

# KENT ASSOCIATION OF LOCAL COUNCILS

Maidstone Area Committee - Chairman Geraldine Brown  
Lees Cottage, Lees Road, Yalding, Maidstone, Kent ME18 6HB  
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Ms L St. John Howe  
Programme Officer  
PO Services  
PO Box 10965  
Sudbury  
Suffolk CO10 3BF

28 November 2016

Dear Ms St John Howe

**RE: IMPACT OF PERCEIVED PROCEDURAL FAILINGS ON MBC's 5 YEARS' HOUSING SUPPLY AND ON THE CONSEQUENTIAL SOUNDNESS OF ITS LOCAL PLAN**

- 1) This letter is submitted on behalf of the Co-ordinating Team and we should be grateful if you would pass to the Inspector, Mr Mellor.

**JR timing & implications**

- 2) At Session 12 of the hearings of the Local Plan (17th November) there was an important set of exchanges between Ms Megan Thomas representing Maidstone Borough Council and Mr John Hobson QC representing Kent County Council. These centred on the coming into force of conditional planning consents granted for various housing sites in the Sutton Road at Langley and about the time available to an interested party to initiate a Judicial Review of those decisions.
- 3) Ms Thomas was firmly of the view that the time limit had already expired since it was governed by the date those conditional consents were granted. Mr Hobson was equally adamant that the time available for Judicial Review had not even started, since it does not commence until the Section 106 Agreement relating to a conditional consent has been secured – and, to our knowledge, that has not yet been achieved for those Sutton Road conditional consents.
- 4) While we are not lawyers and do not have the resources to employ legal advice, the weight of argument appears to lie firmly with Mr Hobson. Assuming that to be right, and given the strength of feeling about these applications (including from KCC), there is a risk that an individual or group will initiate a Judicial Review.
- 5) If the court were then to find that the consents were unsafe or unsatisfactory and quashed them, this would seriously undermine the Local Plan since the three applications:
  - i) 15/509015 Land South of Sutton Road for 850 houses;
  - ii) 15/509251 Land North of Bicknor Wood for up to 250 houses; and
  - iii) 14/506264 Land at Bicknor Farm for 271 houses

provide 1,371 houses towards MBC's claimed housing needs and, without them, a large hole is blown in what MBC insists is the number of houses the plan must meet, although, as we have submitted, we firmly believe that figure to be substantially exaggerated.

- 6) (It must be noted that 14/506264 is with the Planning Inspectorate and the Planning Committee was only asked to say what it would have decided, had the applicant not lodged an appeal).
- 7) We submit therefore that, all the time the potential for Judicial Review exists on these issues (for the reasons set out below), there remains the opportunity for a challenge to the soundness of the plan, whether approved by the Planning Inspectorate or not. If this were to happen, our Borough would suffer a setback which we are anxious to avoid.
- 8) Accordingly, this may be an issue the Inspector concludes should be considered within the current examination.

#### **Potential JR grounds – highways matters**

- 9) At Session 12 of the hearings of the Local Plan (17th November), it was evident that KCC is mindful of the possibility of a party launching a Judicial Review.
- 10) Despite their Statement of Common Ground with MBC, KCC is quite clearly distressed by the refusal of MBC to absorb and act upon the implications of professional traffic advice from KCC Officers, for which KCC is accountable. Instead, MBC has chosen to listen to its own consultants, Mott MacDonald.
- 11) Accordingly, there is the possibility that the validity of the consents for the above three applications could be called into question by the traffic modelling results contained in EDO28(A) dated October 2016.

