jb planning associates

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Dear Lissa

**Rochford Core Strategy: Invitation for comments on Cala Homes Judgement – response on behalf of Countryside Properties (respondent ID 8650)**

I refer to your letter of the 8th February regarding the above, and we set out our comments below.

**The implications of the second Cala Homes judgement**

In our written submissions on the Proposed Changes and at the reconvened Examination on 2nd February we argued that, whilst the first Cala Homes decision on 10th November is critical to this Examination, because it confirms that the East of England Plan remains in force, the second and more recent '*Cala'* decision should have no bearing on this Examination.

This is because the second case is concerned only with whether or not the Secretary of State's future intention to revoke Regional Spatial Strategies is a "material consideration", and as we set out in our statement, there is no provision in legislation for s24(1) of the 2004 Act (which requires Core Strategies to be in "general conformity" with the RSS) to be 'off-set' against other "material considerations". By the same reasoning, any appeal by Cala Homes against the recent judgement is also not relevant.

Although the vast majority of Mr Justice Lindblom's judgement of 7th February deals, as one would expect, with issues connected with the determination of planning applications under s70 and determination of appeals, the judgement does helpfully at paragraphs 62 and 69 confirm our view of the lack of relevance of this Judgement to this Core Strategy process.

At paragraph 62 it is accepted that the Secretary of State's advice of 10th November could "*equally well apply to local planning authorities in the exercise of their functions in the preparation of development plans*" (our underlining) and at paragraph 69 it is accepted that under s19 of the 2004 Act local authorities are required to have regard to the regional spatial strategy when preparing a development plan document. However, as to the current position of the law, the judgement goes on to state in paragraph 69 as follows:

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*" … in my judgement, the duty of an authority under section 24(1) of the 2004 Act to prepare their local plan documents "in general conformity" with the relevant Regional Strategy is not prejudiced by the Government's intention to dispense with such strategies. While Regional Strategies subsist a local planning authority will have to make sure to discharge its duty to achieve general conformity with them. Failure to do this would expose the offending plan to risk of challenge in the courts. An authority preparing a plan is no more at liberty to override its duty under section 24(1) of the 2004 Act than it is to disregard its duty under section 38(6) when determining an application for planning permission."*

(our underlining)

The position is thus clear. When in the course of preparing a plan, there is no reason why a local authority cannot look ahead and take in to account that at some point in the future RSS is set to be revoked. But ultimately whilst the RSS subsists, as it does, a Core Strategy is required to be in general conformity, and there is no legal option to adopt a Plan that is not. As set out in our original written submissions, general conformity remains a legal requirement, not an optional extra, and there is no provision for '*conformity*' to be weighed against other material considerations.

The reasoning in the extract above is in fact central to the principal issue raised under the first point of challenge, namely the allegation by the Claimant that the 10th November letter was an attempt to "*subvert the application of the statutory framework*" (see paras 41 and 43 of the judgement). The judgement however makes clear that there is nothing in the 10th November that can be taken as suggesting that RSSs have in fact been revoked, and rather the conclusion is that they remain "*central in the statutory system*" (para 77). It is the very fact that the judgement concludes that the 10th November letter does not "subvert" existing legislation that led to the claim on this ground being rejected. To now use the Secretary of State's letter and the notion of 'material considerations' as a means of circumventing ('subverting') the requirements of s24(1) would not only result in an unlawful Plan, but it would rather miss the point of why this part of the claim was not upheld in the first place.

I would also draw attention to paragraph 61 of the judgement, which contains a helpful summary of the current situation, and states:

"*As the Chief Planner's letter of 10th November makes plain, after the abolition of Regional Strategies is achieved, if it is, by the new legislation, decisions on housing supply will be made at the local level on the basis of local assessments of need*."

(our underlining)

As we stated at the Examination, until the Localism Bill is enacted and RSS revoked, there is simply no legislative basis for Local Planning Authorities to set their own housing targets (nor is there any policy basis, since PPS12 only refers to housing provision being in accordance with the RSS, and does not at any point seek to suggest that any alternative exists).

As the Chief Planner says in the 10th November letter, the Localism Bill "*will return decision-making powers in housing and planning to local authorities*". But it hasn't happened yet, and until it does, the RSS is the sole governor of local housing targets, enforced by s24(1).

(our underlining)

**"General Conformity"**

In our view then the only question at issue is whether or not the Rochford Core Strategy is, or is not, in "general conformity" with the RSS. If it is not then it fails s24(1).

As put forward in our evidence to the Examination, the original Submission Core Strategy was in general conformity (although our clients have raised some specific matters requiring attention, in particular in terms of phasing of Greenfield sites).

However, the Proposed Changes would render the Core Strategy not in general conformity, and therefore legally deficient. We identified three key factors supporting that contention in our written statement and at the Examination, which in brief were:

(1) The Proposed Changes were put forward only on the (ultimately false) premise that RSS no longer existed and that it was therefore possible for the Council to set its own housing requirement. The paper trail of events and decision making confirms that. If the Proposed Changes were genuinely 'in general conformity', they would not have arisen only on the supposition that RSS had been revoked;

(2) The RSS allows for no flexibility in the matter of housing supply – the housing requirement figures are minima, the numbers are absolutes and not indicative, and (particularly important in this case) the dates by when set levels of housing have to be achieved are also specific;

(3) The scale of the shortfall that would arise from the Proposed Changes is substantial – over 1300 units less than required by the RSS over the plan period, which is over 25% less than the minimum required (see our original written statement for details of the calculation).

There can be little doubt therefore that the Core Strategy, as proposed to be changed, is not in general conformity, and that to comply with s24(1), the proposed changes should be rejected (not just to ensure that the housing figures are correct, but to ensure that the inappropriate removal of all references to the RSS from the Core Strategy is also corrected).

**Appropriate weight even were "material considerations" relevant**

Without prejudice to the above, even were it the case that "material considerations" were relevant in this instance, there is still the matter of the appropriate weight that might reasonably be afforded to such considerations, in the context of a legislative framework that through s24(1) seeks in the first instance to ensure that there is consistency between lower tier plans and higher tier plans. The '*Cala*' judgement contains a helpful summary of the difference between "materiality" and "weight".

In short, if the two tier plan system and conformity between those tiers is not to be turned on its head and made irrelevant, any "material considerations" at the local level would need to be of such significance and so unique such as to avoid the likelihood of common repetition, which would otherwise effectively undermine the purpose of s24(1).

As we set out at the Examination, three pertinent questions might be:

(1) Are the "material considerations" in this case truly unique and/or specific to the local area?

(2) Are they matters that have come to light since the RSS was prepared and which were not factors that were 'part and parcel' of the RSS assessment process (i.e. this should not be an opportunity for a 'second bite at the cherry' just because a local authority is not happy with the outcome of the RSS)?

(3) Are they matters of such weight as to justify setting aside the legal requirement for general conformity under s24(1)?

In the case of the various matters set out in the Council's Topic Paper 3, the answer to each question would be 'no', for the reasons set out in our written statement and at the Examination. Under proper scrutiny, none of the factors advanced are particularly special to Rochford, none of the factors referred to are new or have arisen since the RSS was adopted, and the evidence presented for the most part does not even support a different approach to that set out in the RSS anyway (a good example being the supposed environmental/ sustainability advantages of less homes, when in fact the updated SA records no clear outcome).

Clearly however if our arguments on the lack of relevance of '*Cala*' are accepted, then the above questions do not even fall to be asked.

We hope the above commentary is helpful to the Examination.

Yours sincerely

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cc Mr Steve Price – Countryside Properties PLC
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