

**You are hereby summoned to attend an extraordinary meeting of the**

## **MAIDSTONE BOROUGH COUNCIL**



Date: Monday 2 September 2013

Time: 6.30 p.m.

Venue: Town Hall, High Street,  
Maidstone

Membership:

Councillors English (The Mayor), Ash, Barned, Beerling, Black, Mrs Blackmore, Brindle, Burton, Butler, Chittenden, Collins, Cox, Cuming, Daley, Garland, Mrs Gibson, Mrs Gooch, Greer, Mrs Grigg, Harwood, Mrs Hinder, Hogg, Hotson, Mrs Joy, Lusty, Mrs Mannering, McKay, McLoughlin, Moriarty, B Mortimer, D Mortimer, Moss, Munford, Naghi, Nelson-Gracie, Newton, Paine, Parvin, Mrs Parvin, Paterson, Pickett, Mrs Ring, Mrs Robertson, Ross, Sams, Springett, Mrs Stockell, Thick, Vizzard, Warner, Watson, de Wiggondene, J A Wilson, Mrs Wilson and Yates

**Continued Over/:**

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**Issued on 21 August 2013**

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*Alison Broom*

**Alison Broom, Chief Executive, Maidstone Borough Council,  
Maidstone House, King Street, Maidstone, Kent ME15 6JQ**

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## AGENDA

Page No.

1. Apologies for Absence
2. Dispensations (if any)
3. Disclosures by Members and Officers
4. Disclosures of Lobbying
5. To consider whether any items should be taken in private because of the possible disclosure of exempt information.
6. Minutes of the meeting held on 24 July 2013 1 - 8
7. Mayor's Announcements
8. Petitions
9. Question and Answer Session for Members of the Public
10. Questions from Members of the Council to the
  - (a) Leader of the Council
  - (b) Cabinet Members
  - (c) Chairmen of Overview and Scrutiny Committees
  - (d) Chairmen of other Committees
11. Notice of the following motion has been given by Councillors Munford, Moriarty, Newton, Mrs Stockell, Daley and B Mortimer:

We, the undersigned, hereby requisition an extraordinary meeting of Maidstone Borough Council to consider the following notice of motion:

"In light of the fact that Boughton Monchelsea Parish Council has obtained **Leading Counsel's Opinion** which states that:

1. Maidstone Borough Council does have between a 5-7 years land supply; and
2. Members were misdirected by using advice in the now cancelled PPS3 instead of the quite different advice contained in the NPPF and that if this advice was used in determination of planning applications, (to the effect that there is a lack of a five year supply), this would be a legal misdirection; and
3. The twin tests of paragraph 48 of the NPPF relating to windfall sites have been met and that windfall sites have consistently become available in the local area, and the clear evidence is that they will continue to provide a reliable (and indeed significant) source of supply; and
4. Members have been given information regarding the Langley Park Farm development which was a misdirection

and misleading, and that any planning permission granted based on this advice would be liable to be quashed in the courts as it is clearly a departure from the Local Plan.

We propose that:

1. With some urgency, an all party investigation is carried out by Members to address the situation where we (the Members) are being given unsound advice (in the opinion of Leading Counsel) and that the investigation team has delegated powers, if necessary, to seek a further opinion from Counsel on this matter.
2. The investigation team should report back to full Council with its recommendations for future actions to be taken by this Council regarding this matter.”

**NOTICE IS GIVEN IN ACCORDANCE WITH SECTION 17 OF THE LOCAL GOVERNMENT AND HOUSING ACT 1989 THAT ALTERNATIVE ARRANGEMENTS FOR APPOINTMENTS TO COMMITTEES OUTSIDE THE USUAL POLITICAL BALANCE REQUIREMENTS MAY BE CONSIDERED IN RELATION TO AGENDA ITEM 11.**

# Agenda Item 6

## **MAIDSTONE BOROUGH COUNCIL**

### **MINUTES OF THE MEETING OF MAIDSTONE BOROUGH COUNCIL HELD AT THE TOWN HALL, HIGH STREET, MAIDSTONE ON 24 JULY 2013**

**Present:** Councillor English (The Mayor) and Councillors Ash, Barned, Black, Mrs Blackmore, Burton, Butler, Chittenden, Collins, Cox, Cuming, Daley, Garland, Mrs Gibson, Mrs Gooch, Greer, Mrs Grigg, Harwood, Mrs Hinder, Hogg, Hotson, Mrs Joy, Lusty, Mrs Mannering, McKay, McLoughlin, Moriarty, B Mortimer, D Mortimer, Moss, Munford, Naghi, Nelson-Gracie, Newton, Paine, Parvin, Mrs Parvin, Paterson, Pickett, Mrs Ring, Sams, Springett, Mrs Stockell, Thick, Vizzard, de Wiggondene, J A Wilson, Mrs Wilson and Yates

20. PRAYERS

Prayers were said by the Reverend Canon Chris Morgan-Jones.