#### **Potential JR grounds – process relating to Sutton Road sites**

- 12) This relates to the context surrounding the process of discussion and decision for the three key sites listed above.
- 13) The Coordinating Team has alluded to the practice and procedure followed by MBC Officers in briefing members of the Planning Committee before these applications came forward at its meetings on 30th June, 7th and 14th July.
- 14) These three highly contentious housing applications were up for consideration on the same evening (30th June) as the equally contentious application for the development of Woodcut Farm as an employment site. All these applications are critical to MBC's concept for its Local Plan: the housing applications for the delivery of the 18,560 houses and Woodcut Farm for MBC's perceived employment needs. As might be imagined, the public gallery was packed on that evening.
- 15) Despite strong advice from MBC's Officers, the Woodcut Farm application (which was considered first) was defeated by 1 vote with no abstentions. (Voting 7 – 6, 0 abstentions).
- 16) When it came to closely defining the reasons for that refusal, the mood and tone of the meeting darkened considerably. Officers required members to provide the detailed reasons for their refusal decision, at first unaided and later with scant support. It appeared to those watching these events that members were being punished for arriving at the 'wrong decision'.
- 17) In fact the character of the meeting was such that, on 4th July, our Coordinating Team wrote to all Borough Councillors to register the view that the proceedings were unedifying and made a plea for a more cooperative and professional approach from Officers, whether

members were minded to accept or refuse Officers' recommendations. Please see Attachment 1, including its Annex.

- 18) At approximately 8.00pm on 30th June, after the Woodcut Farm decision, a break was called while the members of the Committee and the Officers adjourned from the room for confidential (exempt) briefing on those three housing applications that were to be considered next on the agenda. Exempt briefing for such occasions is provided on yellow paper and, as members moved from the Council Chamber, it was obvious to the public that yellow sheets were amongst the briefing papers the members were carrying.
- 19) On their return to the chamber, after approximately 30 minutes, the debate on the three applications began. It was extensive and eventually the meeting was adjourned without decision on any of them.
- 20) It took two more lengthy Planning Committee meetings, 7th and 14th July, before decisions were reached. The exempt briefing remained operative for both meetings.
- 21) When it eventually came to voting on 14th July, the pattern of voting was very different to that for Woodcut Farm (on 30th June). While on the latter there were no abstentions, on each of these housing applications there was now a sizeable number of abstentions, as follows:

Application	Approve	Refuse	Abstain
15/509015	5	4*	4
15/509251	4**	4	4
14/506264	4	1	6

*\* A Councillor who voted against the first application then left as he was unwell.*

*\*\* Passed on Chairman's casting vote.*

- 22) The level of abstentions was, of course, immediately noticeable to members of the public present, caused a buzz of comment amongst them and led to questions being raised as to why the pattern of voting was so different to that for Woodcut Farm.

### **Exempt briefing**

- 23) MBC has consistently refused to disclose the confidential advice members were given and attempts by Borough Councillors not on the Planning Committee, but with a real interest in the sites as they impact on their constituents, to see the advice has been refused on the grounds that they 'do not need to know'.
- 24) Nature abhors a vacuum and so intense speculation has inevitably arisen about the nature of the advice contained in the yellow pages and the concomitant oral briefing by the Legal Officer. Given that MBC Officers publicly advised members that they could not refuse planning permission on the housing sites because they had already been included in the Local Plan, people have inevitably, and not unreasonably, concluded that this was the essence of the advice contained in the yellow pages. Furthermore, that the advice went on

(or was so interpreted) to mean that, if members did vote against, they laid themselves open to challenge and possible personal legal/financial penalty. If this is true, it is, in our view, open to serious challenge.

