined as affordable:
>
> > i. where the proposal is for 15 or more dwellings, or is on a site of 0.5 hectares or more in area, and is within an urban area or local service centre as defined in the settlement hierarchy;
> >
> > ii. where the proposal is for 6 or more dwellings, or is on a site of 0.2 hectares or more, and is within a village as defined in the settlement hierarchy.
>
> ...
>
> The actual amount of affordable housing to be provided is a matter for negotiation at the time of a planning application, having regard to any abnormal costs, economic viability and other requirements associated with the development. All but the smallest sites should contribute to the provision of affordable housing."

3. Barratt submit, in summary, that the target of 30% is unsupported by adequate economic evidence, that the defect is not cured by the provision for negotiations on individual sites, and that the policy is in other respects unclear or unsupported.

4. At the heart of the present dispute is the problem of reconciling the authorities' desire to maximise the provision of affordable housing, with the developers' need for a reasonable return to make development viable. Wakefield's strategy was originally devised at a time when the market was buoyant and expected to remain so. By the time of the inspector's consideration in late 2008, market conditions had changed dramatically. The judge explained the dilemma:

> "If the target for affordable housing provided in the Core Strategy is set unrealistically high, developers will be discouraged from bringing forward proposals and social housing needs will not be adequately addressed. The strategy depends upon profitable development, and profitable development depends in large measure upon buoyant land values. If prospective development land is unprofitable because it is 'blighted' by a social housing burden it is less likely that the land will be sold for development and the strategy may, in consequence, fail to bear its intended fruit. If, on the other hand, the affordable housing target is set too low to address need, the Council will fail to deliver national policy. It was Wakefield's view that it had not been sufficiently aggressive in pursuit of affordable housing provision in its District during the previous five years under its existing UDP. At the time when its Core Strategy (requiring at least 30% affordable housing with an 80/20 split) was in preparation market conditions were favourable. By the time the policy was submitted to the Inspector the market had slumped and no new housing was being constructed." (para 16)

**Statutory and policy framework**

5. The Planning and Compulsory Purchase Act 2004, supplemented by the Town and Country Planning (Local Development)(England) Regulations 2004, provides the statutory framework for the preparation of the Local Development Framework ("LDF"), of which the Core Strategy forms part. These documents form part of the "development plan" for the area, in accordance with which development applications must be decided unless material considerations indicate otherwise (s 38(3)(6)).

6. The judge set out in some detail the procedural requirements for preparation of the Core Strategy. I need only pick out the key points:

   i) The authority must have regard among other things to:

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

      b) the Regional Spatial Strategy ("RSS") for the region in which the authority is situated (s 19(2)).

   ii) The Core Strategy must be in "general conformity with" the Regional Spatial Strategy (s 24 (1)).

   iii) It must contain a reasoned justification of the policies (reg 13(1)).

   iv) Before it is adopted it must be submitted for independent examination by a planning inspector on behalf of the Secretary of State, to determine (inter alia) whether it satisfies these requirements and "whether it is sound " (s 20(5)).

v) Any person who makes representations seeking to change the plan must be given an opportunity to appear before and be heard by the inspector (s 20(6)).

vi) The inspector must make recommendations and give reasons for those recommendations (s 20(7)).

vii) The authority can only adopt the strategy, whether as originally prepared or with modifications, in accordance with recommendations of the inspector (s 23).

7. It is to be noted that the procedure does not include a formal planning inquiry in the traditional sense. Collins J described what I understand to be the ordinary format for such an open hearing:

> "... this is not a traditional planning inquiry. It is, as its title suggests, an examination. Inspectors are encouraged to make it relatively informal, and it can be, and frequently is, I understand, carried out by means of discussion. Although formal evidence can no doubt be given and tested if the Inspector decides that that is essential for the purpose of reaching the necessary result, that would be rare, and generally speaking it is dealt with on the basis of written documents being presented, and then discussion between the interested parties and the Inspector based upon those written documents." (*Persimmon Homes (North East) Ltd v Blyth Valley BC* [2008] EWHC 1258 (Admin) para 49)

8. Under the heading "National Policy Guidance" the judge also quoted at length from two relevant national Planning Policy Statements, PPS 3 (issued in November 2006) and PPS 12 (issued in June 2008). It is unnecessary to repeat the detail. I note that paragraph 29 of PPS 3 advises that authorities should set "an overall (ie plan-wide) target for the amount of affordable housing to be provided", and should set "minimum site size thresholds" for the schemes in which such provision is to be made.

