EXTRACT FROM Cala Homes (South) Ltd v Secretary of State for Communities and Local Government and Winchester City Council Queen's Bench Division (Administrative Court) 7 February 2011 [2011] EWHC 97 (Admin) [2011] 1 P. & C.R. 22 Lindblom J.

The relevant law

The legislative scheme for the planning decision-making

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

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

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 In some areas, by virtue of transitional provisions in the 2004 Act, old-style plans adopted under the now repealed provisions of Pt II of the 1990 Act survive as part of the development plan.

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

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

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

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

"Section 18A of the Act of 1972 ... creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972 [the provision in the Scottish legislation equivalent to section 70(2) of the 1990 Act]. Under the previous law, prior to the introduction of section 18A into that Act, the presumption was in favour of development. ... ***467** it is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the development plan.

It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson v. Edinburgh Corporation 1960 S.C. 313 , 318, 'slavishly to adhere to' it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on

all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded ***469*** the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

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

The distinction between materiality and weight

29 The law has always distinguished between materiality and weight. The distinction is clear and essential. Materiality is a question of law for the court; weight is for the decision-maker in the exercise of its planning judgment. Thus, as Lord Hoffmann stated in a well known passage of his speech in Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W.L.R. 759; (1995) 70 P. & C.R. 184 (at p.657G–H):

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

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

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

30 Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it. ***470***

Material considerations

31 What is capable of being a material consideration for the purposes of a planning decision? This question has on several occasions been considered by the courts. The concept of materiality is wide. In principle, it encompasses any consideration bearing on the use or development of land. Whether a particular consideration is material in a particular case will depend on the circumstances (see the judgment of Cooke J. in Stringer v Minister of Housing and Local Government [1970] 1 W.L.R. 1281; (1971) 22 P. & C.R. 255 (at p.1294G)). In the context of development plan-making and development control decision-taking, the test of materiality formulated by Lord Scarman in his speech in Westminster City Council v Great Portland Estates Plc [1985] A.C. 661; (1985) 50 P. & C.R. 20 (at p.669H to p.670C–E) is whether the consideration in question "serves a planning purpose", which is one that "relates to the character and use of land".

32 Three further propositions are relevant in the present case. First, a statement of national planning policy, however made, is capable of being a material consideration in the determination of a planning application. This was recognised by Lord Hope in the passage of his speech in *City of Edinburgh* which I have set out above (see, for example, the decision of Carnwath J., as he then was, in R. v Bolton MBC Ex p. Kirkman [1998] Env. L.R. 560 (at