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**Aphrodite Smagadi**
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**Economic Commission for Europe**
**Environment, Housing and Land**
**Management Division**
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Dear Ms Smagadi

**Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with the planning decision for a superstore in Hythe and access to justice in general Ref. ACCC/C/2010/45)**

Thank you for your letter of 28 October 2010, inviting us to comment on the complaints outlined in communication ACCC/C/2010/45. We have also seen the supplementary communications submitted by the Communicants on 28 March. Where possible, we have sought to respond to the points raised in these communications. However, we are still considering these and reserve the right to submit further comments at a later stage.

The committee asked for information on the progress made in cases ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 as similar issues are raised in this communication. The Ministry of Justice is preparing amendments to the Civil Procedure Rules to codify the case law on protective costs orders in order to provide added clarity and transparency to the law and the procedure for making an application for a PCO with a view to putting our compliance with the Convention beyond doubt. These rules are currently under consideration by the Civil Procedure Rules Committee which has requested its sub-committee to reconsider the draft rules currently before it, including the level of the cap and to whom it should apply. We are working to ensure that changes to the rules come into force as soon as possible. We will keep the Secretariat and the Compliance Committee informed of further developments.

We would like to thank the Committee for the opportunity to comment on the other aspects of this complaint.

## 1. Involvement of third parties in the planning process

The communicant alleges that third parties are denied the opportunity for real participation in the decision making process for planning matters.

The planning system provides many opportunities for local people to participate in key decisions about their areas. The processes for community involvement, along with the rights to make representations, provide a strong framework for protecting rights of public participation entirely consistent with the Convention's requirements.

Local planning authorities are obliged to prepare under section 18 of the Planning and Compulsory Purchase Act 2004, a Statement of Community Involvement (SCI). This document is a statement of the local planning authority's policies about how it will involve interested parties in the exercise of its functions. Local authorities must consider whether it is appropriate to invite representations from residents and/or businesses in their area. If they do so, the local authority must take into account any representations made to them. The local authority responsible in this case, Shepway District Council (SDC), invited and took into account such representations in drawing up the 2007 SCI for its Core Strategy. The document as adopted can be viewed here: http://www.shepway.gov.uk/content/view/1540/4372. Information about how the public can get involved in a wide range of decisions and processes is available at SDC's website: www.shepway.gov.uk.

There are also statutory requirements for making information available about plans and planning applications; allowing people to make representations on plans and planning applications; and governing independent examinations. Regulations require that local authorities take account of representations received when considering individual planning applications or in plan-making.

For example, the Town and Country Planning (Local Development) (England) Regulations 2004 as amended make provision for the form and content of documents setting out a local planning authority's policies about development in its area and its programme for the production of such documents and the procedures it is to follow in connection with their preparation or revision. The Town and Country Planning (Development Management Procedure) (England) Order 2010 sets out the requirements for publicity for applications for planning permission and the requirements relating to statutory consultees.

In addition to opportunities to make their views known to the local planning authority, third parties can also have their views considered by the planning inspectorate. Any person who makes representations seeking to change a development plan document is given the opportunity (if requested) to appear before and be heard at the independent examination (Planning and Compulsory Purchase Act 2004 section 20 (6)). Representations indicating support for, or opposition to, a planning application are taken into account by an Inspector if a case goes to appeal following a refusal or non determination of the application (the regulatory framework supporting the appeal process is set out in the Town and Country Planning Act 1990 (as amended) and in Statutory Instruments that set out the procedures for hearings).

In addition to the above, the UK Government is committed to giving neighbourhoods even more ability to determine the shape of the places in which their inhabitants live. The

Localism Bill published on 13 December 2010 contains a radical package of reforms that will transform the planning system. The Localism Bill will give communities in England the right to develop neighbourhood plans and real power to shape, drive and permit development through neighbourhood development orders. A more specific example of how this will be achieved is provided below.

The communicant sets out specific examples to illustrate their concerns about public participation in the planning process and we would offer the following comments on these aspects of the complaint:

Notice period for consultation and pre-application consultation

Individuals, communities or interest groups can comment on planning applications. The statutory requirements (set out in the Town and Country Planning (Development Management Procedure) (England) Order 2010) provide a framework of minimum standards. The level and extent of consultation and publicity is likely to depending on the size, scale, location and nature of the proposed development. There are three main types of publicity - a notice in the local newspaper, notices displayed on or near the application site and individual letters to addresses in the locality. An application may be subject to one or more of these. Individuals, communities or interest groups normally have 21 days from the date of the site / press notice or consultation letter to send representations to the local planning authority. Statutory consultees (organisations and bodies, defined by statute, who must be consulted on relevant planning applications) are also given at least 21 days notice (or any other period agreed in writing by both parties) of a development proposal so that they can submit their comments.