21. APOLOGIES FOR ABSENCE

It was noted that apologies for absence had been received from Councillors Beerling, Brindle, Mrs Robertson and Warner.

22. DISPENSATIONS

There were no applications for dispensations.

23. DISCLOSURES BY MEMBERS AND OFFICERS

There were no disclosures by Members or Officers. However, Councillor Mrs Wilson stated that although she had taken advice regarding the report of the Head of Policy and Communications concerning Members' broadband allowance, and understood that Members were not required to disclose interests in this matter, she had decided not participate in the discussion and voting since she had been claiming broadband allowance at the maximum rate.

24. DISCLOSURES OF LOBBYING

There were no disclosures of lobbying.

25. EXEMPT ITEMS

RESOLVED: That the items on the agenda be taken in public as proposed.

26. MINUTES OF THE ANNUAL MEETING OF THE BOROUGH COUNCIL HELD ON 15 MAY 2013

RESOLVED: That the Minutes of the Annual Meeting of the Borough Council held on 15 May 2013 be approved as a correct record and signed.

27. MAYOR'S ANNOUNCEMENTS

The Mayor announced that:-

- He was sure that Members would agree to a letter being sent on behalf of the Council to Their Royal Highnesses the Duke and Duchess of Cambridge congratulating them on the birth of their son.
- It was with regret that he had to inform the Council of the death of Mrs Vera Wood, a former Mayoress of the Borough of Maidstone. Mrs Wood was the widow of John Wood who had served as Mayor during 1978/79.
- He would like to thank the Deputy Mayor and Deputy Mayoress and the Mayoral Team for their help and support over an extremely busy few months.
- He had attended the launch at Maidstone Museum of "Treasures from Hirado", an exhibition celebrating the 400<sup>th</sup> anniversary of the opening of trade and cultural ties between Britain and Japan. He would like to thank all those involved in bringing this important international exhibition to the Museum.

28. PETITIONS

There were no petitions.

29. QUESTION AND ANSWER SESSION FOR MEMBERS OF THE PUBLIC

Question to the Leader of the Council

Councillor Rob Bird, KCC Member for Maidstone Central, asked the following question of the Leader of the Council:-

*"The Borough Council Core Strategy proposals for close to 1,000 new houses to be built either side of the B2246 Hermitage Lane will place considerable strain on the local road network, especially the Fountain Lane junction with A26 Tonbridge Road which is already operating at well over capacity.*

*At its meeting in October 2012 the Maidstone Joint Transportation Board unanimously agreed with the Chairman's proposal that the draft Integrated Transportation Strategy be rejected as 'not fit for purpose' and the proposed St Andrew's Gyratory was strongly criticised by all parties. In the intervening 8 months no new proposals have been put forward by Kent Highways and local residents' properties continue to be blighted.*

*Does Councillor Garland agree that the proposed St Andrew's Road*

*gyratory system is not acceptable to Maidstone Borough Council and will he please confirm that development of this gyratory will not be accepted by MBC planning officers as highways remedial works to alleviate congestion in any future planning application?"*

The Leader of the Council responded to the question.

Councillor Mrs Wilson, the Leader of the Opposition, and Councillor Mrs Gooch, the Leader of the Independent Group, then responded to the question.

Councillor Bird asked the following supplementary question of the Leader of the Council:-

*"In the light of Councillor Garland's response, would he agree that the statement sent to local residents on Maidstone Borough Council headed paper saying that Kent County Council as the Highway Authority has been told that the gyratory system is not acceptable to Maidstone Borough Council is misleading?"*

The Leader of the Council responded to the question.

Councillor Mrs Wilson, the Leader of the Opposition, and Councillor Mrs Gooch, the Leader of the Independent Group, then responded to the question.

To listen to the responses to these questions, please follow this link:-

<http://webcasts.umcdn.com/mbc077/interface>

### 30. QUESTIONS FROM MEMBERS OF THE COUNCIL

#### **Questions to the Leader of the Council**

Councillor Parvin asked the following question of the Leader of the Council:-

*"As a long serving member of staff has recently left the Council's employ, will a letter of thanks be sent from all Members of this Council for the service he has given to us?"*

*Neil Harris has served the Council in many posts over the last 30 years taking on many new areas of responsibility and adjusting to whatever they entailed".*

The Leader of the Council responded to the question.

The Mayor said that he wished to place on record his appreciation of Mr Harris's advice and support over the years.

Councillor De Wiggondene asked the following question of the Leader of the Council:-

*"Can the Leader provide an update on the current situation following the call for sites? A number of these are on valued greenfield land and are causing concern to local residents. What percentage of the total now being considered are greenfield sites?"*

The Leader of the Council responded to the question.