- 25) A further explanation of how we have reached these conclusions is in Attachment 2.
- 26) Speculation of possibly wrongful guidance is further heightened by the fact that the same arguments would have applied to Woodcut Farm, since that too was in the Local Plan. So, why did that not attract any abstentions, while the housing applications attracted far more than one would have anticipated?
- 27) The conclusion reached by many is that the decision of members in the Woodcut Farm application took Officers by surprise and filled them with dread that they might then lose the three applications for Sutton Road which would have holed the plan below the water line. Accordingly, there is widespread belief that, at the in-camera session, huge and questionable pressure was piled on the members not to vote down the housing applications. Fear of the possible legal/financial repercussions would then account for the abnormally high number of abstentions – no other explanation comes close to making sense.
- 28) The above remains speculation, but, setting that aside, there is a very serious point here; the designation of all advice, legal and otherwise, within the exempt category, the inability of councillors to discuss these issues in open debate and the secrecy that has cloaked them ever since give real cause for concern that unwarranted pressure was brought to bear on members that evening and that advice is determinedly being suppressed.
- 29) Clearly one way of curbing the speculation would be for MBC to publish the yellow pages concerned, with a full disclosure of all written and oral advice given on that occasion, and to lift the restrictions on members of the Planning Committee discussing these issues in public so that the disinfecting effect of openness can be allowed to work. Failure to do so (and MBC has so far refused to do so) will forever taint those decisions in many minds. This 'elephant in the room' will simply not go away until the bright light of transparency has been shone on these events.
- 30) An illustration of these concerns was the complaint addressed to Mr John Scarborough (Head of Legal Partnership & Monitoring Officer, MBC) on 23 August 2016 by Otham Parish Council. His reply was not helpful and accentuates the impression that committee members may have been given advice, or subjected to pressure, that may not be judged to be 'lawful and reasonable', if exposed to the public domain. Please see Attachments 3 and 4.
- 31) If MBC does not fully disclose the relevant papers and refuses to free members to discuss these issues, we respectfully ask what steps are open to the Planning Inspectorate to satisfy itself about the correctness of what took place before any decision is reached about the soundness of the Local Plan. Is it, for example, possible to seek advice on these issues from the legal team that advises the Planning Inspectorate?

### **Conclusion**

- 32) We are not lawyers and do not have access to funds to enable us to secure our own legal advice. And this is the first time any of us have confronted such issues. But we are aware of the care shown by the Inspector throughout the examination to listen to the arguments and concerns of local people and to give them equal time with the forces ranged against

them. This has ensured that as much of a level playing field as is possible has been maintained throughout this examination. We are very grateful for that.

- 33) However the above issues relating to the process of decision-making for Sutton Road sites are matters where the equality of information does not apply. Until something is done to rectify that, and doubts about the correctness of the procedures followed by MBC are resolved once and for all, suspicion will continue to surround that decision-making and the soundness of the plan will continue to be questioned.
- 34) There is then the issue relating to KCC's position that the opportunity for a party to launch a Judicial Review, presumably relating to highways matters, is still available. (Please see paragraphs 9-11 above).
- 35) Accordingly, we respectfully request the Inspector uses whatever powers, advice and action are open to him to place these issues beyond doubt.

Yours sincerely



Geraldine Brown  
Chairman

For and on behalf of:

Kent Association of Local Councils Maidstone Area, Geraldine Brown, Chairman  
Maidstone Joint Parishes Group, John Horne, Chairman  
Campaign to Protect Rural England Maidstone Branch, Gareth Thomas, Chairman  
Bearsted & Thurnham Society, Roger Vidler, Treasurer  
Leeds Castle, Bill Lash, Estate & Project Director

Copies

Cllr Matthew Balfour, KCC, Cabinet Member for Environment & Transport  
Ms Barbara Cooper, KCC, Corporate Director, Growth, Environment and Transport  
Ms Alison Broom, MBC, Chief Executive

**The following paragraphs are taken from our 4th July letter to all Borough Councillors drawing attention to the shortcomings of the process applied to planning applications at the 30th June Planning Committee meeting.**

**Officers' Advice - balance.** At one point during the 30<sup>th</sup> June meeting, the Chairman had to remind Officers that they advise and Members decide. In planning, Officers and Members have defined and distinct roles. To require Members to give full and reasoned planning argument for rejection of a recommendation shows a misjudgement of the respective roles. It is akin to the jury being required to give a legal justification for their finding.

While it is understandable that Officers wish to see their recommendations approved, their professional role should presumably also extend to advising Members what the best justification for refusal would be, should Members wish to refuse. Members cannot be expected to have the full detail of policy numbers and wording or know how, precisely, to frame a refusal so that it would withstand appeal.

On the evening of 30<sup>th</sup> June, Members were repeatedly challenged by Officers to be specific, with little professional assistance given to make a robust case for refusal. That was a somewhat unedifying experience and cannot be reasonable. Perhaps Officers should be instructed, at least for major, contentious applications, professionally to state not only their recommendation for approval (if that is the case), but also assist with robust grounds for refusal, if Members are so minded. Fortunately, the position has been foreseen by the Local Government Association, in its *Probity in Planning* publication, albeit with reference to departure from a development plan. Please see the relevant excerpt below *(In the Annex)*. It indicates a process that requires Officers professionally to engage in framing grounds for refusal, rather than just putting Members on the spot.

