

IN THE MATTER OF:

SUTTON ROAD, OTHAM, MAIDSTONE

OPINION

**Kent Legal Services
Sessions House
County Hall
Maidstone
Kent ME14 1XQ
Ref: LS/21/108362/720

Our Ref: CLM-145967**

Existing

OPINION

1. I am asked to advise as to how Kent County Council (KCC) may lawfully use financial contributions secured in relation to housing developments on land located on the A274 Sutton Road, Maidstone. The background to the matter is as follows.
2. In mid-2013 Maidstone Borough Council (MBC) received three separate planning applications in respect of housing developments in the above locations. The applications were made by developers Taylor Wimpey, Bellway Homes and Redrow, to build up to 600 dwellings, 186 dwellings and 100 dwellings respectively.
3. In consultations between MBC and KCC, KCC raised no objection subject to (inter alia):

“The provision, by way of a section 106 agreement between the applicant and KCC Highways and Transportation, of a funding contribution of £3,000 per dwelling to off-site highway mitigation works to the A274 Sutton Road, comprising the widening of the carriageway between its junctions with Wallis Avenue and Loose Road to provide an additional traffic lane, at a trigger point to be agreed with the Local Planning and Highway Authorities”.
4. Section 106 agreements were agreed in respect of each application but did not include highways related contributions. These were dealt with by way of separate unilateral undertakings given by the developers.
5. The unilateral undertaking given by Taylor Wimpey (by George Wimpey Limited) was executed on 4 September 2014. The “Highways Contribution” referred to the above scheme, the following term within the definition being given:

“...such contribution to be used by the County Council for the funding of the Highways Scheme”.

The “Highways Scheme” was defined as the widening of Sutton Road in the terms summarised above. The Schedule to the undertaking required Taylor Wimpey to pay the first instalment (out of a total of £1.8m) of £450,000 to the County Council on the earlier of the date on which the County Council implements the Highways Scheme or the date one year after the date of commencement of development.

6. In the Bellway unilateral undertaking executed on 26 September 2014, “Highways Contribution” is defined as meaning “a contribution of £613,800 of which £558,000 is intended to be applied towards the Sutton Road Improvement” as set out in more detail in Schedule 1.
7. The Redrow unilateral undertaking was executed on 14 November 2014. The “Highways Contribution” was defined as meaning “a contribution of £330,000 towards the construction costs of the highway works set out at Schedule 1”, which included the same Sutton Road scheme.
8. The three planning permissions were issued on the same dates in 2014 as the relevant unilateral undertakings. All these planning permissions have been implemented, i.e. they have been “begun” within the terms of section 56 of the Town and Country Planning Act 1990.
9. Subsequent to the planning applications/permissions process, KCC’s policy developed and it requested instead that the contributions be applied to the delivery of a bypass between the A20 and A274, known as the Leeds/Langley Relief Road. On 10 September

2014 KCC's Cabinet Member for Environment and Transport wrote to the Leader of MBC in these terms:

"I am sure you are aware that the scale and location of development proposed by the Borough Council through the emerging Local Plan has changed dramatically in the last two years. Furthermore, two separate Joint Transportation Board Meetings on the 24th October 2012 and 3rd September 2014 have clearly expressed nearly unanimous opposition to the concept of widening Sutton Road for a bus lane. Indeed, the JTB comprehensively rejected the whole Transport Strategy itself in October 2012. Please therefore be in no doubt that Kent County Council as Local Highway Authority will neither support nor permit either the widening of the carriageway itself for traffic use, nor the prioritisation for public transport on this corridor. To do so would be a waste of significant developer contributions which may be put to better use in the area once the Transport Strategy is agreed. In particular I believe we should keep the option open to us of using as much private sector funding as possible for a relief/upgraded road near Leeds and Kingswood which I hope we can begin to discuss in more detail as we work together through the JTB to develop the Transport Strategy".

