CARTER JONAS

The Property People

21st February 2011

Rochford Core Strategy
Response on CALA Homes Judgement February 2011
On Behalf of Southern and Regional Developments

We refer to your letter of the 8th February which as discussed at the resumed Examination, addresses the latest judgement on the CALA Homes judicial review, released on 7th February. The Inspector advised at the Examination, as confirmed in your letter, that she would invite further comments on the following question:

"What weight should be given to the Secretary of State's intention to abolish Regional Spatial Strategies, and what are the implications for the Inspector's consideration of the proposed changes?"

In our response to the Inspector's Matters and Issues prior to the resumed Examination, we pointed out that PPS12 makes clear in paragraph 4.50 that under the Planning and Compulsory Purchase Act 2004 S 20(5)(a) an Inspector is charged with firstly checking that the plan has complied with legislation, which includes in particular checking that the plan conforms generally to the Regional Spatial Strategy, as required by S 24(1) of the Act. This point was developed at the Examination, and it was clarified that there is not the flexibility within the legal framework for the Inspector to give any sort of weight to the possibility that the regional tier of planning may disappear with the enactment of the Localism Bill.

Although CALA lost the challenge on the basis that it is not unlawful for the makers of planning decisions to have regard to the Government's stated intention to abolish the

Regional Strategies in England as a material consideration in making determinations under the Planning Acts, in making his judgement Judge Lindblom did make clear that this related only to decisions on planning applications and appeals. On plan-making, he stated in paragraph 69:

"So far as plan-making is concerned, I believe Mr Mould was correct in submitting that the letter and statement of 10 November 2010 do not compromise the duty of a local planning authority under section 19 of the 2004 Act, as amended, to have regard to "the regional strategy for the region in which the area of the authority is situated …" when preparing a development plan document or any other local development document (section 19(2)(b)). This duty does not exclude the discretion to have regard to other considerations. Other considerations could, for example, include the national government's commitment to reforming the planning system by the removal of regional planning policy altogether. Similarly, in my judgment, 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. <u>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 the risk of challenge in the courts.</u> 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. The statement and letter of 10 November 2010 has not warranted, let alone incited, any such breach. Neither has the Secretary of State's letter of 27 May 2010." (our underlining).

In clarification of this point in paragraph 77, Judge Lindblom emphasised:

"… the principle that Regional Strategies are, and until they are removed will remain, central in the statutory system."

In our response to the Inspector's Matters and Issues, we referred to the advice from PINS on decision making in relation to applications and appeals, but set out that in the case of the emerging Rochford Core Strategy, the Inspector must work within the present planning framework which includes the RSS, as materiality was not relevant. The position has not changed with the CALA decision, indeed it has been reinforced by Judge Lindblom within the context of the above-quoted paragraphs.

As a consequence, the Inspector must therefore find that the Revised CSS is both unsound, as it is not consistent with the clear advice of PPS12 and PPS3, (setting aside our response to the proposed changes that the evidence base is also flawed), but also that it is not legally compliant with the 2004 Act. The sub-question raised in the Inspector's first question in the Matters and Issues regarding whether there any local circumstances that would justify any lack of conformity, is therefore one which has no basis in the Act and must be disregarded.

Our response to the Proposed Changes and at the resumed Examination was that the Inspector cannot proceed with the Proposed Changes, as they are clearly not in conformity with the extant RSS in terms of housing numbers and requirements; minimum housing provision; and by the simple fact that all reference to the RSS within the Proposed Changes has been withdrawn.

In support of this, the PINS LDF Procedure Guidance "Examining Development Plan Documents" August 2009) para 5.21 states that the Inspector will take the published DPD (and if relevant, the addendum submitted with the DPD) to be the final word of the LPA on submission. Para 5.22 sets out that the intention is that LPAs will not seek changes after submission because the frontloading process should have considered the full range of options and policy approaches. Therefore, there is a very strong post submission expectation that changes will not be necessary and this is a key premise of delivering the streamlined examination timetable. It goes on to state that LPAs should only seek changes after submission in very exceptional circumstances. Para 5.26 the Inspector examines the DPD (and any post publication addendum of focused changes he or she

accepts) ‘as submitted’.

Para 5.27 states that if the Inspector considers that the DPD (and/or addendum) may require changes after submission to make it sound, he/she must be satisfied that requirements for public consultation and sustainability appraisal have been met with regard to the changes (as set out in paragraph 5.23 above). Where the Inspector has identified that large numbers of changes are needed, this can make the examination and the reporting process considerably more complex and may point to cumulative flaws that amount to the ‘as submitted’ document being unsound.

In this case, the Council have used the opportunity to make substantial changes to the Submission Core Strategy that go beyond focused changes, and given that the opportunity has subsequently disappeared as a consequence of the CALA decision, the net effect is to make the submission draft – a document that we have argued to be essentially sound subject to minor changes – effectively unsound on a number of counts as set out above.

As a consequence, the Inspector has the ability to reject the Proposed Changes as they are ill founded and would make the Plan unsound, and should revert to the Submitted version, with the changes we requested at the original Examination.