Whilst statutory requirements exist for publicity on planning applications, pre-application discussions are also particularly important for major applications. Pre-application discussions are not compulsory for any party, however, they provide a number of advantages such as: avoiding incomplete applications that cannot be validated, including by ensuring appropriate and adequate supporting information is provided; or helping to reveal issues that could have a significant impact on the development or the prospects of achieving planning permission, at an early stage.

Many applicants voluntarily consult communities on major applications prior to submitting formal applications. This is something Government policy encourages see for example Planning Policy Statement 1: Delivering Sustainable Development

*Effective community involvement requires an approach which:… enables communities to put forward ideas and suggestions and participate in developing proposals and options. It is not sufficient to invite them to simply comment once these have been worked-up…"*

The UK Government recognises the desirability of making this an inbuilt part of the development process the Localism Bill, referred to above, introduces (in England) a statutory requirement on developers planning large projects to consult local people before they make an application, so that communities can have a say at an early stage. The Government is aware there will be a variety of opinions as to what developments should be subject to consultation and recently invited views on this matter.

The Statement of Community Involvement provides an opportunity for local authorities to clearly set out their methods and processes for community involvement and publicity that

will be used throughout the development management process, including at the pre-application and formal consultation stages.

Sainsbury's held public pre-application consultation meetings in Hythe in May 2009 following a mail-drop and advertising in the local press.

In this case, SDC exceeded the minimum statutory requirements for consultation on the application. Site notices were displayed from 29 June 2009, allowing initial comments up until 27 July 2009. Press notices were published in the local newspaper "The Folkstone Herald" on 2 July 2009 allowing comments up until 23 July 2009. A weekly list of planning applications was displayed on the council's website. Letters were sent to a large number of local neighbours surrounding the application site and within the wider locality, dated 29 June 2009, allowing up to 22 July 2009 for initial representations. Following amendments to the scheme all neighbours and any other people who had submitted comments were notified of amended plans on 18 August 2009.

Meetings and proceedings of local authorities

As noted above third parties can make representations and express their views on individual planning applications. The public also has access to local authority meetings reports and documents subject to specified confidentiality provisions. **The Local Government (Access to Information) Act 1985** provides for public access. If local authority meetings are open to the public, agendas, officers' reports and background papers must be publicly available at least three days in advance. SDC sent letters informing all consultees of the planning committee meeting, held on 16 October 2009, with details of how to attend. Following the deferral of the planning application at the first committee, consultees were notified of further amendments to the scheme on 6 November 2009 and again of a second planning committee meeting on 4 December 2009.

The Freedom of Information Act 2000 also allows access to information held by public authorities and the Environmental Information Regulations 2004 allow access to environmental information. In addition, some local planning authorities, including SDC, have introduced a right to speak at planning committee meetings for applicants and objectors. SDC invites one member of the public to speak against and one member of the public to speak in favour in addition to interventions by a representative of a town or parish council, SDC ward members and the applicant or their agent. All speakers have 3 minutes each to address the committee. If more than one member of the public wishes to speak, it is usually determined on a first come, first served basis, although nearby residents may be given priority by the chairman of the committee. The public are invited to observe the debate from a gallery, and planning officers are available to answer any questions.

Conduct of local authority officials

The conduct of officials is rightly a matter for individual local authorities as their employer. Many local authorities have a code of conduct for employees in addition to, or part of, their standard terms and conditions of employment. These codes range from simple statements agreeing to act with propriety to comprehensive documents covering everything from political neutrality to intellectual property matters. These codes of conduct are also integrated into the authority's discipline procedures.

Call–in procedure

Most planning applications are decided locally by the local planning authority. However, the Secretary of State has reserve powers to direct the local planning authority to refer an application to him for decision. The regulatory framework supporting the called-in processes is set out in the Town and Country Planning Act 1990 (as amended) and associated Statutory Instruments. A call-in can only be requested before a decision is issued, it is not a means by which a third party can challenge a decision they disagree with.

The decision the Secretary of State is making is on whether the application ought to be decided by him rather than by the local planning authority. In taking this decision the Secretary of State will consider the Government's policy on call-ins. This is set out in the Caborn statement to Parliament on the 16 June 1999 which states that:

*" ….general approach, like that of previous Secretaries of State, "is not to interfere with the jurisdiction of local planning authorities unless it is necessary to do so. Parliament has entrusted them with responsibility for day-to-day planning control in their areas. It is right that, in general, they should be free to carry out their duties responsibly, with the minimum interference…"*

*His policy is to be very selective about calling in planning applications. He will, in general only take this step if planning issues of more than local importance are involved. Such cases may include, for example, those which, in his opinion:*

- *may conflict with national policies on important matters;*
- *could have significant effects beyond their immediate locality;*
- *give rise to substantial regional controversy;*
- *raise significant architectural and urban design issues; or*
- *may involve the interests of national security or foreign Governments".*

For these reasons, applications are rarely called in, irrespective of how they are put forward for consideration. However, a case considered as a result of a third-party request is as equally likely to be called in as one referred under the Consultation Direction 2009 (this direction requires local planning authorities in England to consult the Secretary of State before granting planning permission for certain types of development).