10. At its meeting on 14 December 2015, the Strategic Planning, Sustainability and Transportation Committee of MBC resolved in these terms:

1. That the following resolution of the Maidstone Joint Transportation Board, made at its meeting on 7 December 2015 be agreed: *"We agree in the absence of an agreed Transport Strategy and in light of the evidence presented to this Board demonstrating Maidstone's significant highway capacity constraints, this Board recommends that a Transport Strategy be taken forward urgently by the Borough and County Councils covering the period of the Local Plan, with a further review completed in 2022...The agreed Transport Strategy should also develop the justification for a relief road between the A20 to the A274 (the Leeds and Langley Relief*

Road), along with a preferred route, in order to allow testing with other strategic transport options and identify all sources of potential funding to enable the schemes to be implemented at the earliest opportunity”.

2. That the highway improvements set out [in] the Draft Integrated Transport Strategy, attached as Appendix 1 to the Committee papers, be progressed, deleting:

a) the words “*widening of the inbound carriageway of the A274 Sutton Road between the junctions of Wallis Avenue and Loose Road*” from the column headed “*intervention*” in the section referring to the “*A274 Corridor*” on page 321 of the report (page 46 of the Draft Integrated Transport Strategy).

11. In simple terms, therefore, neither MBC nor KCC now wish to pursue the Sutton Road scheme to which the unilateral obligations refer, and both authorities wish to pursue a wider transport strategy in the terms indicated above.

12. Taylor Wimpey has paid its first instalment of £450,000 pursuant to its obligation. Contributions have not yet fallen due under the two other obligations. I understand that the developers in each case are content that the contributions be diverted to another transport purpose, provided (naturally) that the validity of their planning permissions and their ability lawfully to complete their developments are not in any way prejudiced.

13. Against that background, the first task is to assess the legal basis on which KCC will hold the monies paid and payable under the obligations. The obligations were, of course,

unilateral, and although the Taylor Wimpey obligation purported to impose an obligation on KCC (“such contribution to be used by the County Council for the funding of the highway scheme”), KCC assumed no contractual nor statutory obligation in relation to the money. That is not to say, of course, that they can expend it for any purpose (e.g. education). The circumstances in which they hold the money can, in my opinion, be derived from the High Court decision in Hampshire County Council v. Beazer Homes Limited [2010] EWHC 3095 (QB). In circumstances sufficiently similar to the present case, the Court held that any fiduciary duty which the County Council may owe in relation to its expenditure of the contributions “would have extended no further than its public law duties”: paragraph 82. The specific circumstances relating to the creation of a private trust which arose in Patel v. London Borough of Brent [2005] EWCA Civ. 644 did not arise in that case, and would not arise in the present case. I see the concept of public law duties in the present circumstances as denoting that KCC could expend the monies on a proper transport purpose that has some connection with the permitted developments, and that in deciding on that expenditure, not to act unreasonably in the legal sense.

14. Accordingly, it would be lawful for KCC to divert the contributions to a transport purpose other than that anticipated at the time of the unilateral obligations. It would be desirable for KCC to justify – in some report or memorandum – in relatively brief terms – why it is not seen as desirable to expend the contributions on the original purpose, and an outline of the proposed use of the contributions. As I understand it, it would be desired to divert the contributions towards the on-going study into different means of resolving present and future traffic congestion in the sector or sectors of Maidstone where alternative works would mitigate the traffic impact of the subject developments. A decision on these lines would, in my opinion, meet the test indicated above.

15. It follows from the above that there is no need for any variation of the unilateral obligations.
16. Further, regulation 122 of the CIL Regulations is, of course, not engaged. There is no further grant of planning permission in the offing, and there is no “relevant determination”.
17. If the course which I advise were followed, there could be no possible prejudice to the three planning permissions referred to above. These permissions, which have been implemented, are impregnable.

C. LOCKHART-MUMMERY QC

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10th February 2016