Councillor De Wiggondene asked the following supplementary question of the Leader of the Council:-

*"Considering the concern expressed on both sides of this Chamber at the threat to greenfield land, could the Leader comment on the fact that whilst having written a letter to the Parishes about protecting green spaces, and asking them to put forward brownfield sites, the Maidstone Liberal Democrats put forward during the recent call for sites a significant tract of greenfield land at Lenham which is capable of delivering several thousand homes at normal densities, potentially tripling the size of the village on a site at the foot of the AONB? Does not this demonstrate the general hypocrisy of their current approach to the Local Plan process?"*

The Leader of the Council responded to the question.

### **Questions to Cabinet Members**

Councillor Mrs Wilson asked the following question of the Cabinet Member for Economic and Commercial Development:-

*"As I am sure the Cabinet Member is aware there has been recent press coverage regarding the Federation of Small Business's statement that if Local Authorities spent an additional 5% of their budget locally and committed just three percent of that to small local firms, an additional £788million could have been generated for local economies across the country.*

*For every £1 spent with a small or medium sized business 63p was re-spent in the local area compared to 40p per £1 with a larger business. Would Councillor Greer confirm the Borough Council's percentage spend on services and purchases that went to small business in 2012/13 and tell me whether there are any positive steps he could take to increase that percentage of total spend in the current and future years?"*

The Cabinet Member for Economic and Commercial Development responded to the question.

Councillor Mrs Wilson asked the following supplementary question of the Cabinet Member for Economic and Commercial Development:-

*"Does this Council use contract terms to ensure that its payment terms are passed on by tier one suppliers through their own supply chains, and, if not, will the Council commit to doing so as a matter of urgency?"*

The Cabinet Member for Economic and Commercial Development responded to the question.

Councillor Mrs Parvin asked the following question of the Cabinet Member for Corporate Services:-

*"As an undertaking was given at the last Council meeting that an element of the Visitor Information Centre would be returned to the Town Hall, including staffing, can the Cabinet Member for Corporate Services give a date when this arrangement will take place?"*

The Cabinet Member for Corporate Services responded to the question.

Councillor Mrs Parvin asked the following question of the Cabinet Member for Economic and Commercial Development:-

*"Has further thought been given to utilising the void space on the ground floor entrance to the Gateway? Suggested use of this empty space could be a Visitor Information Centre, literature and the sale of advertising space, perhaps with electronic display/interactive signing for local businesses, i.e. Hotels, Places of Entertainment, Museums and Leeds Castle?"*

The Cabinet Member for Economic and Commercial Development responded to the question.

To listen to the responses to these questions, please follow this link:-

<http://webcasts.umcdn.com/mbc077/interface>

31. CURRENT ISSUES - REPORT OF THE LEADER OF THE COUNCIL, RESPONSE OF THE GROUP LEADERS AND QUESTIONS FROM COUNCIL MEMBERS

The Leader of the Council submitted his report on current issues.

After the Leader of the Council had submitted his report, Councillor Mrs Wilson, the Leader of the Opposition, and Councillor Mrs Gooch, the Leader of the Independent Group, responded to the issues raised.

A number of Members asked questions of the Leader of the Council and the Leader of the Opposition on the issues raised in their speeches.

32. REPORT OF THE CABINET HELD ON 15 MAY 2013 - REFRESHING THE MAIDSTONE SUSTAINABLE COMMUNITY STRATEGY 2009-20:MAIDSTONE COMMUNITY STRATEGY

It was moved by Councillor J A Wilson, seconded by Councillor Paine, that the recommendation of the Cabinet relating to the refreshed Maidstone Sustainable Community Strategy 2009-2020 be approved.

RESOLVED: That the refreshed Maidstone Sustainable Community Strategy for 2009-2020, attached as Appendix A to the report of the Cabinet, be adopted.

33. REPORT OF THE AUDIT COMMITTEE HELD ON 15 JULY 2013 - AUDIT COMMITTEE - ANNUAL REPORT TO COUNCIL 2012/13

It was moved by Councillor Nelson-Gracie, seconded by Councillor Black, that the recommendation of the Audit Committee relating to its Annual Report to Council be approved.

RESOLVED: That the Audit Committee's Annual Report 2012/13 (attached as Appendix A to the report of the Committee), which demonstrates how the Committee has discharged its duties during 2012/13, provides assurance to the Council that important governance issues are being monitored and addressed by the Committee, and provides evidence to support the Annual Governance Statement, be noted.

34. ORAL REPORT OF THE GENERAL PURPOSES GROUP HELD ON 19 JULY 2013 - APPOINTMENT OF INDEPENDENT PERSON

It was moved by Councillor Mrs Hinder, seconded by Councillor Chittenden, that the following recommendation of the General Purposes Group be approved:-

That Mrs Barbara Varney be appointed as the Independent Person until 31 July 2017.

RESOLVED: That Mrs Barbara Varney be appointed as the Independent Person until 31 July 2017.

FURTHER RESOLVED: That Mrs Dorothy Phillips, the previous Independent Person, be thanked for her services to the Council.

