

SELBY DISTRICT CORE STRATEGY: INSPECTOR'S ABILITY TO RECOMMEND
MAIN MODIFICATIONS

LEGAL SUBMISSIONS ON BEHALF OF SELBY DISTRICT COUNCIL

1. These are the legal submissions on behalf of Selby District Council (“the Council”) in relation to the question of the Inspector’s ability in the circumstances of the present case to recommend main modifications to the Core Strategy. The question arose at the September 2012 examination session and the Inspector directed that submissions be made in writing by 18th January 2013 before the examination resumes at the end of February 2013. At the time of writing no authority or other guidance has been found which casts any light on the question. Nevertheless, the firm submission on behalf of the Council is that, as a matter of statutory interpretation, the Inspector does have the ability to recommend main modifications to the Council in the circumstances of the present case.

2. The relevant power is found in section 20(7B) and (7C) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) as inserted into the 2004 Act by section 112(2) of Localism Act 2011 (“the 2011 Act”).

3. Section 20(7B) provides that subsection (7C) “applies where the person appointed to carry out the examination -
 - (a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but
 - (b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.”

4. Section 33A is that section of the 2004 Act (inserted by section 110(1) of the 2011 Act) which imposes the duty to co-operate (“the DTC”).
5. Section 20(7C) of the 2004 Act provides that “[i]f asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that -
 - (a) satisfies the requirements mentioned in subsection (5)(a), and
 - (b) is sound.”
6. Modifications so recommended at the request of the local planning authority are called main modifications (the term used in section 23(2A)(b) of the 2004 Act as inserted by section 112(3) of the 2011 Act).
7. On receipt of a request from a local planning authority to recommend modifications that would make the document sound the terms of section 20(7C) impose a duty (by use of the word “must”) on an inspector to recommend main modifications.
8. “The document” which is referred to is the development plan document which was submitted to the inspector for independent examination. This follows from the rest of section 20 (in particular, subsection (1)) of the 2004 Act.
9. At the September 2012 examination session a submission was made orally on behalf of Samuel Smiths Old Brewery Tadcaster (“SSOBT”) to the effect that section 20(7B) of the 2004 Act did not apply in the circumstances of this case so that the main modifications procedure in section 20(7C) did not apply either. The thrust of the submission appeared to be that section 20(7B) did not apply because the condition for its application found in section 20(7B)(b) was not satisfied. Section 20(7B)(b) refers to the inspector’s considering that it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation. It seemed to be argued that, because the Inspector had already decided, by a written ruling made in April 2012, that the DTC did not apply in the circumstances of the present case, the Inspector could not be in a position where he was able to consider that it would be reasonable to conclude that there was the requisite DTC compliance by the Council.

10. This submission is flawed for the following reasons. First, it fails to acknowledge the full force of the word “any” in section 20(7B)(b). The reference to “any” DTC in section 20(7B)(b), rather than “the” DTC, means that section 20(7B)(b) does not have the effect of imposing a condition which has to be satisfied in circumstances where the Inspector has already decided that the DTC does not arise. The use of the word “any” allows for situations in which (for whatever reason) the DTC does not bite. Thus an inspector is only obliged to form a view on whether there has been DTC compliance in cases where the DTC has been found to apply.
11. Secondly, the argument to the contrary advanced by SSOBT to the effect that the DTC and the main modifications procedure was some kind of reciprocal legislative package has no substance to it.
12. Thirdly, SSOBT’s submission leads to absurd consequences when it is considered in the context of the amendments made by section 112(2) of the 2011 Act to section 20 of the 2004 Act more generally. Section 20(7) of the 2004 Act, as substituted by section 112(2) of the 2011 Act, provides that “[w]here the person appointed to carry out the examination -
 - (a) has carried it out, and
 - (b) considers that, in all the circumstances, it would be reasonable to conclude -
 - (i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and
 - (ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,the person must recommend that the document is adopted and give reasons for the recommendation.”
13. Section 20(7A) of the 2004 Act, as substituted by section 112(2) of the 2011 Act, provides that “[w]here the person appointed to carry out the examination –
 - (a) has carried it out, and
 - (b) is not required by subsection (7) to recommend that the document is adopted,the person must recommend non-adoption of the document and give reasons for the recommendation.”

14. The language of section 20(7)(b)(ii) is the same as the language of section 20(7B)(b): “considers that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document’s preparation.” If SSOBT’s argument were correct the negative consequences that attend section 20(7)(B) and (C) in cases where the DTC did not apply would, mutatis mutandis, attend section 20(7) also. Thus, authorities whose plan preparation was not subject to the DTC could not enjoy the benefit of the main modifications procedure if the plan were unsound but would also be in a position where, if their plan were sound, inspectors would not be subject to a duty to recommend adoption and would be obliged to recommend non-adoption. That simply cannot be right.
15. Accordingly, the Inspector has the power to recommend main modifications in the circumstances of this case.

Kings Chambers
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Alan Evans
15th January 2013

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