

Vernon Hitchman
Head of Legal Services
Bath and North-East Somerset Council
The Guildhall
High Street
Bath
BA1 5AW

Date 14 June 2012
Your ref
Our ref PKL\PKL4913\9
Direct Line: +44 (0)870 194 1741

peter.keith-lucas@bevanbrittan.com

Dear Vernon

Advice re Council / Executive Functions in the provision of traveller sites

Thank you for your instructions and papers.

1 Background

As I understand the position, the authority conducted a survey and needs assessment for traveller sites in 2007, which identified a need for 19 permanent pitches, plus an additional 3 pitches to 2016, plus a need for 20 transit pitches. The Core Strategy adopted by Council provides that the pitch requirement determined in the needs assessment be approved, and that a specific Development Plan Document be prepared on Site Allocation. That specific DPD is in the course of preparation but is not currently likely to be approved by Council until December 2013. In the meantime, in November 2011 the Cabinet and Council adopted for consultation Preferred Options, which assess a number of sites against criteria derived from the National Planning Policy for Traveller Sites. This process is intended to inform the drafting of the specific DPD.

At a meeting on 15th May 2012, the Council's Planning, Transport and Environment Policy Development and Scrutiny Committee received an update report on the Core Strategy and resolved to ask the Cabinet to consider at its next public meeting the postponement of the consultation on the Preferred Options until it has conducted an updated needs assessment and reconsidered the suitability of the various sites listed in the report, and requested that the updated needs assessment is then presented to the Committee prior to any further decision by Cabinet.

The requisite number of Councillors have now requested an extraordinary meeting of Council in the following terms –

M-7867526-1

Kings Orchard 1 Queen Street Bristol BS2 0HQ
T 0870 194 1000 F 0870 194 1001 DX 7828 Bristol 1
www.bevanbrittan.com

“We request the Chair of Council to convene a Special Meeting of Council in order for Council to have the opportunity to debate the Cabinet Decision of 9 May 2012; Decision E2400: Gypsies, Travellers and Travelling Showpeople Site Allocations Plan Preferred Options consultation and related matters including, but not limited to, the resolution of the Planning Development & Environment Committee Policy Development & Scrutiny Committee passed at its meeting of 15 May 2012.”

An Extraordinary Meeting of Council is now arranged for 18th June 2012.

2 Council / Executive Functions

The Local Government Act 2000 distinguishes between Executive and Non-Executive functions.

Taking a simplistic view –

- Council approves the Budget and strategic policies of the authority including Development Plan Documents, and delegates to Planning Committee the determination of planning applications.
- The Executive (i.e. Cabinet) prepares draft strategic policies at the request of Council and submits them to Council for approval, and discharges functions within the Council-approved Budget and strategic policies, including deciding whether or not to submit a planning application for a new traveller site.

To elaborate, under Section 13(2) of the Act, all matters are to be the responsibility of the Executive (i.e. Cabinet) unless statute specifically reserves them to Council. The Functions and Responsibilities Regulations 2000, as amended, give effect to this rule, specifying which matters are to be the responsibility of Council. For this purpose, the development and management of permanent and transit sites for travellers is not designated as a non-executive function, so it is the responsibility of the Executive. However, this is subject to a number of exceptions, as set out below.

The end result is that the discharge of the executive functions of developing traveller sites is dependent in a number of respects on actions of the Council (or Planning Committee) as follows –

2.1 Planning Permission

2.1.1 Timing of planning applications

Schedule 1 of the 2000 Regulations do not mention the decision to submit planning applications for the authority's own development. So it is for Cabinet to decide what development proposals for traveller sites to bring forward, and when to submit planning applications for those proposed sites. In this process, Cabinet can undertake its own

consultation, but such pre-submission consultation would not comprise the formal statutory consultation required on the planning application.

At present, the development of planning policy, in the form of the specific Development Plan Document, and the identification of preferred sites is running in parallel. Cabinet will have to decide whether to submit planning applications prior to the formal adoption of the DPD, or to wait for its formal adoption. Whilst the Council (or Planning Committee) can take into account an emerging DPD which has yet to be formally adopted, it may also in appropriate circumstances decide that it would be premature to determine a planning application until the formal DPD has been adopted. Accordingly, Cabinet must at some stage decide its programme for submitting planning applications, against the programme for the formal approval of the DPD in December 2013.

2.1.2 Determination of planning applications and the need for a current Needs Assessment

The Regulations also provide that the determination of planning applications (and “deemed” applications by the authority for its own development) is specified in the Regulations as a non-executive function. Accordingly, whilst it will be for Cabinet to decide what sites it wishes to develop and to prepare and submit (deemed) planning applications for each such site, those applications will be determined by Council (delegated to the Planning Committee).