35. REPORT OF THE HEAD OF POLICY AND COMMUNICATIONS - MEMBERS' BROADBAND ALLOWANCE

It was moved by Councillor Moss, seconded by Councillor Barned, that the recommendation contained in the report of the Head of Policy and Communications relating to Members' broadband allowance be approved.

Amendment moved by Councillor Lusty, seconded by Thick:-

1. That no change be made to the basic allowance for Members, but Members may claim an allowance of £11.17 per month for broadband with effect from 1 August 2013 if they so wish without the requirement to supply copy invoices.
2. That the Members' Allowance Scheme be updated accordingly.

AMENDMENT CARRIED

The substantive motion was then put to the vote.

SUBSTANTIVE MOTION CARRIED

RESOLVED:

1. That no change be made to the basic allowance for Members, but Members may claim an allowance of £11.17 per month for broadband with effect from 1 August 2013 if they so wish without the requirement to supply copy invoices.
2. That the Members' Allowance Scheme be updated accordingly.

36. REPORT OF THE HEAD OF POLICY AND COMMUNICATIONS - COMMITTEE MEMBERSHIP

It was moved by the Mayor, seconded by Councillor Ash, that the recommendations contained in the report of the Head of Policy and Communications relating to the membership of Committees be approved.

RESOLVED:

1. That the following changes be approved to reflect the wishes of the Leader of the Conservative Group:-

Community, Leisure Services and Environment Overview and Scrutiny Committee

Members

Delete Councillor Ash. Insert Councillor Mrs Parvin.

Substitute Members

Delete Councillor Mrs Parvin. Insert Councillor Ash.

Economic and Commercial Development Overview and Scrutiny Committee

Members

Delete Councillor Mrs Parvin. Insert Councillor Ash.

Planning Committee

Substitute Members

Insert Councillor McLoughlin.

2. That the following changes be approved to reflect the wishes of the Leader of the Liberal Democrat Group:-

Community, Leisure Services and Environment Overview and Scrutiny Committee

Members

Delete Councillor Beerling. Insert Councillor Vizzard.

Substitute Members

Delete Councillor Mrs Grigg. Insert Councillor Beerling.

Planning, Transport and Development Overview and Scrutiny Committee

Members

Delete Councillor Harwood. Insert Councillor Chittenden.

Substitute Members

Delete Councillor Chittenden. Insert Councillor Harwood.

37. MRS ANGELA WOODHOUSE - HEAD OF POLICY AND COMMUNICATIONS

The Council congratulated Mrs Woodhouse on her appointment as Head of Policy and Communications.

38. DURATION OF MEETING

6.30 p.m. to 8.15 p.m.

# Agenda Item 11

Mr Bill King

Clerk to Christopher Lockhart Mummery QC

**INSTRUCTIONS TO COUNSEL  
BOUGHTON MONCHELSEA PARISH COUNCIL AND MAIDSTONE BOROUGH COUNCIL  
FIVE YEAR HOUSING LAND SUPPLY**

## **Pre-amble**

- (a) Boughton Monchelsea Parish lies to the south of Maidstone. The Parish Council is concerned to prevent the unrestricted further encroachment of the Maidstone urban area into the Parish.
- (b) Over the last 20 or so years Boughton Monchelsea Amenity Trust (BMAT) has acquired control over several hundred acres of land in the Parish between the village centre and the urban edge of Maidstone. The prime objective of BMAT is to preserve the land in an undeveloped condition in the interests of preserving the amenity of local residents.
- (c) Boughton Monchelsea Parish Council and Boughton Monchelsea Amenity Trust work closely together and are not opposed in principle to limited development at the margins of Maidstone provided proper provision is made to protect the amenity of the residents of the Parish.
- (d) The Maidstone Local Plan was adopted in December 2000. Housing provisions in the Plan ran to 2006. The Plan is evidently out of date and in need of replacement.
- (e) There is currently a proposal to make a new Local Plan for Maidstone Borough which is programmed to be adopted in 2015. The new plan will run until 2031. (See Document 1, Page 10.
- (f) Boughton Monchelsea Parish Council has resolved to prepare a Neighbourhood Plan for the Parish in tandem with the proposals for the emerging Maidstone Local Plan. It is hoped the Boughton Monchelsea Neighbourhood Plan will also be made by 2015.
- (g) The emerging Maidstone Local Plan contains a proposal to build 600 houses at a site called Langley Park. All the houses at Langley Park would be constructed in Boughton Monchelsea Parish.
- (h) A hybrid planning application for 600 dwellings at Langley Park (including a first phase of 170 dwellings in detail) was submitted on 28<sup>th</sup> June 2013. The application is accompanied by a formal Environment Impact Assessment. Details of the

application (Reference MA/13/1149) are not included with these instruction but can be viewed on line if Counsel regards this as necessary.