Use and enforcement of planning conditions

It is for the local planning authority, in the first instance, to judge on the facts of the case, whether a particular development proposal should be approved subject to planning conditions. Where they do so authorities must state the reasons for their decision and reasons must be given for the imposition of every condition (Town and County Planning (Development Management Procedure) (England) Order 2010).

Enforcement work is often undertaken following receipt of a written complaint or other form of notification by the public of breaches in planning control. However, the fact that there has been a breach of planning control does not automatically mean that enforcement action must be taken. Planning enforcement action may only be taken when it is considered by the enforcement authority as expedient to do so in keeping with its overall enforcement policy. There are two provisions which authorities may use to enforce conditions: an enforcement notice, under section 172 of the Town and Country Planning Act 1990 (as amended), or a breach of condition notice under section 187A.

## 2. Third party rights of appeal on planning decisions

The communicant alleges that the UK has breached Article 9(2) and (3) of the Convention by failing to provide third party rights of appeal to planning decisions. They argue that there is no third party right of appeal on planning decisions and that it is almost impossible to get access to a review procedure for a planning decision on substantive grounds**.**

A third party does not have the right to a general administrative review of a planning decision. There is no requirement in the Aarhus Convention for both access to administrative *and* judicial review procedures.

However, if a third party is unhappy with a planning decision then there are a number of means by which that party can challenge that decision.

### Judicial review

The UK considers that the grounds of challenge available meet the standard of review required by the concept of substantive legality in Article 9(2) of the Convention.

As has been recognised by the complainant, third parties may challenge a planning decision in the courts on the grounds that it was procedurally flawed, for example, if the council did not follow the correct procedures or take all material considerations into account.

However, as the UK has previously submitted in the context of other cases before the committee, judicial review is not concerned solely with whether a decision was reached by a correct process, but also whether the decision was in itself contrary to law. Irrationality, or "Wednesbury unreasonableness", is merely one form of unlawfulness among many which may form the basis of a challenge by way of judicial review. A decision which is in breach of a requirement of EU law, or of one of the Convention rights incorporated in the Human Rights Act, for example, will also be amenable to judicial review on the ground that it is in breach of such a requirement or right and in such a case the court will consider whether a public body has acted in accordance with the principle of proportionality – see for example Zalewska v Department for Social Development [2008] UKHL 67, a case in which the House of Lords considered whether, when applying a derogation from an EU obligation, the UK had acted proportionately. The substantive legality of a decision must be distinguished from its merits in policy terms. That a decision is argued to be "bad" in policy terms does not equate to its being *unlawful*; and a review of the substantive *legality* of a decision does not require that a court substitute its own view of the merits of the decision for that of the decision-maker.

Injunctive relief as required by Article 9(4) is available in judicial review proceedings.

### The Local Government Ombudsman

If individuals are not satisfied with the authority's response to a complaint regarding a planning decision, the Local Government Ombudsman (LGO) can consider whether there has been maladministration in taking the decision; over 200 such cases relating to

planning applications have been considered over the last 10 years. It is not, however, a form of recourse if someone simply disagrees with the merits of the decision.

Those wishing to complain to the Ombudsman must first have complained to the council. It is appropriate that councils are given a reasonable opportunity to investigate and reply to complaints. The Ombudsman considers 12 weeks to be a reasonable time for the council to investigate a complaint and reply. Those not satisfied with the council's final answer, or if it does not give an answer within this time, can complain to the Ombudsman.

In those instances where the LGO finds that a council was at fault the LGO can recommend that the council provide a remedy or recommend that the council take steps to reduce any harmful effects, but it is correct that there are no powers to enforce such a recommendation. Further information on the scope of the LGO role in planning complaints is available on the LGO website (http://www.lgo.org.uk), together with a digest of planning cases.

## 3. Information on access to administrative and legal review procedures

As regards the issues raised by the applicant regarding Environmental Impact Assessments, the forthcoming consolidation of the 1999 EIA Regulations will address this concern.

It is already the case that third parties can ask the Secretary of State to exercise his power to make a screening direction, but the amended Regulations will make sure this is clear. We expect the Regulations to come into force mid 2011. New guidance due to be published around the same time will also clarify that third parties can make a representation to the Secretary of State to issue a screening direction.