The Planning Committee will need to consider each application on its merits against the Local Development Framework, comprising the Core Strategy and any specific Development Plan Document. Whilst I do not know what the DPD will provide, the Planning Committee may only determine a planning application contrary to the Local Development framework if there are over-riding reasons for doing so. In this context it is for Planning Committee to decide whether a proposed development is contrary to the LDF and whether there are over-riding reasons to justify the departure from the LDF

In that consideration, the Planning Committee will take into account the needs assessment which underpins the application and may take the view that it requires a current needs assessment to demonstrate whether the needs have changed significantly since the last needs survey and assessment in 2007. So, Planning Committee cannot require the Cabinet to undertake a new needs assessment, but may consider whether it is able to determine a planning application without recent evidence of continuing need, and may reasonably warn the

Cabinet that, if and when planning applications are submitted, it will be looking for a more current needs assessment to demonstrate the need for the development.

As a note, given the proposed timetable, with planning applications following the adoption of the DPD in December 2013, it would appear unlikely that those planning applications would come before the Planning Committee before mid to late 2014. Given the passage of time since the last needs assessment in 2007, and given the peripatetic nature of travellers, it is likely that the independent inspector will want an up-to date needs assessment when considering the draft DPD, and that the Planning Committee will want to have an up-to-date needs assessment before them in 2014 to inform its determination of any planning applications. Any needs assessment conducted in 2012 will no longer be completely current by late 2013 or 2014. Accordingly, I would suggest that it would be appropriate that the Cabinet should satisfy itself at this stage that circumstances have not changed materially since the last needs assessment in 2007, but that any new formal needs assessment should be timed to inform the examination in public of the draft DPD and the Planning Committee's determination of any planning applications.

2.2 Planning Policy

In determining any planning application for a traveller site, the Planning Committee must act in accordance with the plans which make up the Local Development Framework, unless there are exceptional and over-riding circumstances.

Regulation 4 and Schedule 3 to the Functions and Responsibilities Regulations provide that Council and the Executive have quite distinct roles in the preparation and adoption of strategic plans and policies, including plans which comprise the Development Plan (i.e. the Local Development Framework) –

- **Council** may require the Executive to prepare a draft plan (or draft revised plan) and submit it to Council for approval, and only Council may adopt that plan or policy. Council (and Planning Committee) have no power to prepare a draft plan or a revised draft plan, but may amend any draft plan or draft revised plan which the Cabinet submits to it for approval (subject to the ability of the Cabinet to object to any such proposed amendments, and the requirement for Council to consider any such objections).
- In contrast, the **Executive** must undertake the preparation of a draft plan or policy when so required by Council and must submit that draft plan or policy to Council for approval. If Council decides to amend the draft plan, the Executive has an opportunity to object to the proposed amendments,

but ultimately, after considering such objections, Council can decide to make appropriate amendments to the draft plan or policy.

Whilst the approval of a plan which forms part of the Local Development Framework is subject to a statutory process, involving the appointment of an independent inspector, an examination in public and consideration by the Council or the inspector's recommendations, it is for the Cabinet to decide what process it undertakes in preparing a draft plan for submission to Council. So it is a matter for Cabinet's discretion whether and when it prepares issues papers and other preparatory documents, and whether it undertakes consultation on such preparatory documents or on the draft plan itself before submission to Council for approval. Such executive consultation may usefully inform the Council in its consideration of the draft plan, but does not prevent the Council undertaking its own consultation.

Accordingly, the decision whether to require the preparation of a draft plan is a matter for Council, but the decision to undertake executive consultation before submission of a draft plan to Council is a matter for the discretion of Cabinet, on which Council may recommend but cannot direct Cabinet.

2.3 The Strategic Plan Framework

In discharging its executive functions, the Cabinet must not act contrary to the Strategic Plan Framework as approved by Council. Where Cabinet proposes to act contrary to the Strategic Plan Framework, it cannot take such a "departure decision" itself, but must refer it to full Council for decision.

Schedule 3 of the Functions and Responsibilities Regulations define the Strategic Plan Framework to include all documents which comprise the Development Plan (i.e. the Local Development Framework), but Council may require the Cabinet to prepare and submit to it for approval plans and policies in respect of the authority's functions which are not "Planning" policies, as evidenced by the Community Strategy. Schedule 4 defines a "departure" as comprising any decision which is contrary to such an approved plan or strategy.

At present, Council has not approved a specific DPD in respect of traveller sites, nor has it adopted any strategy for traveller site provision. Accordingly, the approved policy remains the Core Strategy. So, this means that if the Cabinet wishes to progress a preferred sites process which is contrary to the Core Strategy, the decision to progress that preferred sites process contrary to the Strategic Plan Framework would be a "departure" and so would the Cabinet would not be able to take a decision to progress it without referring the matter to Council for determination.

The difficulty with this provision is that the statutory provisions do not say who is to determine whether a proposed decision is a “departure”. Accordingly, Cabinet may take the view that a proposal is not a departure, but Council or a Scrutiny Committee may consider that it would constitute a “departure”. Whilst the Monitoring Officer may express a view, ultimately the point may only be capable of resolution by a Court of Law.

In this context, the Core Strategy may contain a policy that certain areas of land be protected from development except where there are over-riding reasons to the contrary, and Cabinet may take a different view from Council as to whether there are such over-riding reasons, and therefore whether a decision to bring forward a development proposal might be a departure. This difference of views may not be capable of resolution at this stage. The balance of the argument may change over time as new Development Plan Documents are approved, which may recognise certain factors as over-riding reasons for this purpose. However, if the proposal ultimately requires planning permission, it will ultimately be the Council (or Planning Committee) which will determine whether there are sufficient over-riding reasons to justify the grant of planning permission.