- (i) Boughton Monchelsea Parish Council does not object in principle to the proposal. The site was allocated for a mixed employment and housing development in the 2000 Adopted Local Plan in any event. The Parish Council is however very concerned to ensure that any planning permission makes proper provision to mitigate the not inconsiderable community impacts of the construction of an additional 600 dwellings within the Parish.
- (j) Areas of payment sought by Boughton Monchelsea Parish Council for mitigation include:
  - (i) A small community hall attached to the new primary school proposed to be built on the site (sought by Maidstone Borough Council and at best optional so far as Boughton Monchelsea Parish Council is concerned).
  - (ii) A contribution towards the replacement of the existing village hall within the centre of Boughton Monchelsea Village. (£500,000)
  - (iii) A fit for purpose upgrade for playing pitches and a new multi-use games area (MUGA) adjacent to the exiting village hall. ((£100,000)
  - (iv) The provision of changing facilities for the playing pitches [either as a stand-alone facility or as part of the replacement village hall (see ii above)]. (£150,000)
  - (v) Upgraded footpath/cycleway links between the existing village hall, village centre, primary school and shop and pub on the one hand the proposed housing, new primary school and associated social/community facilities on the other. Counsel should note that some of these upgraded links can be provided on Boughton Monchelsea Amenity Trust land and no third party land would be required (£500,000).
  - (vi) The total sum which is sought for mitigation of community impacts is therefore in the region of £1,250,000.
- (k) In discussion with the Parish Council, Maidstone Borough Council (MBC) and the applicant Taylor Wimpey (TW) have not indicated that they will make provision within a Section 106 Agreement for community mitigation to anything like the amount sought by the Parish Council.
- (l) Maidstone Borough Council has indicated it does not yet know how it will handle community mitigation. Taylor Wimpey has indicated it is frustrated at the slow Maidstone Borough decision making but that it cannot make commitments to any mitigation to Boughton Monchelsea Parish Council until it knows the full extent and cost of the package demanded by Maidstone Borough Council.
- (m) A complication arising from community mitigation is an associated proposal in the emerging Local Plan to construct a further 285 dwellings on a site called 'North of Sutton Road' which lies opposite Langley Park.(See Document 1, pages 144-145) Langley Park lies to the south of Sutton Road (A274). (See Document 1, pages 139-

- 142) Maidstone Borough Council takes the view that the two sites together form a strategic location and that community impact mitigation needs to be dealt with as a whole across the entire 885 dwelling allocation. (See Document 1. Pages 138-139)
- (n) Part of 'North of Sutton Road' lies in Otham Parish and part of it lies in a Maidstone Urban Ward. Maidstone Borough Council is concerned that the urban ward and the nearby parish councils (especially Otham) will also make claims for community mitigation which makes them reluctant to agree to a settlement with Boughton Monchelsea.
- (o) Maidstone Borough Council (as part of the Local Plan Work Programme) has agreed to introduce Community Infrastructure Levy (CIL). The programme is for Community Infrastructure Levy to be introduced during the latter months of 2015. If Community Infrastructure Levy was levied in Maidstone at £10,000 per dwellings (a conservative estimate) and if a Neighbourhood Plan was in place Boughton Monchelsea Parish Council would receive 25% of the Community Infrastructure Levy. The payment for Langley would be £2500 x 600 = £1.5m.
- (p) Counsel will note that the conservative estimate for a Community Infrastructure Levy payment at £1.5m is greater than the amount sought for community impact mitigation under Section 106 (£1.25m).
- (q) Because of the uncertainties associated with the collection of Community Infrastructure Levy payments Boughton Monchelsea Parish Council would prefer to reach an acceptable Section 106 contribution in negotiation with Maidstone Borough Council and Taylor Wimpey.
- (r) One of the issues arising in relation to the Taylor Wimpey application is whether Maidstone Borough Council has a 5 year supply of housing land. It appears to Boughton Monchelsea Parish Council that Maidstone Borough Council do have a 5 year land supply if a reasonable allowance for windfall sites is included in the calculation as allowed in the National Planning Policy Framework.
- (s) Maidstone Borough Council has not included an allowance for windfalls in its most recent calculation of housing land supply in the mistaken belief that:  
'national guidance allows for the inclusion of a windfall site allowance for the latter years of the plan period'.  
(Document 1, paragraph 1.6.3). (Page 37)
- (t) Counsel will be aware that the above reference is to PPG3 which was replaced by the National Planning Policy Framework in March 2012.
- (u) Counsel will also be aware that paragraph 48 of the National Planning Policy Framework states:  
'Local Planning authorities may make an allowance for windfall sites in the five year supply if they have compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply.'

