

## **Matter 1**

### **Issue 1b: Other legal and procedural requirements**

#### **Question 1**

Has consultation on the RBLP been undertaken in accordance with the Council's adopted *Statement of Community Involvement* (LP25) and the consultation requirements in the Regulations?

#### **Concise Answer**

No.

#### **The Judiciary and the Executive**

1. In the recent case on the priority to be accorded to local development plans Lord Carwarth, writing the majority opinion of the Supreme Court, chose to emphasise the words of the Minister for Planning in the foreword to the *National Planning Policy Framework* that the government was "allowing people and communities back into planning"<sup>1</sup>.

#### **Common law, public authorities and consultation**

2. The requirements that public authorities must meet when consulting have been established by case law and include the Sedley Principles<sup>2</sup> that the authority must:

- Consult when proposals are still at a formative stage;
- Give sufficient reasons for a proposal to allow for intelligent consideration and response;
- Give adequate time; and
- Properly consider and respond to the consultation responses.

On this last point the government's legal department writes "Where a consultation has taken place and before the decision has been made, proper weight must be given to the representations received. The decision must make it clear that this has been done"<sup>3</sup>.

#### **Consultation on the Preferred Option**

3. RBC's *Statement of Community Involvement* (LP25) refers to Regulation 18 and the Preferred Option stage of plan making on page 14.

4. On 8 December 2015 the Council received a report on the Preferred Option stage which informed them, inter alia, that "Public consultation on the Preferred Option must be undertaken in line with the Statement of Community Involvement ..."<sup>4</sup>. In line with the *Statement of Community Involvement* the report also provided a consultation template including the statements "**All** comments received will be given full consideration and will inform the detail of the Proposed Submission Version Local Plan. We will engage in discussions where this helps develop the document" [my emphasis] and "Responses received will be publicly available following the close of the consultation and will be summarised in a Consultation Statement that will highlight key issues and how comments have been dealt with and affected the Plan".

5. On 19 July 2016 the Council received a draft *Publication Draft* and granted authority to the Head of Growth and Investment to publish the *Publication Draft* of the local plan. The only comment

the report made about the consultation on the *Preferred Option* stage was “Work on the Publication Draft has been informed by the feedback received during ... previous consultation periods”<sup>5</sup>.

6. A report on the Preferred Option stage consultation was **not** produced until September 2016<sup>19</sup>.

7. I submit that as a report on the Preferred Option stage consultation was not produced until September 2016 councillors could **not** have given proper consideration to this consultation in July 2016 when they voted to proceed with the publication draft. Therefore the *Statement of Community Involvement* was **not** complied with in respect of the Preferred Option stage.

#### **Consultation on the Publication Draft**

8. RBC’s *Statement of Community Involvement* (LP25) refers to Regulation 19 and the Publication Draft stage of plan making on pages 14 and 15.

9. On 19 July 2016 the Council was informed that “Regulation 19 of the Town and Country Planning Regulations 2012 requires that all documents that are to be submitted to the Secretary of State must be made available for public inspection”<sup>6</sup>.

10. At the start of the consultation on the *Publication Draft* **none** of the documents were available in Rugby Public Library as promised by the Council<sup>7</sup> and some of the documents were not available on the borough council’s website. Some of these failings were rectified following protests from local residents – see the *Rugby Advertiser* of 29 September 2016.

11. Document LP32 is the *Water Cycle Study*. Paragraph 11.16 of the *Publication Draft* states “The Council is undertaking a Water Cycle Study to update its evidence base. This work will be completed **in advance of this document being published for public consultation** and its findings reflected in the IDP and policies” [my emphasis]. This document was **neither** available in Rugby Public Library **nor** on the borough council’s website during either of the consultation periods. A Freedom of Information Act request was made for this document on 6 December 2016<sup>8</sup>. On 6 January 2017 the borough council replied “This information is exempt under Section 22 of the Freedom of Information Act as it is information intended for future publication. It is anticipated that this will be sometime during the next two months”. A reminder concerning the Freedom of Information Act request was sent on 14 May 2017 but received no response.

12. I submit that paragraph 11.16 of the *Publication Draft* is evidence that the borough council had an intention to submit a Water Cycle Study to the Secretary of State. However they did **not** make this document available during the consultation periods – indeed they sought to frustrate consideration of this document by using the future publication defence to a Freedom of Information Act request. I submit that they have therefore breached Regulation 19.