9. PPS 12, under the heading "Justification of Core Strategies", advises:

> "4.36 Core strategies must be justifiable: they must be:
>
> - founded on a robust and credible evidence base; and
>
> - the most appropriate strategy when considered against the reasonable alternatives."

By way of explanation of the latter point, the statement adds:

> **"Alternatives**
>
> 4.38 The ability to demonstrate that the plan is the most appropriate when considered against reasonable alternatives delivers confidence in the strategy. It requires the local planning authority to seek out and evaluate reasonable alternatives promoted by themselves and others to ensure

> that they bring forward those alternatives which they consider the LPA should evaluate as part of the plan-making process..."

10. Another section deals with "Effectiveness":

> "4.44 Core strategies must be effective: this means they must be:
>
> - deliverable;
>
> - flexible; and
>
> - able to be monitored."

Each of these concepts is further explained in the succeeding paragraphs.

11. I would emphasise that this guidance, useful though it may be, is advisory only. Generally it appears to indicate the Department's view of what is required to make a strategy "sound", as required by the statute. Authorities and inspectors must have regard to it, but it is not prescriptive. Ultimately it is they, not the Department, who are the judges of "soundness". Provided that they reach a conclusion which is not "irrational" (meaning "perverse"), their decision cannot be questioned in the courts. The mere fact that they may not have followed the policy guidance in every respect does not make the conclusion unlawful.

12. As already noted, there is by contrast an express statutory requirement that the Core Strategy should be in "general conformity" with the RSS. In this case, the relevant RSS was contained in Policy H4 of the Yorkshire and Humberside Plan (Regional Spatial Strategy to 2026), May 2008, which provided as follows:

> "A The Region needs to increase its provision of affordable housing. Plans, strategies, programmes and investment decisions should ensure the provision of affordable housing to address the needs of local communities.
>
> B LDFs should set targets for the amount of affordable housing to be provided. Provisional estimates of the proportion of new housing that may need to be affordable are as follows:
>
> • Over 40% in North Yorkshire districts and the East Riding of Yorkshire
>
> • 30-40% in Kirklees, Leeds, Wakefield and Sheffield
>
> • Up to 30% in other parts of South and West Yorkshire, Hull, North Lincolnshire and North East Lincolnshire."

13. It is not part of Barratt's case that the Core Strategy was otherwise than "in general conformity" with the RSS. On the other hand, it is to be noted that the requirement for

local development frameworks to set "targets" for affordable housing, and the provisional estimate of 30-40% for Wakefield, were necessary parts of the background to the preparation of the Strategy and its consideration by the inspector.

14. Finally under this heading I should mention the powers of the court. Section 113 of the 2004 Act provides for a form of statutory judicial review, familiar in the context of planning decisions. A "person aggrieved" may apply within six weeks to the High Court on the grounds that the relevant document is "not within the appropriate power", causing "substantial prejudice" to the interests of the applicant. The court's powers are discretionary. If satisfied that the grounds are made out, it may quash the relevant document, in whole or in part, or remit it to the person or body responsible for its preparation or approval. The courts have held that the statutory grounds encompass the conventional judicial review grounds of illegality, irrationality, and procedural impropriety.

**Preparation of Wakefield's Core Strategy**

15. The authority submitted its draft Core Strategy to an inspector, Mrs Bussey, on 17 January 2008. At that stage policy CS6 provided for affordable housing as follows:

> "All proposals for additional housing, including those for a mix of uses, above identified size thresholds must make provision for sufficient affordable housing to meet identified needs. At least 30% of new dwellings on developments across the district which meet the thresholds should be dwellings which can be defined as affordable, with a split of approximately 80% social rented and 20% intermediate tenure..."