- (v) Boughton Monchelsea Parish Council believes that, contrary to the view of the Borough Council, Maidstone does have a 5 year land supply because there is compelling evidence to demonstrate the continued availability of windfalls in the Borough.
- (w) Boughton Monchelsea Parish Council wish Counsel to provide a written opinion to the effect that he agrees that Maidstone do have a 5 year supply. Armed with that opinion Boughton Monchelsea will seek to persuade Maidstone Borough Council and Taylor Wimpey to make proper provision for community mitigation in a Section 106 Agreement for Langley Park.
- (x) If Boughton Monchelsea Parish Council is unsuccessful in securing the above aim, then as a fall-back position the Parish Council will seek to have planning permission at Langley Park not granted until such time as community impact mitigation measures have been properly aired at a Local Plan Examination. By that time Boughton Monchelsea Parish Council believes the matter may well be dealt with under Community Infrastructure Levy in any event.

Please find attached a bundle of paper in relation to housing land supply.

1. Document 1 is the Agenda and Minute of a Cabinet Meeting held on Wednesday 13<sup>th</sup> March 2013. Page 10 of the Document 1 sets out a programme for the preparation of a Local Plan for Maidstone leading to adoption in July 2015.
2. Page 35 of Document 1. (paragraph 1.5.1) sets out that until recently Maidstone Borough Council had a moratorium on the release of greenfield housing sites on the basis that the Council had a healthy 5 year housing land supply.
3. Paragraph 1.5.2 goes on to explain the new NPPF requirement to specify deliverable sites for 5 year housing land calculations.
4. Paragraph 1.5.4 notes that windfall sites on previously developed land (brownfield land):
 

‘are no longer materialising at the same rate’.

Counsel will note this document does not say NIL windfalls are materialising.
5. Paragraph 1.5.5 notes that the 2011/12 Annual Monitoring Report (AMR) (Document 2) states that Maidstone Borough Council has a 4.5 year supply against a 10,080 dwelling target and a 3.9 year supply against a 11,080 target. (More on targets below).

6. Paragraph 1.5.6 refers to a number of Core Strategy Strategic Site Allocations (2012) including Langley Park (SS2a). All of the houses proposed at Langley Park (600 dwellings) lie within the Boughton Monchelsea Parish. The Report makes reference to the Development Plan. Langley Park is allocated in the adopted Maidstone Local Plan December 2000. (Extracts at Document 3). Paragraph 1.5.4 notes that the South East Plan (SEP) 'has not yet been revoked' and advised the Council to use SEP for the calculations of housing land supply.
7. Paragraph 4.88 of the December 2000 Adopted Maidstone Local Plan(Document 3) describes the Langley Park proposals as an integrated village incorporating employment, land, housing and other uses.
8. Policy H8 provides for housing development on 13 hectares within the land at Langley Park Farm West. Paragraph 4.93 and Policy H1 (xiii) confirms the housing allocation as 325 dwellings.
9. Paragraph 4.92 confirms the employment content on 6 hectares at Langley Park Farm West as 20,000 m2. Policy ED1 (iv) of the 200 Adopted Local Plan Provides for 13,000 m2 of B1 and 8000 m2 of B2 at Langley Park Farm West.
10. Counsel is asked to confirm that the current proposal to build 600 houses instead of 325 houses and 13,000 m2 of B1 and 8000 m2 of B2 on the land at Langley Park Farm West is a departure from the Development Plan and should be treated as such.
11. Counsel may wish to consider whether Borough Councillors were misled by the comments in the Cabinet Report at paragraph 1.5.6 (pp. 36-37) regarding planning decisions in accordance with the development plan when the current proposal at Langley Park (600 dwellings) is so much at variance with the Development Plan (325 dwellings and 21,000 m2 of employment space).
12. On the basis of the AMR lack of 5 year land supply the Council is recommended at paragraph 1.1.7 (page 37) to revoke the current moratorium on the release of housing sites allocated in the 2000 Local Plan. This recommendation was accepted by the Borough Council.
13. Counsel will note the proposed Interim Local Plan Policies for Langley Park (policy SS2c) at pages 139 – 142. The site is described as 34 hectares (paragraph 4.8). The capacity is given as 600 dwellings (paragraph 4.11) and Policy SS2a (1) (page 141).

14. The extent of the site is shown on a plan at page 142. Counsel will note this is slightly different from the site in the adopted Local Plan in that a small part of the allocated 2000 site has been built out for employment use.
15. The Report to Cabinet (document 1) at paragraph 1.6.3 (page 37) states that:

