Yes, Minister?

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A recent case has ruled that changes to planning policy by written ministerial statement are lawful, but lack of public consultation may have wider, unintended consequences, say Rachel Holt and James Bowler

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Ministerial statements, whether written or oral, are a means of placing the day-to-day administration of the government on the public record. They are not subject to parliamentary procedure and, as such, forgo a substantial debate. Accordingly, questions of due process are raised when ministerial statements are used to amend policy unilaterally ? particularly since written statements are merely published without going before Parliament.

The effect of written ministerial statements can be to introduce far-reaching changes to the planning system effectively overnight. In contrast, the process of revising the National Planning Policy Framework (NPPF) has been much slower, with several rounds of consultation. Written ministerial statements and the associated national planning policy guidance amendments may therefore be considered controversial, as they can be perceived as a means for the government to introduce or revise policy by the back door. Such changes have not been limited to those affecting housing, but have included amendments to national retail planning, onshore wind development and exploratory apparatus for fracking.

These arguments pervaded the claimants? case for judicial review in Richborough Estates Ltd & 24 Ors v Secretary of State for Housing, Communities & Local Government [2018] EWHC 33 (Admin), in which a consortium of 25 developers questioned the legality of a written ministerial statement that purported to bolster the position of neighbourhood development plans in the context of housing land supply criteria. It was contended that the lack of thorough consultation required the statement to be withdrawn. A number of examples of planning policy introduced by written ministerial statement and without consultation were considered by the court.

The use of written ministerial statements in this way has the potential to cause uncertainty in planning

Paragraph 49 of the NPPF provides that the 'relevant policies' for the supply of housing will be considered out of date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites. In such circumstances, paragraph 14 of the NPPF ? which applies a 'titled' balance test in favour of granting permission ? is triggered. The wording of the paragraph has been subject to litigation over the past two years in Suffolk Coastal District Council v Hopkins Homes Ltd UKSC 2016/0076 . In this case, the Court of Appeal interpreted 'relevant policies' widely to include any policy plan that affected housing land, before the Supreme Court took a narrower interpretation to include only policies that concerned the numbers and distribution of new housing.

The written ministerial statement was issued on 12 December 2016, before the Supreme Court handed down its judgment in the Suffolk and Richborough cases, by the then Minister for Housing and Planning, Gavin Barwell . There was concern that the Court of Appeal?s wide interpretation of 'relevant policies' would unjustifiably undermine neighbourhood development plans if the local planning authority failed to meet the criteria of paragraph 49. As such, the minister sought to carve out an exception so that the relevant policies for the supply of housing in a neighbourhood plan would not be out of date if:

- the written ministerial statement is less than two years old, or the neighbourhood plan has been part of the development plan for two years or less;
- the neighbourhood plan allocates sites for housing; and
- the local planning authority can demonstrate a 3-year supply of deliverable housing sites.

The claimants argued inter alia that the ministerial statement was based on an error of law and a misinterpretation of paragraph 49 of the NPPF. It was asserted that this reduced the housing land supply requirement for neighbourhood plan areas from five to three years without the consultation that developers had legitimately come to expect for such a change in national planning policy. Mr Justice Dove found against the claimants on all of their five grounds and dismissed their challenge.

Practical implications

While lawful, the use of written ministerial statements in this way has the potential to cause uncertainty in planning, as policy changes can be introduced quickly and without consultation. It has also been suggested that such statements have had the effect of granting disproportionate power to local communities to frustrate development, depending on their content. Recent commentary on Richborough has suggested that its effect has been to bolster neighbourhood plans.

However, the Court of Appeal's decision in R (on the application of Holder) (Appellant) v Gedling Borough Council (Respondent) & (1) John Charles Jones (2) Jones (Interested Parties) [2018] EWCA Civ 214 illustrates that a more sensible approach to written ministerial statements is possible. Here, the court considered the interpretation of a written ministerial statement stating that local planning authorities could grant permission for a wind energy development if 'satisfied that [the proposal] has addressed the planning impacts identified by local communities and therefore has their backing'.

The claimant, Mr Holder, argued that this phrasing meant the planning authority had to be satisfied that all detrimental impacts identified by local communities had been eliminated and contended that the visual amenity and cultural heritageconcerns remained. The Court of Appeal disagreed and held that 'addressed' did not mean 'eliminated'. The planning officer was therefore entitled to find the development proposal acceptable if the planning impacts had been sufficiently assessed and addressed, even if some objections remained.

However, the Court of Appeal's decision illustrates that a more sensible approach to written ministerial statements is possible.

Parallels may also be drawn with local planning authorities? attempts to manipulate planning policy without due process. There have been a number of recent cases where developers have successfully argued that such authorities have sought to amend local planning policy through supplementary guidance ahead of local plan scrutiny, and therefore without the requisite independent inquiry.

At the end of last year, in William Davis Ltd and Others v Charnwood Borough Council [2017] EWHC 3006 (Admin) , a local planning authority?s decision to publish a supplementary planning document (SPD), which purported to specify the council?s requirements for the mix and size of affordable and market homes, was successfully challenged by way of judicial review. The High Court found that the SPD contained policy that went beyond the remit of a such a document and strayed into the territory of local plan policymaking, which has a defined procedure under the Town and Country Planning (Local Planning) (England) Regulations 2012 . Policies in SPDs should not contradict the adopted development plan and, as a result, the document produced by Charnwood Borough Council ought to have been properly scrutinised by way of independent examination as a local plan. The policy was, therefore, quashed by the High Court.

Similarly, in R. (on the application of Skipton Properties Ltd) v Craven DC [2017] EWHC 534 (Admin), the High Court ruled that a local planning authority had erred in its decision to adopt a revised affordable housing policy document without fulfilling the necessary public consultation and examination provisions of the 2012 regulations. Whether or not a policy document should be considered a development plan document for the purposes of the 2012 regulations was a matter of law for the court to decide, not a matter of planning judgement for the local authority. This last point is where the similarities end: while the law for local development plan documents is clear on the required content and process, there are no similarly defined parameters for written ministerial statements.

Although in Holder reason prevailed on the facts, the wider context of clandestine amendments to policy can have a negative effect on investor confidence. Even though the Conservative government?s opinions on onshore wind energy developments were outlined in the party?s manifesto, the speed by which the related written ministerial statement was effectively able to transform a manifesto pledge into national planning policy is nevertheless worrying.

The language in Richborough further illustrates the wide discretion that may be afforded by the courts to written ministerial statements that effectively amend planning policy. While policy changes are introduced via such statements and continue to be prima facie lawful the courts may be reluctant to rule otherwise, except in extreme cases of irrationality and unreasonableness. This may therefore act as a signal to discontented developers or interested parties that written ministerial statements will invariably stand, despite a lack of consultation and overall legal scrutiny.

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Further information

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