16. Following an exploratory meeting with interested persons on 20 February 2008, and a pre-hearing meeting on 2 June 2008, the Inspector indicated that she was not satisfied that the Core Strategy was "sound", having regard, among other matters, to the absence of a completed Strategic Housing Market Assessment (SHMA) and the lack of "robust economic viability testing" to justify the policy. The Council was given time to supplement the evidence. The authority then instructed development consultants, DTZ, to carry out an evaluation of economic viability of the Core Strategy for affordable housing. Their work was completed in October 2008, and recorded in a report: "Wakefield Strategic Housing Market Assessment: Economic Viability Appraisal" (the "EVA").

17. The judge described the DTZ exercise:

> "DTZ set about creating models of hypothetical sites for new build development, of a sufficient size to sustain affordable homes, in five geographical areas of Wakefield District known to vary considerably in land value and profitability. Having selected the sites DTZ applied a variety of assumptions as to the size of the development, building and development costs, a variable percentage of affordable housing and a variable split between social and intermediate housing. The object was to test what revenues could be

> generated across the district when applying the common assumptions to each site. DTZ took as its starting point its experience that land was unlikely to be brought forward for development when the "internal rate of return" ('IRR') was lower than 20% for small sites (under 50 units) and 23% for larger sites (over 50 units). DTZ was therefore engaged in an exercise of discovering which categories of, and how many, sites in the District were capable of sustaining a percentage of affordable housing while at the same time providing the developer with an acceptable return on investment." (para 18)

18. DTZ concluded that, having regard to current market conditions at the baseline date (August 2008), there was little scope to deliver any development, let alone affordable housing. However, this did not mean that the requirement should be set at 0%. As they explained in the Executive Summary:

> "... over the course of the Core Strategy and the life of any affordable housing policy it is recommended to expect, having regard to the cyclical nature of the housing market, that the market conditions will vary significantly. WMDC need to ensure that any policy they put in place is flexible enough to deal with these changes in market conditions.
>
> ... Scenarios to reflect the height of the recent market in early 2007 show that 30% affordable housing could be viably delivered at 50/50 split between social rented and intermediate tenures. This is the highest level of affordable housing which has been deemed viable in all the modelling work which has been undertaken."

19. In the body of the report, having set out the results of their testing of different scenarios, they said:

> "The economic viability assessment undertaken has demonstrated that a range of between 0% and 30% affordable housing can be delivered across the district depending on market cycles/variables and affordable housing tenure splits..." (para 7.7)
>
> "The results... show that any policy put in place by WMDC for the delivery of affordable housing needs to be flexible and have built in trigger points which enable more affordable housing to be delivered as the market improves to more normal market conditions." (para 7.8)

20. A further hearing was arranged in December 2008. The EVA was made available for comment by interested parties. Wakefield also distributed a "statement of common ground" designed to elicit responses to the report.

21. A response on behalf of Barratt was submitted by their consultants, Turley Associates. This helpfully responded point by point to the items of "suggested common ground". On its face, the areas of difference appear relatively limited. One point of disagreement is in relation to item 7 "30% affordable housing requirement is appropriate", to which the response was:

> "Not agreed. First, the 30% 'requirement' should be a target. Second, the SHMA Economic Viability Appraisal demonstrates that the 30% requirement is inappropriate and is unlikely to be appropriate in the foreseeable future."

Item 12 "Approach to economic viability (ie IRR)" was said to be "agreed". Item 18 "Results of the Economic Viability Modelling Exercise" was said to be "Agreed but the results understate the real position".

22. The Inspector prepared a document "Main Matter 11" setting out a series of questions that she considered relevant. They included:

> "11.4 What evidence is there to support the 30% affordable housing provision threshold and the tenure split thresholds contained in the Policy CS6? Are these RSS and PPS 3 compliant? If not what is the local justification for deviation?
>
> ...
>
> 11.10 Should the policy be more flexible to take into account site by site viability considerations?"

23. Wakefield responded in writing:

> "The council considers that in strong market conditions the affordable housing policy is achievable. It is clear from the economic viability evidence, however, that a degree of flexibility is required within the policy to accommodate different market conditions. As these conditions are continually changing the Council does not consider that it is possible or appropriate to have varying thresholds and affordable housing proportions. Other parts of the evidence base, such as affordable housing need, indicate that the proportions should be higher than 30%, for example. However, given the need to reflect historic rates of affordable housing provision and the results of the economic viability appraisal, Policy CS6 criterion (b) should be amended such that "at least" is deleted from the start of the second sentence..."

