

Shepway Environment & Community Network

The Spout House Lympne Kent CT21 4LQ

Tel: 01303 265737

Dear Mr Lewis,

In re: Planning Application YO9/0627/SH: demolition of existing buildings, construction of a new 5731sq.m. retail superstore, together with associated engineering at Smith Industries, Military Road, Hythe.

You will be aware that GOSE is currently considering whether or not to call this application in for determination by the Secretary of State.

The purpose of this letter is to put the Council on notice that, having taken the advice of leading counsel, Shepway Environment and Community Network is of the view that should GOSE decide not to call in the application, it would be necessary for the Council's officers to take the application back to Committee to consider the implications of recent changes in national policy before any decision notice can be issued.

The legal principles which apply in this case are set out in the decision of the Court of Appeal in the case of R (Kides) v. South Cambridgeshire District Council [2002] EWCA 1370, where Lord Justice Parker said:

"125. ... where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, s 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

"126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of s 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision."

In the present case, the Council resolved to grant planning permission on 15th December 2009. At that stage, the relevant national guidance on retail matters was contained in PPS6. However, on 24th December 2009 CLG issued the new "Planning Policy Statement 4: Planning for Sustainable Economic Growth" and the accompanying "Planning for Town Centres: Practice guidance on need, impact and the sequential approach."

Continued overleaf

The Shepway Environment & Community Network
is working to help and empower local communities facing threat of unwanted development
SECN is a not for profit voluntary organisation

In introducing the new guidance, CLG has explained that its purpose is to introduce a tougher "impact" test. The Housing and Planning Minister, John Healey, explained that the guidance provides authorities such as Shepway with 'new tools' which "go further than ever before to protect town centres from the harm large out-of-centre developments can have" (see CLG web-site). As you will know, a substantial part of SECN's objections to the proposal have been based on its impact on Hythe town centre.

We have previously set out to you the reasons why the retail impact assessment carried out for this application does not meet the requirements of PPS6. One of our principal criticisms is the lack of a systematic and thorough survey of the views of existing town centre traders, either by the applicant, or as is required by the PPS, by the Council. Also, we have yet to understand why such research as has been carried for the Council (by KCC in 2007) is dismissed as irrelevant by officers. Concerned residents have now carried out a survey and will be submitting the results to you under separate cover. You will see that these results contradict the assumptions made by the applicant regarding the attitude of existing traders, and constitute a further material consideration in this case.

A review of the application against the new PPS4 shows that it does not meet the new requirements any more than it complied with PPS6. If the application is judged against the now finalised practice guidance published alongside PPS4, its shortcomings are clear.

In circumstances where CLG has made it clear that the tests set out in the new policy are tougher than those which previously applied, there can be no doubt that the new policy and guidance is a highly important consideration which must be brought to members' attention. As you will know, the resolution to approve was only by a **majority of 9:4.** It is impossible to conclude that, if the application was subjected to the "tougher" impact tests required by the new guidance, members would not reach a different conclusion. In the circumstances, it would be an error of law if officers did not take the application back to committee.

Yours sincerely

David Plumstead

Cc Alistair Stewart