**Officers' Advice - completeness.** At the 30<sup>th</sup> June meeting, the Committee discussed 14/506264 (Land at Bicknor Farm) with a view to submitting to the Planning Inspectorate the decision that it would have made, had the appeal not been submitted. Officers recommended to the meeting that Members should confirm that they would have accepted the application and, in their briefing to Members, gave a page and a half of conditions. Whatever the merits of the application, it was very surprising that, as Members seemed to be moving towards a decision on what to say, Officers made a plea for a two weeks delay so that they could prepare a better list of conditions; for instance a condition relating to the design of roof eaves! We must ask why that homework had not been done more rigorously before the meeting to avoid the need for a further meeting (now set for 14<sup>th</sup> July).

The Chairman of the Planning Committee was always going to have a very difficult challenge when major applications came forward in advance of the Inspector's conclusions on the submitted Local Plan. To enable him to ensure that Officers advise and Members decide, we ask that our observations are digested.

**LGA: Probity in Planning - Decisions which differ from a recommendation** (the *highlighting* is ours)

The law requires that decisions should be taken in accordance with the development plan, unless material considerations (which specifically include the NPPF) indicate otherwise (s38A Planning & Compensation Act 2004 and s70 of the Town and Country Planning Act 1990).

This applies to all planning decisions. Any reasons for refusal must be justified against the development plan and other material considerations.

The courts have expressed the view that the committee's reasons should be clear and convincing. The personal circumstances of an applicant or any other material or nonmaterial planning considerations which might cause local controversy will rarely satisfy the relevant tests.

**Planning committees can, and often do, make a decision which is different from the officer recommendation.** Sometimes this will relate to conditions or terms of a S106 obligation. Sometimes it will change the outcome, from an approval to a refusal or vice versa. **This will usually reflect a**

difference in the assessment of how a policy has been complied with, or different weight ascribed to material considerations.

Planning committees are advised to take the following steps before making a decision which differs from the officer recommendation:

- discussing the areas of difference and the reasons for that with planning officers beforehand (as part of a standard 'callover' meeting where all items on the agenda are discussed)
- recording the detailed reasons as part of the mover's motion
- adjourning for a few minutes for those reasons to be discussed and then agreed by the committee
- where there is concern about the validity of reasons, considering deferring to another meeting to have the putative reasons tested and discussed.

If the planning committee makes a decision contrary to the officers' recommendation (whether for approval or refusal or changes to conditions or S106 obligations), a detailed minute of the committee's reasons should be made and a copy placed on the application file. Councillors should be prepared to explain in full their planning reasons for not agreeing with the officer's recommendation. **Pressure should never be put on officers to 'go away and sort out the planning reasons'.**

The officer should also be given an opportunity to explain the implications of the contrary decision, including an assessment of a likely appeal outcome, and chances of a successful award of costs against the council, should one be made.

All applications that are clearly contrary to the development plan must be advertised as such, and are known as 'departure' applications. If it is intended to approve such an application, the material considerations leading to this conclusion must be clearly identified, and how these considerations justify overriding the development plan must be clearly demonstrated.

The application may then have to be referred to the relevant secretary of state, depending upon the type and scale of the development proposed (s77 of the Town and Country Planning Act 1990). If the officers' report recommends approval of such a departure, the justification for this should be included, in full, in that report.