13. Document LP19 is the *Strategic Transport Assessment 2016* and document LP20 is the *Strategic Transport Assessment 2017*. Neither of these documents were available in either Rugby Public Library or on the borough council’s website at the start of the consultation. The *Strategic Transport Assessment 2017* was **not available at any stage** during either of the consultations. Indeed even councillors had less than a week to study this document before resolving to submit the *Publication Draft* to the Secretary of State. The failings of the county council’s 2016 evidence were

plain before the start of the second period of consultation with the Council's Executive Director reporting "Many of the concerns expressed to officers and Members through the consultation to date have focussed on effective delivery of infrastructure and particularly highways impacts. In response to these concerns it is clear that the Council has additional technical work to undertake in partnership with Warwickshire County Council and the extension of the overall timetable for plan production will create additional time for this work"<sup>9</sup>.

14. I submit that by 15 November 2016 the Council had formed an intention to submit an additional document to the Secretary of State on highways matters and that this later became LP20. However the Council did **not** make this document available during the consultation period and that therefore they have breached Regulation 19.

15. I submit that the failure to provide LP32 and LP20 during the consultation period are clear breaches of Regulation 19.

16. I wish to make a submission with regard to the nature of the council's treatment of LP19 which is not clear cut but which points to a failure to comply with the *Statement of Community Involvement*. The *Statement of Community Involvement* [LP25] refers to the *National Planning Policy Framework* as "relevant legislation that is applicable to the preparation of Local Development Documents". This is the confusion between legislation and government policy which the Supreme Court sought to dispel. However it is certainly true that RBC must have regard to government policy, that this regard must be extended to the *Statement of Community Involvement* and therefore RBC must consider "allowing people ... back into planning" and that this matter has been emphasised by the Supreme Court.

17. LP19, the *Strategic Transport Assessment 2016*, is a 6.6MB PDF file with 173 pages. It is a summary of findings of the Rugby Wide Area traffic model. As the report says "The output [of the RWA model] is a visual display which shows the changing position of individual vehicles and queues on the highway network in real time. **The advantage of a visual display enables nontechnical stakeholders to view the results of highway and development proposals in terms of traffic flows and congestion**" <sup>10</sup> [my emphasis].

18. I submit that LP19 is not an easy read for members of the public. Whilst some of the flaws in the document, such as the failure to model traffic flows around Lodge Farm, leap off the page other flaws such as the failure to fully allow for either the Rugby Radio Masts development or the Daventry International Rail Freight Terminal and the failure to model the A4071/A45/B4453 junction might only be visible to the layperson after several hours of careful study.

19. Rugby's Executive Director admitted that the highways impacts of the *Publication Draft* are of particular concern to residents<sup>9</sup>. Indeed the Council concedes that "The capacity of the existing road network generates the greatest level of comment"<sup>18</sup>. In addition to concerns about the traffic congestion and delays to journey times it should be noted that there are two areas of the borough which exceed the legal limit on annual nitrogen dioxide concentration as a result of traffic congestion<sup>20</sup>. An Air Quality Management Area was introduced in 2004 but the borough council has failed to resolve the nitrogen dioxide problem. I submit therefore that the traffic impacts of RBC's proposals are a significant area of interest.

20. RBC did **not** arrange for WCC highways engineers to be present at its exhibitions on the *Publication Draft* to answer questions on highways matters. As a result of protests on this failure one Dunchurch resident, John Bennett, was granted a thirty minute telephone conversation on 20 October 2016 with one of the highways engineers (Nick Dauncy). This brief conversation did not resolve all [or indeed a majority] of Mr Bennett's issues and Mr Dauncy suggested to Mr Bennett a longer and more public session on transport but stressed this would have to be arranged by the borough council<sup>11</sup>. The *Statement of Community Involvement* [LP25] acknowledges that workshops may be an appropriate means of engaging with the local community<sup>12</sup>. Accordingly I asked the Leader of the Council to arrange a workshop on highways matters. This request was rejected on 31 October 2016<sup>13</sup>.