‘national guidance allows the inclusion of a windfall site allowance for the latter years of the plan period.’
16. The Report to Cabinet (paragraph 1.5.5, page 36) refers to the AMR in relation to the 5 year housing land supply. The supply of 3.9 years is in relation to the delivery of the South East Plan target of 11,080 dwellings between 2006-2026 for Maidstone. (AMR paragraph 3.2, page 18).
17. As Counsel will be aware the South East Plan was revoked on 25<sup>th</sup> March 2013 so far as Maidstone housing figures are concerned (Document 4).
18. As this imminent revocation was in the public domain does Counsel believe Maidstone Borough Council should have relied on South East Plan requirements in relation to the 3.9 year South East Plan based target in the Report to Cabinet of 13<sup>th</sup> March 2013.
19. The Maidstone Borough Council Annual Monitoring Report 2010-2011 (undated) deals with housing land supply at paragraphs 3.2 to 3.7 (pages 19 to 23). (Document 5)
20. At paragraph 3.2 the Report only tests the lower Core Strategy target of 10,080 new dwellings. Counsel will note the different approach to the 5 year supply of housing land in the AMR earlier.
21. The 2010-2011 AMR (Document 5) includes an Annual Housing Trajectory. Counsel will note that windfalls are included as 36 dwellings for 2021/22 and 145 dwellings per annum for 2022/2023 to 2025/2026.
22. The 2010-2011 AMR at paragraph 3.5 (page 22) lists the elements of supply. The 6<sup>th</sup> entry is an allowance for windfall sites (or previously unidentified sites) from 2021 onwards:

‘in accordance with national guidance (planning Policy Statement 3)’.

23. Counsel will of course be aware that Planning Policy Statement 3 (PPG3) was replaced with the advent of the National Planning Policy Statement NPPF in March 2012.
24. The 2010-2011 AMR is undated but it is believed it would have been produced in October/November 2011 i.e. before the advent of NPPF in March 2012.
25. The 2010-2011 AMR (paragraph 3.7, page 23) notes that there was a 5 year housing land supply at that time (6.4 years) without including an allowance for windfall sites.
26. The 2011-12 AMR presents housing land supply slightly differently. Paragraph 3.6 and Table 3.2 list the elements which constitute the 5 year land supply. No mention is made of an allowance for windfalls and no windfall sites are included in the 5 year land supply.
27. The 2011-12 AMR at paragraph 3.7 concludes that Council does not have a 5 year land supply. The supply is listed at 4.5 years in relation to a target of 10,080 dwellings based on the emerging Core Strategy.
28. Based on the South East Plan target of 11,080 dwellings the supply is listed as only 3.9 years. The 2011-2012 AMR is undated but is believed to have been produced in October/November 2012. The South East Plan was revoked on 25<sup>th</sup> March 2013. (See Document 4)
29. The Borough Council's position is that windfalls can no longer be relied upon to come forward because Maidstone has been relying on windfalls since 2000 and the opportunities are reducing.
30. In the 2010-2011 AMR (Table 3.2, page 20) Maidstone Borough Council rely on windfalls at a rate of 145 dwellings per annum.
31. The most recent Strategic Housing Land Availability Assessment (SHLAA) for Maidstone is dated May 2009. (Document 6). Paragraph 6.1.12 (page 41) identifies a windfall capacity of 628 dwellings for the period 2013-2018. (125 dwellings per annum.)
32. Maidstone Borough Council has seen housing completions at an average rate of 650 dwellings per annum 2000/01 to 2010/11. The average was 675 dwellings per annum over 5 years 2006/7 to 2010/11. See document 7, Table 1, page 9. Document 7 includes, at page 6, a note on Windfall Supply. Based on PPG3, windfall allowances are excluded from estimates of future supply in Document 7.

33. Because of the moratorium, allocated greenfield housing sites have not been released in Maidstone (to provide any significant number of units) over the last 5/10 years. Document 1 paragraph 1.5.4 confirms the high level of windfall completions previously.
34. The shortfall is either 578 dwellings (South East Plan target) (11,080 dwellings) or 201 dwellings (Core Strategy target) (10,080 dwellings).
35. The SHLAA (Document 6) identifies a windfall capacity of 628 dwellings for the 5 year period 2013-2018.
36. The 2010-2011 AMR includes windfalls at 145 dwellings per annum, i.e. 725 dwellings over 5 years.
37. Completions (without greenfield site allocation release) have averaged 675 dwellings per annum over 2006/7 to 2010/11. Document 8 is an estimate of windfalls produced by Kent County Council and marked 'provisional 27 February 2013'. No estimate of windfalls is given for Maidstone for 2011/12. For 2010/11 (the most recent year for which windfall estimates are available) the figure is given as 344 dwellings. In the column marked 'projected 5 year annual average (based on the last five years) the estimate of windfalls for Maidstone is given as 332 per annum.
38. National Planning Policy Framework (paragraph 48) states local planning authorities may make an allowance for windfall sites if certain criteria are met. In the case of Maidstone these criteria are met.
39. It appears Maidstone Borough Council acted in error in the March 12<sup>th</sup> Cabinet Report which stated national guidance allows for the inclusion of a windfall site allowance only 'in the latter years of the plan period.'
40. It appears the higher South East Plan target is no longer relevant, although bearing in mind the windfall figures given above, even with a South East Plan shortfall of 578 dwellings, it would also appear Maidstone does have a five year land supply if windfalls are included.
41. To achieve a 5 year housing land supply on the lower Core Strategy target Maidstone only needs to include a windfall allowance of 40 dwellings per annum. In view of the previous delivery and previous estimates it seems unreasonable for Maidstone not to regard windfalls as a reliable source of supply. Most windfall sites in Maidstone are redundant industrial land and so excluding residential garden land will not materially impact on the above conclusion.