Turley Associates also submitted a response, in which they accepted DTZ's methodology, but questioned their assumed costs for certain items, and described their appraisal as "if anything… a best case scenario", resting on "a somewhat contived set of assumptions unlikely ever to be realised in the future".

24. The reconvened meeting took place on 9 December 2008. Mr Keogh of Turley Associates attended and also took a note. From that note, as the judge observed, the inspector "took the lead role" in seeking from the parties answers to the questions in her questionnaire. The note also records that Mr Roebuck of DTZ explained their methodology and findings, and was questioned by the inspector. There is no record of any public statement of significant disagreement on behalf of Barratt.

25. The inspector reported on 3 March 2009. On the basis of the EVA, she noted that in current market conditions housing schemes were generally unviable, but that in the market conditions prevailing when the Core Strategy was submitted, and on the assumptions adopted in one of the EVA scenarios, 30% affordable housing could be achieved "in the majority of schemes" (para 3.24-5). Although the indications were that the current recession would last "some time", she had seen "no evidence" that the housing market would not recover to the former strong conditions sometime during the plan period. As conditions were continually changing, she agreed with the Council that it was "not possible or appropriate to have varying thresholds and/or lower affordable housing targets within the Policy". She continued (para 3.3.28):

> "To provide necessary flexibility, further text should be added to the Policy that permits negotiation on a site by site basis, to take account of any abnormal costs, economic viability and other requirements associated with the development... in addition, to provide certainty, to reflect poor historic rates of affordable housing delivery and the results of the economic viability appraisals, conclude that criterion (b) of Policy CS6 should be amended by deleting the 'at least' prefix to the 30% target..."

26. She ended this part of her report:

> "To summarise, I conclude that the affordable housing policies... are generally sound. They are informed by robust and credible evidence based on methodologies that accord with national guidance prevailing at the time they were undertaken, and they have included key stakeholders in their preparation. The Policies are consistent with national and regional planning policy. Their thresholds, targets and approach represent the most appropriate and flexible policy options taking into account the evidence, provided that they are amended in the ways I recommend above." (para 3.3.30).

**The issues before the judge**

27. The judge's exposition of "the Claimant's case" runs to more than four pages of the judgment (paras 28-42). As I understand, the main points were these:

    i) The mandatory requirement in policy CS6, that "*all* proposals" on qualifying sites "*must*" make provision for sufficient affordable housing to meet identified needs, ignored the DTZ conclusion that in current market conditions 0% affordable housing was viable, and that even in the most favourable market

conditions only two thirds of the sites in the District could produce affordable housing (para 28).

ii) A target of 30% throughout the 17 year duration of the Strategy was not justified by the DTZ study. There were no "trigger points" as recommended by DTZ. It was not open to the inspector to rely on the absence of evidence to conclude that the market would recover over any particular time period, or to its previous levels.

iii) In consequence the policy did not comply with the guidance in PPS 12, in that:

a) The policy was not "justified" in that it was not founded on the EVA;

b) The EVA was not itself "robust and credible evidence" since it made unwarranted assumptions with which the Inspector failed to deal in her reasons;

c) The policy was not formulated upon a judgement which of the available alternatives was the most appropriate. No attempt was made to test DTZ's advice that triggers should be included to aid flexibility.

d) The policy was demonstrably ineffective because it could not be delivered.

iv) Reliance was placed on the judgment of Collins J in *Persimmon Homes (North East) Ltd v. Blyth Valley Borough Council* [2008] EWHC 1258 (Admin) (upheld on appeal), where a similar Core Strategy was quashed because the council had adopted a target of 30% affordable housing, without, as the judge found, giving consideration to the issue of economic viability. Collins J had made suggestions as to what the inspector could have done in the absence of adequate economic evidence:

> "He could perhaps have substituted a provision which made it clear that the appropriate percentage should be considered on each application, and that it should be as high as reasonably possible, or he could have decided to adjourn the examination to receive evidence relating to that issue and to obtain a reliable figure." (para 71)

v) The Inspector was wrong to treat the RSS as necessarily requiring a percentage for affordable housing in the range 30-40%. The RSS recognised that there would be differences in requirements within districts. She made no attempt to analyse and reflect those differences in the target.

vi) The Inspector failed to deal adequately in her reasons with the objections taken by the claimant to the assumptions made in DTZ's report and she failed to explain why she had rejected the advice to include "triggers" within policy CS6.

vii) Barratt were substantially prejudiced because the imposition of an unachievable target renders development economically unviable, and as a

result they are unable to make commercial decisions about the strategy for their land holdings in the Wakefield area.

