BNES 23

BATH AND NORTH EAST SOMERSET CORE STRATEGY

SHORT RESPONSE ON S.112 LOCALISM ACT 2010

1. This Note responds to Ian Dove Q.C.'s Note received at 6pm on 18th January 2012. It is additional to and not a substitute for our BNES21.

2. S.112 makes amendments to s.20 of the Act – independent examination. It does not amend s.19 (preparation) or change the basic facts that: (1) s.19 is dealing with plan preparation by the Council; and (2) s.20 is dealing with a separate stage namely testing of the plan prepared under s.19 by the independent examination with the inspector being tasked with examining the prepared plan (and where appropriate) making recommendations as to changes to it.

3. Amongst a number of similar provisions catering with the various permutations, s.20(7B)(b) as inserted by s.112 requires the Inspector to consider whether in all the circumstances it would be reasonable to conclude that the LPA "complied with any duty imposed on the authority by section 33A in relation to the document's preparation:

    a. The "document" is the CS as submitted under s.20(1) and s.20(2) following preparation under s.19 and in accordance with the 2004 Regs and not the document which finally emerges following the independent examination. ;

    b. It is the "preparation" of that document which is to be tested under s.20(7B)(b). That is the s.19 process which has, by definition concluded, before submission;

    c. The Inspector is required to ask whether the LPA "complied" - past tense – plainly a reference back to the earlier stages of the process.

4. S.112(6) does not amend s.20. It is a provision setting out the circumstances in which the amendments to s.20 apply. It is simply telling us that post 15th January 2012, the provisions of s.20 (as amended) apply to all adoptions no matter what stage the document has reached. So even if steps had been taken under the old s.20 prior to 15th January 2012 or even if the Council was about to adopt based on what had been binding recommendations of the Inspector under the old legislation, the new provisions of s.20 apply to it. It is

accepted, of course, (ID para 5) that the purpose of s,112(6) was to make it clear that as from the coming into force of the changes to s.20, it would be the amended s.20 against which any DPD would be tested but that is not the point. S.112(6) does not tell us anything about whether "any" duty to co-operate applies to the document. That is to be ascertained from s.110 and we have made submissions on that.

5. It is said that the Council's reading of s.112(6) frustrates the purpose of the legislation re: co-operation. Parliament's intention is contained in the words it has used. It is plainly not Parliament's intention to retrospectively impose a duty to co-operate on an LPA which has submitted its DPD for independent examination prior to commencement of s.110. If it had been Parliament's intention to retrospectively impose a duty to co-operate in plan preparation it would have had to make provision for documents at the s.20 stage to be taken back to the s.19 stage. It has not done so.

6. It is said that the Council's interpretation removes the distinction between s.20(7) and (7A) on the one hand; and s.20(7B) and (7C) on the other. That is wrong. S.20(7) is about a sound document, s.20(7A) is about an unsound document; .s 20(7B) is about an unsound document which can be made sound if the Inspector is asked to (s.20(7C)). That is the crucial distinction between the various provisions. The requirement to consider <u>any</u> s.33A duty is a condition precedent to s.20(7) and s.20(7B) but that tells one nothing as to whether there is any such duty on the facts.

7. The Council has made its position on the factual assessment of "co-operation" on a "without prejudice" basis orally. It does not disagree with ID para 9 although it sees no need for an adjournment. The Council will discuss appropriate procedure on this on Tuesday when the Inspector has decided how he intends to address these matters.

David Forsdick

18th January 2012