### Deduced Contents of Exempt Briefing

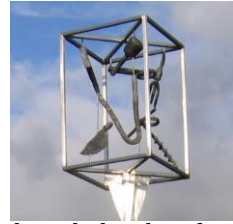
- 1) There were three Planning Committee meetings to consider three substantial applications along Sutton Road: 30th June, 7th and 14th July. They were only decided at the last of those meetings.
- 2) Committee Members were provided with confidential 'Yellow Sheets' under 'exempt' procedures'.
- 3) We have examined legislation (1972 Local Government Act, Schedule 12A, Part 1). It would appear that none of the seven paragraphs therein could have been held up as potential justification for exempt treatment, other than perhaps paragraph 5: "Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings".
- 4) The fact that it was exempt briefing would therefore indicate that it was legal briefing, presumably approved, if not prepared, by MBC's Legal Officer.
- 5) The confidential briefing presumably gave legal arguments supporting or advocating acceptance of Officer recommendations, and, as Members need to follow legal guidance (but have discretion in planning matters), Members were presumably warned about the legal dangers of overturning Officer recommendations.
- 6) We therefore believe that committee Members may have been counselled that, as the three development sites are in the Local Plan as submitted by Full Council (voting 38 for, 13 against), they should not refuse them.
- 7) As an indicator that our understanding may be correct, we refer to the following paragraph from MBC's response to Session 8 - Employment Policies & Allocations (with our highlighting and 15/503288 is Woodcut Farm):
 

*8.17.3 The Planning Committee report on application 15/503288 concluded that the public benefits of the development proposed outweighed the identified harm, including to the setting of Woodcut Farmhouse (paragraph 7.10)3. Planning Committee itself weighed matters differently and came to the opposite conclusion. It is nonetheless apparent that the public benefits are capable of outweighing the identified harm. This is affirmed by the site's inclusion in the submitted Local Plan, as agreed by Full Council, which mirrors the support for development at Junction 8 in the Council's Economic Development Strategy which was also agreed by Full Council.*
- 8) The above leads us to conclude that Officers are clearly determined to overturn Planning Committee's refusal of Woodcut Farm and, should a revised application be submitted, there is concern that exempt briefing may be deployed to pressure Members. (If the existing, refused application goes to appeal, it is assumed that Officers would diligently defend the Planning Committee's decision).



# OTHAM PARISH COUNCIL

Clerk: Mrs T. Irving  
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The tools that shaped our

village

Mr. John Scarborough  
Head of Legal Partnership & Monitoring Officer  
Maidstone Borough Council  
Maidstone House  
King Street  
Maidstone. ME15 6JQ

23 August, 2016.

Dear Mr. Scarborough,

Following the disarray at the planning meeting which determined Land North of Bicknor Wood. I must advise you that there is evidence to show that an officer, or others, contrived to mislead Planning Committee Members on the urgent update, with the figures contained within the KCC/Amey traffic survey report halved. On two occasions at the meeting, Planning Officers upheld details contained within the urgent update so had knowledge of the fact that they were reduced.

Since the meeting, it has been indicated that an amount of money from 'The Community Chest' may have been allocated for the Ward Member's parish who recommended approval of this application. It has been noted from the webcast of the meeting that the member concerned did not declare a pecuniary interest at that point. If this statement happens to be correct, then we would consider that the recommendation for approval should be set aside.

Following the meeting, the Borough Council Member for Otham enquired to have sight of the yellow pages that were given to members at the planning meeting. The Monitoring Officer refused access to those papers.

We find the above matters totally unacceptable and disturbing.

I look forward to receiving a response to the above at your earliest convenience.

Yours Sincerely,

**Teresa Irving**  
**CLERK TO THE COUNCIL**

Copied to: Helen Whately MP, Local Council Ombudsman, Cllr Newton (MBC), Cllr Cooke (KCC), Cllr Aplin (OPC), Cllr Cheesman (DPC).

**From:** John Scarborough [mailto:John.Scarborough@MidKent.gov.uk]  
**Sent:** 05 September 2016 16:33  
**To:** Downswood <teresa.iring@btinternet.com>  
**Cc:** OPC - Paul Aplin <Aplin.paul@sky.com>; Gary Cooke Cllr <Gary.cooke@kent.gov.uk>; Gordon Newton (Cllr) <GordonNewton@maidstone.gov.uk>; DPC - Roz Cheesman <roz.cheesman@btinternet.com>; 'WHATLEY, Helen' <helen.whatley.mp@parliament.uk>  
**Subject:** ENQ02639 Stage 1 Complaint - Planning Meeting re Land North of Bicknor Wood

**For the attention of Theresa Irving, Clerk to Otham Parish Council**

Dear Ms Irving

Thank you for your letter dated 23 August 2016. Please see below my response to the three points that you have raised.