28. The judge's "Analysis and Conclusion" runs to more than ten pages, but I hope again that a brief summary of the main points will be sufficient for present purposes. He accepted that if the policy had imposed a target of 30% across the district for the whole of the plan, it would not have reflected the EVA, and would not have been justifiable or effective (para 58). He considered that the inspector had adequately investigated the DTZ conclusions, and he noted that there was no evidence that here had been "any significant challenge" to the DTZ assessment. Given Turley Associates' interest on behalf of Barratt, he would have expected Mr Keogh to have recorded such a challenge if it had been made (para 68).

29. Since it is directly relevant to one of the grounds of appeal, I should quote in full what he said about the inspector's reasoning:

> "69. It does not seem to me that the Inspector was required, in the process which took place, to make her own judgement what should have been the assumptions which educated the EVA modelling exercise. It was not her task to adjudicate upon differences of view between developers. DTZ had recorded at paragraph 3.39 of its report that build costs at the base line in August 2008 were a calculated average taken from a national database, BCIS5, after applying a local index for the Wakefield area. Prospective reduction in build costs was a matter of opinion based on experience. The Inspector was required to make a decision whether DTZ, in performing its modelling exercise, (1) had taken proper account of available evidence and the views of stakeholders generally, and (2) if so, whether the report provided her with a robust and credible evidence base. Having led the meeting on 9 December 2008 and listened to Mr Roebuck's presentation, the Inspector was, in my judgement, entitled to conclude that DTZ had, in formulating its advice, properly considered the available evidence and, accordingly, that the EVA constituted robust and credible evidence.
>
> 70. I accept that while the process of policy making was not the same as that which attended a planning appeal, the Inspector was required to give in her report intelligible and adequate reasons for her conclusions on the 'principal important controversial issues'. The detail of contributions by developers to the modelling process would not, in my opinion, constitute principal and important controversial issues unless the Inspector had reason to think that those details were at risk of undermining the whole exercise. Since the meeting of 9 December 2008 had not revealed any such reason the Inspector was not required to deal with it. It was not, in my judgement, necessary for the Inspector to descend to the detail of recording Barratt's written comments on the DTZ's methodology and DTZ's response to those comments;

> nor was it necessary for her to explain why she accepted DTZ's opinion that the assumptions on which the modelling exercise was based were reasonable. Apart from acknowledging the report, a substantial and impressive piece of work which spoke for itself, it was enough for her to record the process by which the evidence had been gathered and considered in meetings and led her to conclude that the evidence base was sound."

30. With regard to interpretation, he accepted that policy CS6 was not happily drawn, and that if strictly interpreted as Barratt submitted it would be outside the power given by the Act. However, properly read in context he did not think the policy was objectionable in law. His overall view appears sufficiently from his concluding paragraph:

> "83. It follows that in my opinion the policy adopted by Wakefield did pay due regard to national policy and the relevant Regional Spatial Strategy. The policy as adopted set a justifiable target for sites above a workable threshold limit. It recognised, however, that the target was achievable only in certain economic conditions. Application of the policy that affordable housing should be provided where possible meant that provision must depend upon the exigencies both of the site and of market conditions at the time the application for permission was made. The policy provided the flexibility required by making the target subject to negotiation. The alternative, namely to provide stepped percentages based upon variable economic conditions, was unworkable and, in my view doomed to failure because of the difficulties of accurate prediction and definition. Having regard to the need for affordable housing this was the best the Inspector could do in unusual and unstable economic times. It is an undeniable consequence that, while national policy wished to provide both improved targets to deliver affordable housing and developers with the requisite degree of certainty for the purposes of planning development, current economic conditions have, at least for the time being, undermined policy. However, I cannot conclude that the solution adopted was irrational."

