

[REDACTED]

From: paul collins [REDACTED]

Sent: 15 November 2018 15:55

To: Karl Roberts; Neil Crowther; David Easton; Simon Davis; Liz Fitcher; Cllr. Richard Bower; Cllr. Stephen Haymes; Cllr. Dawn Hall; Cllr. Ashvin Patel; Cllr. Phil Hitchins; Nigel Lynn; Cllr. Derek Ambler; Cllr. Jim Brooks; Planning.Responses [REDACTED]

Subject: Y/44/17 OUT, Y/91/17 OUT, Y/92/17 OUT, Y/ and Pagham Planning applications P/140/16 OUT, P/134/16/OUT, P/140/16/OUT, P/6/17/OUT,, P/25/17/OUT

Importance: High

Dear All

For my sins I have watched the web casts of the Development Control Committee on 13/14th November 2018 in the light of the Officer reports and the minutes of the Development Control Committee on 24 October 2018 and have the following observations to make.

At the meetings on 24 October 2018 and 13 November 2018 there were clear breaches of the Council's constitution and the Planning Services Code of Conduct and the Committee was repeatedly and incorrectly told (amongst many other incorrect or inaccurate assertions) by officers and the Chairman that they could not debate the Local Plan allocations, or take into account other applications and matters not before the Committee, the Pagham applications under consideration had to be approved because the sites were allocated in the local plan and all relevant matters had been addressed by the Local Plan, that they could not depart from the Local Plan unless there were "some very good reasons" and that the only way to secure district wide infrastructure was to approve housing so that developer contributions could then be secured to pay for it (contrary to the CIL tests).

At the meeting of the Committee the next day on 14TH November the same members were told by the same Chairman that application Y/44/17 OUT was an urgent item because it was addressing the education requirements arising from the Strategic Allocation SD7 (Applications Y/91/17 OUT and Y/92/17 OUT which were not before the Committee) and by the related Officers report that although the proposals were in direct conflict with relevant policies in the Local Plan the proposals should be approved because (in effect) the conflict was minor and did not matter and that the gift of the education land in an effort to solve the problems of SD7 on that unrelated site (by ownership or policy) was a material consideration (no other legitimate material considerations were advanced) capable of overriding such conflict and following a speech by Councillor Haymes (Chairman of Yapton Parish Council and ward member) saying much the same thing the application was duly approved subject to a S106 securing same as per the officer recommendation without debate.

For the record and as I have (as an interested party) previously recorded, the item was considered on the basis of clear and unequivocal breaches of the Council's constitution and the Planning Code of Conduct for Officers and members (yet again) and was yet another example of a decision made by this Committee unlawfully (There have been a number in the last 4 months since the ADLP was adopted). Furthermore the irrational decision making by this Committee (largely it seems to me et al led by the Chairman) and its total disregard for its legal responsibilities under Section 38 (6) of the Act and other legal provisions pertaining to S106 Agreements is not only plain to see but

also astonishing given that no member (including the Chairman) is allowed to sit on the Committee without planning training.

It strikes me that on this performance alone, all members of the Committee (including the Chairman) and some Officers need to revisit that training and as part of that training they should be instructed (amongst a raft of other matters) in the implications of paragraphs 17, 18 and 19 Tesco Stores Limited (Appellants) v Dundee City Council (Respondents) (Scotland) [2012] UKSC 13 (extract attached for your files).

Paragraph 17 states: ***“It has long been established that a planning authority must proceed upon a proper understanding of the development plan..... The need for a proper understanding follows in the first place from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails, to understand them”.***

Part of paragraph 18 states: ***“The development Plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers while allowing a measure of flexibility to be retained”*** and

part of paragraph 19 states: ***“As has often been observed development plans are full of broad statements of policy, many of which may be mutually irreconcilable so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse..... Nevertheless, planning authorities do not live in the world of Humpty Dumpty they cannot make the development plan mean whatever they would like it to mean”.***

In short whilst pragmatism has its place in planning it does not and cannot replace the statutory responsibility of a LPA to act within the law and the ends do not justify the means when those means are unlawful.

All of the foregoing is probably too late for poor old Yapton Parish Council because it is clear from the correspondence on these files that they have been dissuaded from their objections by the undeliverable promises of ADC regarding the limitation of future housing numbers in the parish, a say in how their parish will be developed and beguiled by land gift and other infrastructure inducements but ADC needs to be aware that (to their credit) Pagham Parish Council sees matters differently and are not so dissuaded or beguiled.

As you are aware I have repeatedly made it clear (on their behalf) that no decisions can lawfully be issued by ADC as a result of the Committee resolutions made by the Committee at its meetings on 24th October and 13th November due to a whole raft of material considerations that need to be reconsidered by the Committee before any such decisions are issued. With this in mind I have also asked when the decisions will be issued in respect of P/140/16 OUT and P/134/16 OUT and have been told by officers that the decisions will be issued once the S106 Agreements are signed (with signature imminent I am told) and that no public consultation will take place on those Draft agreements (despite material changes to heads of terms since they were considered at the Committee) and no referral back to Committee will take place. Once again I ask that Officers to confirm the date in each case when this will happen for future reference if required.

