

Kathryn Pettitt
Chief Legal Officer
Hertfordshire County Council
County Hall
Hertford
Herts SG13 8DE

By email to: kathryn.pettitt@hertfordshire.gov.uk

Dear Ms Pettitt

Thank you for offering the District Council the opportunity to respond to the actions which the County Council is proposing to take in its cabinet meeting of 9 December 2013.

It is not, of course, appropriate for one local authority to seek to interfere with the decision-making processes of another and the District Council does not propose to do so in this case.

Nevertheless, as a request has been made of this Council to comment on the proposed steps, this letter seeks to do so bearing in mind the responsibility I have referred to above.

It is noted that the Cabinet recommendation contained in the officer's report is largely influenced by the advice of Mr Rhodri Price Lewis QC contained in his Opinion of 4 November 2013.

The District Council takes this opportunity to provide the County Council with its following observations on the relevant case law.

The leading case in this area is *R v Warwickshire County Council ex parte Powergen* (1998) 75 P&CR 89.

The court in *Powergen* gave three reasons for its decision that a highway authority could not act inconsistently with the factual judgments reached previously by the appeal inspector: (a) the question of highway access was central to the planning application, and was accordingly given full consideration by the Inspector; (b) permission was granted by the Secretary of State rather than by the local planning authority; and (c) there were no new facts or changed circumstances following the Inspector's decision. The court added that, for the County Council's refusal to enter a s. 278 agreement to be lawful:



“... the highway authority would have to raise a fresh objection sufficiently different from their earlier one to admit of a realistic prospect that, had they advanced it before the Secretary of State on the planning appeal, it might, unlike the earlier one, have prevailed.” (page 95)

This case was followed, albeit in an immigration context, in *R v Secretary of State for the Home Department, ex parte Danaei* [1997] EWCA Civ 2704. The case concerned the Home Secretary’s capacity to reach a different view of a factual matter from that of the special adjudicator (who at the time occupied a position *vis a vis* immigration decisions analogous to that of a planning inspector *vis a vis* planning applications). The court held that the Secretary of State was not entitled to form a different view on matters of fact from that of the special adjudicator. It was pointed out:

“On an issue such as this it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence unless only:

- 1. the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones - none of which is suggested here;*
- 2. fresh material has since become available to the Secretary of State such as could have realistically have affected the adjudicator's finding - this too was a matter we considered in Powergen;*
- 3. arguably, if the adjudicator has decided the appeal purely on the documents, or if, despite having heard oral evidence, his findings of fact owe nothing whatever to any assessment of the witnesses.”*

Judge LJ also made the following observation:

If ... the Secretary of State is to set aside or ignore a finding on a factual issue which has been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on Wednesbury principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible.”

The law in this area was considered by the High Court in *R v Cardiff County Council ex parte Sears Group Properties Ltd* [1998] PLCR 262, which like *Powergen* concerned the s. 278 Highways Act jurisdiction. Having considered the various authorities in the area, the Judge expressed the following view (at page 272):

“... it is, in my view, possible to discern in the cases a broad principle (subject to variations in detail) that where a formal decision has been made on a particular subject matter or issue affecting private rights by a competent public authority, that decision will be regarded as binding on other authorities directly involved, unless and until circumstances change in a way which can be reasonably found to undermine the basis of the original decision. That change may be a change in the factual circumstances or sometimes in the underlying policies affecting the decision ... in the public sphere, once the matter has been formally decided, it should stay decided until circumstances change in some material respect.”
[highlight added]

The Judge also emphasised that, in deciding whether a public authority is to be regarded as bound by another public authority’s decision, it is important to consider *“whether, having regard to the factual and statutory framework, the subject matter is, in truth, the same”* (page 273).

No different position from the above observations was taken in *The Mayor of London v Enfield LBC* [2008] Env LR 33, which Mr Price Lewis has referred to in his Opinion.

These authorities establish that, where a particular factual matter has been determined by the Secretary of State following full consideration at a public inquiry, the determination is conclusive of that particular factual matter for the purposes of related decisions to be made by other public authorities, unless either (a) there has been a material change of circumstances subsequent to the determination or (b) the determination was in error of law.

Additionally, if a decision on a particular issue which was later to be determined had not been the subject of the earlier assessment, the local authority would not be bound subsequently to take a particular course in relation to that issue. Accordingly, should the proposed section 106 obligation in the present case contain any onerous obligations which were not considered either by the Inspector and/or the Secretary of State on the appeal (whether implicitly or specifically), the County Council would not be bound to enter into that obligation.

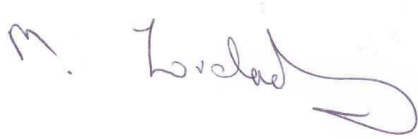
The existence of a material change of circumstances and an assessment of the legality of the decision are, given the above, relevant matters to take into account when deciding whether it is right to conclude that the County Council is bound by the terms of the Inspector’s determination.

Consequently, the District Council would point out the following:

1. Before reaching a decision on either the s. 106 agreement or the disposition of the Radlett site, the County Council should take into account whether there have been any changes of circumstances since the Secretary of State’s minded to grant letter was issued, for example whether any alternative sites have emerged. Again, the District Council does not wish to influence the County Council in its decision-making process and leaves this assessment to the authority.

2. The County Council should consider the legality of the minded to grant decision. This would be consistent with the Council's fiduciary duty to the inhabitants of its area given that the advice of Mr Price Lewis is couched in an assessment of the position should the minded to grant letter be lawful.
3. The County Council should assess whether any of the proposed obligations are more onerous than those proposed in the appeal. The District Council expects that this is not the case, but, if they are, that will clearly alter the County Council's duty to enter into the obligation.

Yours sincerely

A handwritten signature in blue ink that reads "M. Lovelady". The signature is written in a cursive style with a long, sweeping tail.

M Lovelady LL.B. (Solicitor)
Head of Legal, Democratic and Regulatory Services

Copy to: Elaine.Shell@hertfordshire.gov.uk