### **1. Information presented to Planning Committee**

The Head of Planning and Development informs me that there was an inadvertent error in the presentation of the two totals of the overall vehicle movements in the relevant surveys covered in the Urgent Update report to Planning Committee on 14 July. This was confirmed verbally at Planning Committee last Thursday. This error was caused in part by the surveys only being made available to officers on the day of Planning Committee. In all other respects the relevant surveys were reported accurately and their analysis and conclusions, as presented in the Urgent Update report, were correct: that the surveys do not provide clear evidence of 'rat running'. This simple error does not alter the substantive evidence considered by Planning Committee. In these circumstances I do not consider that the planning application needs to be reconsidered by Planning Committee. KCC has also confirmed that the error does not change the conclusions of the report.

### **2. Failure to declare an interest**

In your letter, you make an allegation that a Maidstone Borough Councillor failed to declare an interest. With regard to these concerns, I would draw your attention to (1) the Maidstone Borough Council Code of Conduct for Councillors, (2) the procedure for making complaints against Borough Councillors and (3) the online complaint form.

These documents can be found at the following web links:

[http://www.maidstone.gov.uk/\\_data/assets/pdf\\_file/0003/29217/Code-of-Conduct-for-Members-v-2.pdf](http://www.maidstone.gov.uk/_data/assets/pdf_file/0003/29217/Code-of-Conduct-for-Members-v-2.pdf)

[http://www.maidstone.gov.uk/\\_data/assets/pdf\\_file/0004/29218/Information-about-How-to-Make-a-Complaint-of-Member-Misconduct-December-2015.pdf](http://www.maidstone.gov.uk/_data/assets/pdf_file/0004/29218/Information-about-How-to-Make-a-Complaint-of-Member-Misconduct-December-2015.pdf)

[http://www.maidstone.gov.uk/\\_data/assets/pdf\\_file/0011/20234/MBC-Member-Misconduct-Complaint-Form-Dec-2015.pdf](http://www.maidstone.gov.uk/_data/assets/pdf_file/0011/20234/MBC-Member-Misconduct-Complaint-Form-Dec-2015.pdf)

The only route by which complaints against Maidstone Borough Councillors can be considered is via this procedure. If, therefore, you wish to complain that a Borough Councillor has breached the Code of Conduct, please can you complete a complaint form and submit it to me for my consideration.

### **3. Request to view exempt information**

Councillor Newton requested to see the exempt (ie confidential) information which was supplied to Planning Committee on 14 July 2016 in connection with the above and other planning applications. His request was made after the decisions on the applications had been taken by Planning Committee. The exempt information in question was the external legal advice from Counsel to the Planning Committee about the applications.

The legal test which relates to the information which Councillor Newton requested sight of is the common law "need to know" principle. The "need to know" principle states that councillors have the right to access information held by their authority where it is reasonably necessary to enable the member to properly perform their duties as a councillor. However, case law has also established that if the councillor's motive for seeing documents is indirect, improper or ulterior, this may be raised as a bar to their entitlement. Councillors are not, therefore, allowed to go off on a 'fishing expedition' through their council's documents. If a councillor is a member of a particular committee or sub-committee, then they have the right to inspect documents relating to the business of that committee or sub-committee. If not a member of that committee or sub-committee, the councillor has to show good cause why sight of them is necessary to perform their duties.

The "need to know" principle is enshrined in Maidstone BC's Constitution at Page 34, Part 3.2. This sets out that the Council has delegated responsibility to me (or my Deputy) to decide in any particular case whether or not a Councillor has demonstrated the "need to know" to my satisfaction.

I have explained to Councillor Newton that I am not satisfied that he has demonstrated the "need to know" based on the information he has provided to date. However, I have also said that I am more than happy to review my decision if he wishes to supply further information about his motives for wishing to see the information and why it is necessary to perform his duties as a councillor. To date, he has not supplied any further information for me to review my assessment.

Yours sincerely

**John Scarborough**

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