

JOINT CORE STRATEGY PROPOSED MODIFICATIONS

A D V I C E

1. At its meeting on 16 December 2013 the West Northamptonshire Joint Planning Committee (“the WNJPC”) resolved to accept its officers’ recommendation that the Proposed Modifications to the Joint Core Strategy (“JCS”) be published for consultation and in due course, be put before the inspector who is examining the JCS as the WNJPC’s proposals to address the inspector’s soundness concerns. The resolution was passed in reliance on the Chairman’s casting vote.
2. An issue has arisen as to whether all those who voted in favour of the motion that the Proposed Modifications be endorsed were entitled to vote at the meeting. In particular, the proposer of the motion that the Officers’ recommendations be accepted (Councillor Millar) was present at the meeting as a substitute for a member of the WNJPC namely Councillor Irving-Swift. Councillor Irving-Swift had a longstanding engagement in Germany which

risked making her unavailable for the meeting and, in consequence, it was ultimately agreed that Councillor Millar would substitute for her at the meeting.

3. The WNJPC is established under the West Northamptonshire Joint Committee Order 2008 (“the Order”). The Order permits of substitution of members of the WNJPC but only in certain circumstances. Article 2 of the Order defines “substitute” to mean “*a person appointed in accordance with article 5(3)*”. Article 5(3) provides:

“Each constituent authority shall appoint a substitute for each voting member it appoints; and where paragraph 5(6)(c) of the Schedule applies, a substitute shall be entitled to vote at the meeting of the joint committee as regards which the substitute is deemed to be a voting member on any question which falls to be decided at that meeting”.

4. Article 8 of the Order further provides that:

“The meeting and proceedings of the joint committee shall be conducted in accordance with the rules set out in the Schedule to this Order”.

5. In so far as is relevant, the Schedule to the Order, which deals with the rules for the conduct of meetings of the WNJPC, provides:

“5(5) A voting member who is unable to attend any meeting of the joint committee shall inform the chair of the joint committee in writing as soon as practicable and in any event not later than 24 hours before the meeting is due to take place.

(6) Where the chair receives notification in accordance with sub-para (5) –

(a) the voting member giving the notification shall be deemed not to be a member of the joint committee for the whole meeting to which the notification relates; and

- (b) the voting member's substitute may attend the meeting;
and*
- (c) the voting member's substitute shall be deemed to be a voting member of the joint committee for the whole of that meeting".*

The Facts

6. From the e-mails I have seen, it is apparent that formal written notification of Councillor Irving Swift's inability to attend the Committee Meeting was not given to the Chairman until 10.00 a.m. on 16th December 2013. This did not comply with the requirements that such notice be given not less than 24 hours prior to the meeting.
7. It is also clear however that the Joint Committee Chairman was well aware of the risk that Councillor Irving-Swift might be unable to attend the Joint Committee Meeting prior to the submission of this formal notification. West Northamptonshire Joint Planning Unit Manager has stated that conversations were taking place to his knowledge as early as 27th November 2013 with regard to the likelihood that Councillor Millar would have to attend as substitute for Councillor Irving Swift.
8. As it so happens, Councillor Irving-Swift would have been able to attend the meeting (subject to there being no delays to her return flight) but the Chairman took the view that there was still merit in Councillor Millar attending as her substitute.

The Legal Consequences

9. Because there was breach of the requirement that 24 hours notice of inability to attend a meeting should be given, Councillor Millar was not a voting

member for the purposes of the meeting of 16 December 2013 unless on a fair interpretation of the Order it is concluded that Parliament cannot have intended that non-compliance with the notice provision should have that effect. Although reference to statutory requirements as being either mandatory or directory is no longer strictly accurate, these terms are convenient shorthand for the purposes of analysis provided that they are used as the output of the inquiry into Parliament's intention.¹

10. The wording and scheme of the Order would indicate that the requirement is a mandatory one. The use of the word "*shall*" is indicative though not determinative of this. The legislative intent of the provision is also important. What is the purpose of the notice period? There is no express obligation on the Chair of the WNJPC to pass on the fact that notice has been received either to other members of the WNJPC or officers. However, it is implicit in the requirement that it is there to ensure that the Chairman is aware prior to the meeting of the need for the substitute to attend and to put in place arrangements to ensure that the substitute is aware of the need to attend. That there is time for these arrangements to be made is clearly important to the proper discharge of the WNJPC's functions and would support a mandatory interpretation.
11. It is, however, also possible to support a directory interpretation. For example, if a voting member suddenly falls ill on the day of a meeting or for some other reason is unexpectedly unable to attend but the attendance of the substitute can be secured, why should it matter that the notice period was less

¹ See e.g R v Soneji [2006] 1 AC 340

than 24 hours. It might be that the member's preparation time is short but that would be the case even with the 24 hour notice period.

12. So is this requirement a mandatory or directory one? On balance, my view is that the requirement is properly to be regarded as a mandatory one. Those who drafted the Order clearly felt it was appropriate to have a notice period included within its terms and there was merit in a fixed notice period in terms of the ordered conduct of the WNJPC's business. The norm should be that if the notice period is not respected, the substitution should not take place. That in my view is legislative intent of non-compliance.
13. It follows that the prudent course is to treat the decisions of 16 December 2013 as ultra vires by reason of the procedural irregularity. Those decisions are voidable rather than nullities and will stand unless and until rescinded by the WNJPC or quashed by Court order. There is an inevitable risk that were a claim for judicial review to be made, the Court would conclude that the decisions of the WNJPC reached at that meeting should be quashed. The WNJPC would be the proper defendant to any such claim which could be brought by any person interested in the content of the JCS (e.g. a member of any of the constituent authorities).
14. All of that said, there is a discretion to quash and not an obligation to do so. It would be an unusual course for the High Court to refuse to quash a decision where one of the decision makers was not entitled to participate in that decision. However, this is an unusual case. It seems to me that, given the Chairman was well aware of the likely need to substitute significantly in advance of the date of the meeting and was in fact heavily involved in the

decision to substitute taken on 16 December 2013, the objective of the notice provision has been met. As I have indicated above, the Chairman is under no express obligation to divulge that information to any other person in advance of the meeting; it suffices that s/he knows of the substitution and can ensure that it is likely to be effective.

15. Here the procedural irregularity is in substance, a failure to provide a handful of hours notice of the substitution to a Chairman who knew of its likely need. Whilst it can be argued that without the participation of Councillor Millar the decision would have been different, the proper question to pose is had the procedural requirement been met, would the decision have been any different. To that question there can only be one answer. I would doubt on those facts that circumstances the Court would be prepared to exercise its discretion to quash the resolutions in the absence of some substantive error in the decision making process. However, to guard against the risk of challenge, I would recommend that the WNJPC be asked to ratify its earlier decisions at the earliest opportunity.

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**WEST NORTHAMPTONSHIRE
JOINT PLANNING COMMITTEE**

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ADVICE