**The issues in the appeal**

31. There are four grounds of appeal, which I summarise in the order in which they were taken by Mr Village for Barratt:

    i) (Ground 2) The judge should have held that CS6 was unlawful because the 30% starting point was flawed, and could not be saved by provision for negotiation on a site by site basis (following Collins J in *Persimmon Homes* (above)).

ii) (Ground 1) The judge was wrong in interpreting the policy as not containing a mandatory requirement for affordable housing in all future residential developments above identified size thresholds.

iii) (Ground 3) The judge erred in finding that the Inspector had adequately addressed Barratt's concerns regarding the EVA.

iv) (Ground 4) The judge erred in concluding that she had given adequate consideration to approaches other than that followed in the adopted policy.

32. I say at the outset that I have found the precise legal basis of some of the submissions a little elusive. I have already commented on the limited powers of the court. Reading both the judgment, and the appellants' lengthy written submissions to this court, I have the impression that matters proceeded on the basis that it was for the judge himself to determine whether the policy met the appropriate standard under national guidance, rather than simply to review the legality of the decision reached by the council and the inspector.

33. It is incumbent on applicants in such cases to specify precisely the grounds on which they allege that the relevant decision is beyond the powers of the Act or procedurally defective. It is not suggested that the policy failed to conform to the RSS, nor, as I understand, that there was a failure to comply with any other specific substantive or procedural requirement. The only other potentially relevant statutory requirements are that the Strategy should be "sound", taking account of the relevant policy guidance, and that the inspector's recommendations should be adequately reasoned. As I have said, "soundness" was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law. Reasons are adequate if they are "intelligible" and enable the reader to understand "why the matter was decided as it was and what conclusions were reached on the 'principal controversial issues'" (see *South Bucks DC v Porter (No 2)* [2004] UKHL 33 para 36, per Lord Brown). If the only failure is one of reasoning (a procedural requirement), the applicant must show also that he was substantially prejudiced by the failure. It is by those criteria that the appellants' case must now be judged.

34. *Ground 2* In this ground Mr Village seeks to draw a parallel with the *Persimmon Homes* case. He relies in particular on the comments of Collins J, when, in holding that a target which was legally flawed could not be saved by flexibility in relation to individual applications, he said:

> "The 30 per cent has been produced on the basis of material which is not supported by the guidance and which ignores a highly material factor, namely the economic viability of the relevant target. True it is, as Mr Porten submits and as the Inspector himself pointed out, that individual applications will be dealt with on the basis of an assessment of economic viability. On the other hand, the target will be there. It is set out as what is to be achieved and it is what section 38(6) of the Act will require to be taken into account as the relevant

> planning policy. In my judgment, that, in the circumstances of this case, means that there is a legal flaw." (para 73)

35. Those comments are not reflected in the judgment of the Court of Appeal. But in any event the position in that case was quite different. As was conceded before the Court of Appeal, the council had failed entirely to satisfy the requirement of PPS 3 in respect of economic viability assessment, which was held to be a "crucial requirement of the policy" (see [2008] EWCA Civ 861, para 34, per Keene LJ). By contrast, in the present case the inspector plainly had regard to the issue of economic viability, and took steps to ensure that she was provided with adequate evidence to make a judgement on it. There is nothing in the judgment of the Court of Appeal to suggest that it would be illegal or irrational, following such an economic evaluation, to adopt a percentage target at the top of the expected range, subject to negotiation down having regard to the circumstances of individual sites.

36. *Ground 1* As I understand the appellants' case, they make two points on the wording of the policy in its final form (quoted at the beginning of this judgment):

    i) The first sentence of paragraph b states that "all proposals" above the specified threshold "must make provision for sufficient housing to meet identified needs".

    ii) The last sentence of the policy states that "all but the smallest sites should contribute to the provision of affordable housing."

    On their face, they submit, these requirements are incompatible with the evidence of the EVA which makes clear that in current conditions there is no realistic prospect of any affordable housing being provided on any sites, big or small.

37. I accept that, if the inspector had recommended the adoption of a policy which was irretrievably incompatible with her own reasoning, there would be a failure of both rationality and reasoning. However, that is not a conclusion to which the court would readily be driven, if there is a realistic alternative. Furthermore, in interpreting the policy, the court (as indeed the public) is entitled to have regard to the reasons given by her for the approving policy.