3 Specific Points

Turning then to the points raised in the Rationale submitted by Councillors –

3.1 Postponement of the options consultation

This is a matter for Cabinet’s determination. If Cabinet feels that the pressure to deal with the issue of travellers is such that it is appropriate to start the process of identifying possible sites and preparing proposals so that planning applications can be submitted as soon as the DPD has been approved, that is a tactical decision for the Cabinet.

3.2 Response to the Chair of Overview and Scrutiny Committee

I would draw attention to the requirement in the new Section 9FE of the Local Government Act 2000, as set out in Part 1, Chapter 2 of Schedule 2 to the Localism Act 2012, setting a mandatory timetable for Cabinet to respond to formal reports and recommendations of Overview and Scrutiny Committees.

3.3 The validity of the consultation process

Note that this is not the statutory planning consultation, but a consultation designed by Cabinet to inform its selection of preferred sites. It is legitimate for Council to report its concerns over that consultation process, but ultimately this is a matter for Cabinet to determine and it does not prejudice the statutory

consultation which will need to be carried out on the draft DPD or any planning application.

3.4 Needs assessment to support the Core Strategy

As set out above, a decision to undertake a new needs assessment is a decision for Cabinet and not for Council. However, Cabinet should have in mind the need for up-to-date survey and needs information to support the examination in public of the DPD (currently in preparation) and any subsequent planning applications.

4 What can Council do?

4.1 During the preparation of the draft DPD

Council can indicate that, when the independent inspector conducts the examination in public on the draft DPD, or when Council comes to consider and adopt the draft DPD, or when Planning Committee comes to determine any planning application, it will require certain supporting evidence such as a current needs assessment. But it has no power to undertake such a needs assessment on behalf of the Executive.

4.2 In respect of executive consultation

If Council considers that the Executive is acting unlawfully in refusing to prepare a draft DPD or in the process which it is following, a representative Council Tax payer may apply to the Court for judicial review of the Executive's decision to act in that manner. In *R (Oxby) v Bassetlaw DC*, it was the leader of the Council who applied for judicial review of a decision of the Council's Development Control Sub-Committee, so the precedent is set for any member of Council to act as the applicant. The authority may grant the representative member an indemnity for his legal costs in taking the action – I am not aware of the arrangements which the authority has adopted for dealing with applications for such an indemnity.

However, for an application for judicial review to succeed it is necessary to show that the Executive has acted unlawfully, and that essentially means that the Executive has acted –

- Outside its powers;
- In breach of statutory procedural requirements;
- For an ulterior and improper purpose;
- Unreasonably; or
- That its decision was vitiated by actual or apparent predetermination or bias on the part of members of the Executive.

4.3 When the draft DPD comes before Council for adoption

At this stage, Council is required to go through its own statutory process of consultation and examination in public. There may be an overlap between this statutory process and any non-statutory consultation undertaken by the Executive, but the fact that the Executive has previously undertake such non-statutory consultation does not invalidate the subsequent statutory process.

However, if the Executive failed to provide the Council with sufficient information upon which to undertake a proper consideration of the draft DPD – for example if the Executive failed to provide a reasonably current needs assessment – the Council could defer consideration of the draft DPD until such information was provided.

4.4 When a planning application comes before Planning Committee

Planning Committee must consider any planning application on its merits. The Planning Committee would consider the application on its merits. But, if the applicant (in this case the Executive) fails to provide sufficient supporting evidence such as a reasonably current needs assessment, it is likely that this evaluation will be less favourable to the application, and may even result in its being refused, than it would have been if strong evidence was submitted in favour of the proposal.

4.5 At any time

If Council disagrees with the Executive, it is open to Council to remove the Leader from office mid-term by a simple majority vote, and replace the Leader with a member who is more sympathetic with Council's viewpoint.

5 Officer Advice on a Notice of Motion

I confirm that it is entirely proper for officers to include in the agenda for the Extraordinary Meeting of Council a written report setting out the factual basis of the issue and their professional and technical advice, and to proffer that advice at the meeting.

There is nothing in law or in the Council's constitution which either prevents such a supporting report or exempts business on a member notice of motion from the requirements of administrative law that the Council take its decisions on the merits of the issue, within the law and having regard to all material considerations, and on the basis of good and substantial reasons which must be recorded as the basis of the decision.

Accordingly, I would consider that the professional officers of the Council, who are required by their job descriptions to act in the best interests of the authority, would be in dereliction of that duty if they failed to provide a sound basis of information and advice to enable the Council to take a lawful decision on any matter.

I have been provided with a draft copy of the officers' report to the Extraordinary Council Meeting, and I consider that it comprises necessary and appropriate advice to Council.

Yours,

A handwritten signature in black ink, appearing to read 'Peter Keith-Lucas', written in a cursive style.

Peter Keith-Lucas
Commercial Partner
For Bevan Brittan LLP