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22 March 2010

# Folkestone

Hythe & Romney Marsh

Shepway District Council



Mr David Plumstead  
On behalf of SECN  
The Spout House  
Lympne  
Hythe  
Kent CT21 4LQ

Dear Mr Plumstead

## **Response to Shepway Environment & Community Network Pre Action Protocol**

Associated Council Officers:

Mr C Lewis – Head of Planning Services

Mr B Geering – Major Projects Officer

**Reference details: Planning permission Y09/0627/SH –**

**“Demolition of existing buildings, construction of a new 5573 square metre retail superstore, together with associated engineering operations, car parking, delivery yard and vehicular access.”**

### **The details of the matters being challenged**

The decision of Shepway District Council, dated 12<sup>th</sup> February 2010, to grant planning permission for the above development.

In particular SECN consider that –

The Council's planning committee considered the application on 15<sup>th</sup> December 2009. At that time the relevant national planning policy guidance for retail developments was set out in PPS6. The officer's report did not suggest that the draft PPS4 or interim GPG went further than the existing advice in PPS6 and therefore members had not been correctly advised.

That the guidance in the adopted PPS4 and GPG, dated 29<sup>th</sup> December introduced a 'tougher impact test' than those of PPS6 and that this new guidance was a material consideration which might have led members of Shepway's Planning Committee to reach a different decision.

Cont'd overleaf/.....

That officers, applying the principles set out in the case of *R (Kides) vs South Cambridgeshire District Council*, should have referred the application back to the Development Control Committee for reconsideration in light of the new consideration to ensure compliance with the authority's statutory duty.

Given the arguments set out above Shepway District Council should concede to Judicial Review.

### **Response to the proposed claim**

Shepway District Council contest this claim in full.

It is the Council's view that in this instance the application did not need to be referred back to the Development Control Committee for further consideration and the authority was not in breach of its statutory duty in issuing the planning permission. As such Shepway District Council contests the views of Mr Plumstead via the Shepway Environmental & Community Network.

Shepway District Council were informed by the Government Office for the South East on 10th February 2010 that the application was not to be called in for determining by the Secretary of State. In coming to this recommendation GOSE fully considered whether the application accorded with the Development Plan, including the newly adopted Planning Policy Statement 4 (PPS4) – 'Planning for Sustainable Economic Growth.'

Following GOSE's decision, planning permission was issued by Shepway District Council for application Y09/0627/SH on 12th February 2010.

In coming to a recommendation for the granting of planning permission the Officer's report contained a detailed assessment of the development against PPS6 - Planning for Town Centres, the draft PPS4 - 'Planning for Sustainable Economic Growth' and the 'living draft' guidance 'Planning for Town Centres – Good Practice Guide on Need, Impact and the Sequential Approach' as set out in pages 57-64 of the original committee report (20<sup>th</sup> October 2010), pages 2-5 of the Supplementary Information and pages 18-22 of the committee report of the 15<sup>th</sup> December. In addition the Council's independent Retail Impact Assessment, completed by Roger Tym and Partners, fully considered both existing and emerging national policy when advising the Council on the suitability of the proposal.

At the Development Control Committee of 15th December 2009 all existing and emerging national planning policy was considered in determining the application. The emerging PPS4 and GPG was considered a material consideration in determining the application. It should be noted that the quote taken from SECN's letter (para 8.4 of committee report 15.10.09) should be read in the context of the wider report and the considerable assessment of the retail impact of the proposal.

In recommending the granting of planning permission for the application, the Development Control Committee agreed –

*“That planning permission be granted subject to the completion of a legal agreement to secure improvements and funding to encourage linked trips to the High Street and provide a fund for double/secondary glazing and new doors to properties 1a and 3 to 17 Military Terrace. The permission to be subject to the conditions set out at the end of the report including any revisions or additions the Head of Planning Services may consider appropriate. An addition to the legal agreement is the inclusion that Sainsbury’s fund a scheme of improvement works at the Scanlons Bridge Junction.”*

Following the Committee meeting a holding direction was placed upon the determining of the application on 22nd December 2009, to allow GOSE to determine whether the application should be called in by the Secretary of State. Between the 22nd December and 10th February the draft PPS4 moved from emerging national policy to full national policy. Both the planning permission decision notice and GOSE's consideration of the scheme refer to the full PPS4 (the decision notice also refers to PPS6 as the national planning policy in place at the time the application was considered by Officers and the Development Control Committee). In using delegated authority to determine the application it was considered that -

- The draft PPS4 and Good Practice Guide had been considered as material considerations by the Development Control Committee and Officers and in reaching the recommendation to permit the development the proposal was in accordance with emerging national policy, and that existing in PPS6.
- The authority was fully aware of this change in national policy guidance and the adopted PPS4 and Good Practice Guide was not materially different from the draft PPS4 and Good Practice Guide living draft that had received full consideration by the Development Control Committee. In particular policies EC10, EC14, EC15, EC16 and EC17 of the adopted PPS4 are not materially different from EC12, EC18, EC19, EC20 and EC21 of the draft PPS4 which were fully considered as a material consideration by the Development Control Committee on the 20<sup>th</sup> October and 15<sup>th</sup> December.
- Delegated authority for the issuing of the decision had been granted to the Head of Planning Services, including any revisions or additions that may be considered appropriate
- The decision was fully in accordance with PPS4 and had been fully assessed against the substantially similar draft form of this document. Had PPS4 been considered in its final form by the committee the same recommendation would have been reached. As such the determining of the application was fully in accordance with the findings of *R (Kides) vs South Cambridgeshire District Council*, in which Lord Justice Parker stated (126) that –

"In practical terms therefore, where since the passing of a 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 purpose of s70 (2), it might 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."

**Details of any other interested parties not identified by the claimant**

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**Address for further correspondence and service of court documents**

Miss E Culligan, Principal Solicitor, Legal Department, Shepway District Council,  
Civic Centre, Castle Hill Avenue, Folkestone Kent CT20 2QY

Yours sincerely



Christopher Lewis  
Head of Planning Services