38. Adopting that approach, I see no real difficulty in this case:

    i) The first sentence of (b) can fairly (and in my view most naturally) be read as introductory only, and qualified by the more detailed provision in the second sentence. Were it otherwise, it is difficult to see what useful guidance could be extracted from the words "sufficient...to meet identified needs", given that on any view the identified needs outstrip potential supply.

    ii) Similarly, the last sentence can fairly be read as subject to what precedes it. It expresses an aspiration, but is subject to negotiations at the time of the application to establish the amount (if any) appropriate for a particular site. (With regard to a possible query mentioned in argument, I believe it now to be common ground that the sentence refers to "the smallest sites" *above*, not below, the qualifying thresholds.)

39. *Ground 3* It is said that, having regard to the inquisitorial nature of the inspector's function, the judge was wrong to conclude that she did not need to address Barratt's concerns merely because they were not voiced at the December 2008 meeting. In this context, Mr Village made some detailed criticisms of the DTZ reasoning, and the inspector's treatment of it, particularly in respect of the assumed internal rate of return underlying the most optimistic case.

40. I agree with Mr Village that the judge's approach in paragraph 69 (quoted above) is not altogether easy to follow. It was not in fact a question of "adjudicating differences of view between *developers*", as he described it. DTZ were consultants, not developers, and they had been engaged specifically to provide independent evidence to inform the inspector's judgement. It was the inspector's task to evaluate that evidence in the light of her own judgement, and of any significant criticisms from developers (such as Barratt) or other interested parties, that might emerge out of the written submissions or the meeting. In so far as the judge was suggesting otherwise, I would respectfully disagree.

41. However, I am satisfied that the inspector did not take such a restrictive view of her own role. In the passages of her report quoted above, she reviewed the EVA, and concluded that it provided "robust evidence" consistent with the PPS. If she did not make an "adjudication", it was because she understood those who attended to be in "broad agreement" with the DTZ approach. I agree with Mr Village that, having regard to an inspector's "inquisitorial" role, it might not always be sufficient simply to rest on the lack of overt criticism from those who happen to attend such a meeting. But in this case those who attended the meeting represented a considerable body of experience and expertise, on which she was clearly entitled to rely, at least in so far as there was apparent consensus.

42. The real issue, under this ground, is whether she was reasonably entitled to find that there was such "broad agreement", or whether as Mr Village submits, she should have understood that there were significant areas of dispute which needed to be addressed in her report. The judge noted Mr Village's submission that the inspector had failed to deal in her reasons with "objections taken by the claimant to the assumptions made in DTZ's report" (para 38), but he did not record any specific examples. He regarded it as significant that Mr Keogh's note of the meeting had not indicated any challenge to the DTZ approach (para 63, 68). I have referred above to the limited points of difference which appear to emerge from Turley Associates' written submissions to the inspector.

43. In this court, Mr Village has drawn particular attention to the DTZ approach to the Internal Rate of Return (IRR) as assumed in its modelling. (In general, the higher the assumed rate of the return, the lower the scope for unprofitable elements such as affordable housing.) The following is a summary of the relevant points, as I understand them:

    i) In the introduction to the study, DTZ indicated that "through their experience of working developers", they had assumed a minimum IRR of 20% for small schemes (less than 50 units), and 23% for larger sites (more than 50 units).

ii) However, in their table "Scenario 6" (the most optimistic) the assumed IRRs were reduced, without apparent explanation, to 15% and 18%, for smaller and larger schemes respectively.

iii) The commentary to this table noted that 30% affordable housing was deliverable across 67% of all the schemes, slightly below the 70% they recommend, but that this shortfall could be overcome by a variation in the "housing tenure splits".

iv) Later, in a section 7, headed "Policy implications", DTZ summarised the effects of the various examples. In what appears to be a reference to scenario 6, reflecting the "development process at the height of the market in late 2006", it was said that 25% affordable housing was viable in all areas, and 30% in "high to mid value areas which have high to mid densities". The assumed IRR requirement in this example was given as "18-20% - to reflect more stable market conditions".