21. Whilst holding workshops under the *Statement of Community Involvement* [LP25] is an option there is no requirement that the Council do so. The Council has discretion to reject any individual request to hold a workshop. However I submit that this matter should be considered in the round. Traffic congestion is a major source of concern, it is the source of RBC's long standing failure to meet its legal requirements with regard to air quality. LP19 is a challenging document to understand and rests on a model whose advantage is that it enables "nontechnical stakeholders to **view** the results of ... development proposals in terms of traffic flows and congestion" (see above). The Council failed to arrange for other means of explaining LP19 to the public (such as securing the services of WCC highways engineers at its exhibitions). If this topic was not suitable for a workshop (where the model outputs could be viewed) then it is hard to imagine what topic could be suitable for a workshop. Accordingly it is submitted that the Council has not acted in accordance with the spirit of the *Statement of Community Involvement*.

22. A further, relatively trivial, example of a breach of the *Statement of Community Involvement* concerns the meetings which were held with consultees in 2017. Here LP25 states "Where a meeting with consultees is held, a record of the meeting will be made and circulated to those in attendance"<sup>21</sup>. Save Dunchurch and About Turn have no record of receiving the Council's note of meeting although About Turn provided the Council with one. SHARE report that they did receive a note of meeting but only after chasing for one.

### **The decision to submit the Publication Draft to the Secretary of State**

23. On 21 June 2017 the Council's Executive Director recommended that the Council approve the submission of the Publication Draft [LP55]. His report did not summarise the responses to consultation or state how the Council had responded to those responses instead councillors were informed that "a summary of consultation responses received to the Publication Local Plan consultation has been distributed to all Councillors in April 2017 and has also been made available on the council website on the Local Plan webpage"<sup>14</sup>.

24. The summary to which the Executive Director referred and on which councillors must have relied when considering whether they had properly met their duty to consult has not [at the time of writing] been included in the Examination Library. It is a 40 page report<sup>22</sup> followed by a 19 page annex on the Sustainability Appraisal. The report eschews quantification instead adopting phrases like "a consultee"; "a number of respondents" [a meaningless phrase particularly if one regards zero

as a number]; “some respondents”; “many respondents”; “the vast majority”. RBC now report that they received 7,133 representations from 2,261 respondents<sup>15</sup> however this information was not provided in that report. The 7,133 representations are summarised in just 23 pages of the report. Even the representations which were identified in the report did not always have a response. For example the report correctly stated that “Daventry District Council did not feel the plan justified why provision needed to be made on greenfield sites ... no analysis had been undertaken to explore how delivery on ... brownfield sites could be accelerated”<sup>16</sup>. However these points were neither accepted nor refuted.

25. I submit that it is impossible to effectively summarise the 7,133 responses to the *Publication Draft* in just 23 pages of a report and when points are worthy of mention but are not responded to then this is evidence that they have not been considered. Therefore I further submit that “all representations” were not “taken into account”<sup>17</sup> and thus RBC failed to meet the requirements of its own *Statement of Community Involvement* [LP25] with regard to the *Publication Draft*.

#### **Events since the Council decided to submit the Publication Draft**

26. On 4 August 2017 the Inspector informed the Council that they had failed to provide a summary of representations.

27. The Council has since undertaken a more extensive analysis of the representations made and has posted them in the Examination Library. I submit that an analysis of representations undertaken *after* the submission of the *Publication Draft* to the Secretary of State is *not* evidence that the Council properly considered those representations before deciding to present the *Publication Draft* to the Secretary of State.

28. The second point I wish to make with regard to this retrospective analysis of the representations is that it still incomplete. I have not cross-checked all 7,133 representations to see if their essence has found its way into LP53 however I have checked the consultation section of LP53 to see if it picks up the points I made in my two representations on the consultation procedures adopted by RBC. The first of these was submitted at 13.33 on 8 November 2016 and the second at 08.52 on 11 November 2016 (both within the consultation period). Both of these submissions were acknowledged by RBC at the time of submission yet neither are referred to in the consultation section of LP53. Clearly even at this late stage not “all representations” have been “taken into account”<sup>17</sup>.

#### **Summary**

29. A summary of responses to the *Preferred Option* consultation was only produced after councillors had already voted to proceed to the *Publication Draft*. Therefore the responses could not have been taken into account when the decision was taken and thus the Council did not comply with its own *Statement of Community Involvement*.

30. The Council had formed an intent to submit LP32 to the Secretary of State before the start of the consultation on the *Publication Draft* and had formed an intent to submit LP20 to the Secretary of State before the start of the second consultation on the *Publication Draft*. Neither document was

produced during either of the consultation periods. Indeed the Council actively sought to frustrate access to LP32. RBC is in breach of Regulation 19.