With this in mind please be advised that Pagham Parish Council considers that in the face of such illegality it has been left with no choice but to take legal advice with a view to undertaking JR proceedings in the event that any decisions are issued prior to a reconsideration of the applications by the DCC with the remedy sought being a quashing order in respect of any decisions issued. The grounds to be explored will be:

- (a) Illegality
 - (i) Doing an act with no legal authority (simple illegality).
 - (ii) Misinterpreting/misunderstanding the law and policy governing the decision.
 - (iii) Failure to retain a discretion by:

- (1) Improper delegation.
- (2) Fettering of discretion by adoption of over-rigid policy.
- (iv) Abuse of discretion:
 - (1) Using a power for an improper purpose.
 - (2) Taking into account irrelevant considerations and failing to take into account relevant considerations.
 - (b) Irrationality.
 - (c) Procedural Impropriety.

However if after due consideration you are able to confirm that no decisions will be issued on any of the Pagham applications until such time as the DCC do reconsider these applications, this will obviate the need to consider such proceedings so it is (I would suggest) in the public interest and the public purse for you to confirm that such a reconsideration will take place at the earliest opportunity and I invite you to do so by return. Obviously such a reconsideration can of course take place without the need for ADC to acknowledge or accept the claim that grounds for JR challenge exist and provided such reconsideration is undertaken lawfully, without any prior commitment to a different outcome.

Please put this e mail and attachment and any response on all the files listed for future reference if required.

Thank you

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RTPI

Chartered Town Planner

14. The respondents had compounded their error, it was submitted, by treating the proposed development as definitive when assessing whether a "suitable" site was available. That approach permitted developers to drive a coach and horses through the sequential approach: they could render the policy nugatory by the simple expedient of putting forward proposals which were so large that they could only be accommodated outside town and district centres. In the present case, there was a site available in Lochee which was suitable for food retailing and which was sequentially preferable to the application site. The Lochee site had been considered as part of the assessment of the proposal, but had been found to be unsuitable because it could not accommodate the scale of development to which the interveners aspired.

15. In response, counsel for the respondents submitted that it was for the planning authority to interpret the relevant policy, exercising its planning judgment. Counsel accepted that, if there was a dispute about the meaning of the words in a policy document, it was for the court to determine as a matter of law what the words were capable of meaning. The planning authority would only make an error of law if it attached a meaning to the words which they were not capable of bearing. In the present case, the relevant policies required all the specified criteria to be satisfied. The respondents had proceeded on the basis that the proposal failed to accord with the second and third criteria. In those circumstances, the respondents had correctly concluded that the proposal was contrary to the policies in question. How the proposal had been assessed against the first criterion was immaterial.

16. So far as concerned the assessment of "suitable" sites, the interveners' retail statement reflected a degree of flexibility. There had been a consideration of all sites of at least 2.5 ha, whereas the application site extended to 6.68 ha. The interveners had also examined sites which could accommodate only food retailing, whereas their application had been for both food and non-food retailing. The Lochee site extended to only 1.45 ha, and could accommodate a store of only half the size proposed. It also had inadequate car parking. The Director, and the respondents, had accepted that it was not a suitable site for these reasons.

Discussion

17. It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, *affd* (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 219, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it

cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with which the other members of the House expressed their agreement. At p 44, 1459, his Lordship observed:

“In the practical application of sec 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.”

18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority required to proceed on the basis of what Lord Clyde described as “a proper interpretation” of the relevant provisions of the plan. We were however referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act of much of their effect, and would drain the need for a “proper interpretation” of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted

objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.

20. The principal authority referred to in relation to this matter was the judgment of Brooke LJ in *R v Derbyshire County Council, Ex p Woods* [1997] JPL 958 at 967. Properly understood, however, what was said there is not inconsistent with the approach which I have described. In the passage in question, Brooke LJ stated:

“If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy.”

By way of illustration, Brooke LJ referred to the earlier case of *Northavon DC v Secretary of State for the Environment* [1993] JPL 761, which concerned a policy applicable to “institutions standing in extensive grounds”. As was observed, the words spoke for themselves, but their application to particular factual situations would often be a matter of judgment for the planning authority. That exercise of judgment would only be susceptible to review in the event that it was unreasonable. The latter case might be contrasted with the case of *R (Heath and Hampstead Society) v Camden LBC* [2008] 2 P & CR 233, where a planning authority’s decision that a replacement dwelling was not “materially larger” than its predecessor, within the meaning of a policy, was vitiated by its failure to understand the policy correctly: read in its context, the phrase “materially larger” referred to the size of the new building compared with its predecessor, rather than