v) It seems that it was this scenario which the inspector used as the foundation for her conclusion that, on the basis of market conditions when the Core Strategy was presented, the proposed targets could be achieved "in the majority of schemes" (para 3.3.25).

vi) Finally, I note, for completeness, Mr Fraser's suggestion that, by referring to a simple "majority" as the criterion, rather than the 70% of schemes recommended by DTZ, the inspector may have intended to allow a sufficient margin to deal with such possible discrepancies. He illustrated this by showing that, on the basis of the figures in Table Scenario 6, the majority of schemes would appear to qualify even at the higher IRRs originally assumed. Whether this is the correct interpretation can, at this stage, be no more than speculation.

44. I have done my best to summarise the sequence of the relevant points, as I understood them from Mr Village's submissions. But so to state them shows immediately how difficult it is to extract a legal issue suitable for consideration by the court, and confirms that the time to explore it, if at all, was in the course of the inspector's examination. Yet, there is no indication that the detail of the Barratt's calculations, as respects IRR or anything else, was raised as a major issue on behalf of Barratt, either in Turley Associates' written submission to the inspector, or at the hearing.

45. On no view could this narrow issue provide a basis for a rationality challenge to the overall conclusions. The most that Mr Village can say, by way of legal challenge, is that the inspector should have "grappled" with the point, and that the conclusion was inadequately reasoned. However, as already noted, for such a challenge to succeed in the court, the applicant must show that it was a point of material controversy, and that he has been substantially prejudiced by the inspector's failure to deal with it. If he did not raise it clearly as an issue when he had the opportunity to do so before the inspector, he can hardly complain if it was not picked out for special treatment by the inspector. In any event, I do not see this point as critical to the inspector's conclusions. The available evidence was sufficient for her to conclude that a 30% target was a realistic aspiration in favourable conditions, and that was sufficient for her purpose.

46. *Ground 4* Mr Village faces a similar hurdle for his last ground of challenge. He complains that the inspector failed to compare the proposed policy with "reasonable alternatives", as advised in PPS 12. I have already noted that this was not a legal requirement as such, but it would have been appropriate for the inspector to have considered any serious alternative approaches put forward by the interested parties.

47. Mr Village suggests that she should have dealt specifically with DTZ's proposal for "trigger points" to take account of varying market conditions. That suggestion seems to me to have been adequately covered by the Inspector's comment, in agreement with the Council, that, because market conditions were continually changing, it was not possible or appropriate to have "varying thresholds and/or lower affordable housing targets within the Policy".

48. Mr Village also referred us to the same inspector's report on another Core Strategy, for Sheffield, issued in the same period. In that document, the affordable housing policy was expressed in general terms, leaving the detail to be set out in City Policies or Supplementary Guidance. No doubt these and other ideas might have been examined in more detail at the Wakefield hearing, if anyone had raised them for discussion. But there is no indication that Barratt or anyone else was advocating the Sheffield model, or any other specific alternative. Barratt had the resources and the expertise to make such proposals if they had wished to do so. Not having done so, they cannot in my view rely on the inspector's inquisitorial duty to mount a retrospective challenge in the courts.

**Conclusion**

49. For these reasons, I agree with the judge that Barratt's legal challenge must be rejected. In reaching this conclusion, I have some sympathy for their position. Mr Village emphasised that what developers want is clear policy guidelines, so that they can plan their future development programmes accordingly. If the purpose of the Strategy was to provide such guidance, it may be thought to have had limited success. It provides one specific target of 30%, based on what is admittedly achievable only in the most favourable market conditions, but leaves everything else for negotiation on a site-specific basis. That is not a problem limited to this plan. It arises from dramatic changes in market conditions which have arisen since the national policy guidance in PPS 3 was issued, and on which accordingly it provides little help. It may be, as Mr Village implied, that since this plan was approved, other authorities and other inspectors have developed more sophisticated mechanisms for dealing with the same problem. However, that does not mean the conclusions reached in relation to this strategy, at the time it was considered, were legally flawed.

50. Accordingly, I would dismiss this appeal.

**LORD JUSTICE STANLEY BURNTON :**

51. I agree.

**LADY JUSTICE ARDEN :**

52. I also agree.