31. An adequate summary of the representations received was not available to the Council before it decided to present the *Publication Draft* to the Secretary of State. Even where representations were noted in the 'Summary' which was produced they did not always receive a response. Even now after the decision to present has been taken not all representations have been noted. Therefore not "all representations" have been "taken into account" and thus the Council did not comply with its own *Statement of Community Involvement*.

32. The failure of RBC to hold a workshop on the transportation issues raised by its Local Plan when this was a method of consultation specified in the *Statement of Community Involvement*, when the evidence was particularly technical and where the traffic modelling technique chosen had the advantage of a visual display that would enable "nontechnical stakeholders" to "view the results of development proposals" is indicative of a Council which does not want to "allow people ... back into planning".

33. In respect of its *Publication Draft* RBC has neither complied with Regulation 19 nor with its own *Statement of Community Involvement*.

**Richard Allanach**

**December 2017**

[2,792 words]

## Footnotes

1. Paragraph 10 of Carwarth LJ in the judgement on Suffolk Coastal District Council (Appellant) v Hopkins Homes Ltd and another (Respondents) Richborough Estates Partnership LLP and another (Respondents) v Cheshire East Borough Council (Appellant) (2017). He in turn was quoting the Minister for Planning on page ii of the *National Planning Policy Framework* (2012).
2. Established in *R v Brent LBC ex p Gunning* (1985).
3. Page 12, *Judge Over Your Shoulder*, Government Legal Department (2016)
4. Paragraph 5.1 of Agenda No 7(b) of the Council meeting of 8 December 2015.
5. Paragraph 2.2 of Agenda No 7(a) of the Council meeting of 19 July 2016.
6. Paragraph 4.3 of Agenda No 7(a) of the Council meeting of 19 July 2016.
7. An example of this promise is given on page 105 of LP26.
8. The history of this Freedom of Information Act request can be viewed at [https://www.whatdotheyknow.com/request/current\\_water\\_cycle\\_study#comment-80242](https://www.whatdotheyknow.com/request/current_water_cycle_study#comment-80242).
9. Paragraph 2.5 of Additional Agenda Item of the Council meeting of 15 November 2016.
10. Paragraph 4.3 of LP19.
11. E-mail of 21 October 2016 to, amongst others, Rajvir Bahey of Rugby Borough Council. Not in the Examination Library but available at pages 16 to 17 of: [http://www.planningportal.rugby.gov.uk/fastweb\\_upload/Planning%20Scanned%20Applications/R13-2102/Appeal/SARD-CommentsSoCGandAppendices.pdf](http://www.planningportal.rugby.gov.uk/fastweb_upload/Planning%20Scanned%20Applications/R13-2102/Appeal/SARD-CommentsSoCGandAppendices.pdf)
12. Page 12 of LP25.
13. Minutes of RBC Cabinet meeting – 31 October 2016.
14. Paragraph 6.3 of LP55.
15. Page 47 of LP26.
16. Page 15 of *Local Plan Publication Draft Consultation Responses Summary*, RBC, 2017.
17. Page 15 of LP25.
18. Page 15 of *Local Plan Publication Draft Consultation Responses Summary*, RBC, 2017.
19. *Local Plan Preferred Options – Summary of Consultation Responses*, RBC (2016). At the time of writing this is not in the Examination Library but is available here [https://www.rugby.gov.uk/downloads/file/1113/local\\_plan\\_preferred\\_options\\_-\\_consultation\\_responses](https://www.rugby.gov.uk/downloads/file/1113/local_plan_preferred_options_-_consultation_responses)
20. Page 21 of *Air Quality Annual Status Report 2016*, RBC, 2017. Not in the Examination Library but available at: [https://www.rugby.gov.uk/downloads/file/1109/air\\_quality\\_annual\\_status\\_report\\_2016](https://www.rugby.gov.uk/downloads/file/1109/air_quality_annual_status_report_2016)
21. Page 13 of LP25.
22. *Local Plan Publication Draft Consultation Response Summary*, RBC, 2017. Not in the Examination Library but available at: [https://www.rugby.gov.uk/downloads/file/1324/local\\_plan\\_-\\_publication\\_draft\\_summary\\_of\\_consultation\\_responses](https://www.rugby.gov.uk/downloads/file/1324/local_plan_-_publication_draft_summary_of_consultation_responses)