42. Boughton Monchelsea Parish Council (BMPC) wishes to support the proposal to build 600 houses within the Parish at Langley Park. BMPC believe the addition of 600 houses to the Parish would justify the payment of section 106 contributions of between £500,000 to £1,500,000 to mitigate community impacts.
43. Maidstone Borough Council has not agreed to ask the developer for such mitigation payments. Maidstone Borough Council appears to be more concerned with strategic transportation (see Document 1, pages 138-139) than important local community impact mitigation. (See NPPF paragraph 171).
44. By publicly stating that they do not have a 5 year land supply, Maidstone Borough Council appear to be inviting planning applications for development in accordance with its emerging Core Strategy.
45. If Maidstone Borough Council will not agree to appropriate Section 106 contributions to mitigate community impacts, Boughton Monchelsea Parish Council would wish to object to the application for 600 houses on the basis that the community impacts of the emerging Core Strategy/Local Plan proposals should properly be subjected to community consultation (2013 and 2014) and public Independent Examination in February/March 2015.
46. If taken through the proper processes the Local Plan would be adopted in 2015 (i.e. only 2 years' time). It seems to Boughton Monchelsea Parish Council that Maidstone Borough Council has acted in error in saying it does not have a 5 year housing land supply, lifting the moratorium and effectively inviting planning applications on various housing sites including Langley Park.
47. As the shortfall is 201 dwellings it seems to Boughton Monchelsea Parish Council that Maidstone Borough Council would be perverse to pursue a planning permission for 600 dwellings at Langley Park, which is clearly a departure from the adopted Local Plan (2000).
48. It appears to Boughton Monchelsea that the actions of Maidstone Borough Council appear to be denying proper process and preventing payment of CIL revenue.
49. Counsel is asked to advise as follows:

1. The proposals for Langley Park in the Maidstone Borough-Wide Local Plan (Adopted December 2000) (the Development Plan) are for 325 houses [policy H1 (xiii)], 13,000 m2 of B1 and 8000 m2 of B2 [policy ED1 (iv)]. The current application at Langley Park (MA/131/1149) is for 600 dwellings and ancillary facilities. Does Counsel consider the current application to be a Departure from the Development Plan and does he therefore consider the Borough Council should follow departure procedures should it wish to grant consent to the application?
  
2. The Report to Cabinet of 13<sup>th</sup> March 2013 makes references to section 38(b) of the Planning and Compulsory Purchase Act 2004. The Report states that planning decisions must be made in accordance with the development plan unless material considerations indicate otherwise. Does Counsel consider that the current proposals at Langley Park are so much at variance from the Development Plan that the Borough Council would be in error to progress with the current proposals at Langley Park on the basis of the advice set out in the Report to Cabinet?
  
3. The Report to Cabinet on 13<sup>th</sup> March 2013, at paragraph 1.5.4, states that the South East Plan 'has not yet been revoked'. The Report therefore advises the Council to rely on the South East Plan housing target of 11,080 dwellings. In view of the fact that the South East Plan was actually revoked on 25<sup>th</sup> March 2013 (some 12 days after the Cabinet meeting) does Counsel consider the Council should rely on South East Plan targets for the calculation of its 5 year housing land supply calculations?
  
4. The Report to cabinet on 13<sup>th</sup> March 2013 states (at paragraph 1.6.3) that:

'national guidance allows the inclusion of a windfall site allowance for the latter years of the plan period.'

Bearing in mind that PPG3 was revoked by the introduction of the National Planning Policy Framework in March 2012, and that the National Planning Policy Framework contains different guidance on how windfalls may be dealt with, does Counsel consider that the Council Office has made a mistake in its guidance to Council Members in the Report to Cabinet?
  
5. Recent evidence on windfalls includes the following:
  - i. The 2010-2011 Annual Monitoring Report (AMR) includes a windfall allowance of 145 dwellings per annum for 2022/23 to 2025/26.

- ii. The most recent strategic Housing Land Availability Assessment (SHLAA) at paragraph 6.1.12 identifies a windfall capacity of 628 dwellings for the period 2013-2018 (125 dwellings per annum).
- iii. An estimate of windfalls produced by Kent County Council marked 'provisional 27<sup>th</sup> February 2013' gives a 2010/11 estimate as 332 dwellings per annum as a projected 5 year annual average (based on the last 5 years).

Given the above evidence and bearing in mind the new advice in the National Planning Policy Framework, does Counsel believe that Maidstone is correct in not including any allowance for windfalls and therefore stating that it has a 5 year housing land shortfall of:

- (a) 201 dwellings in relation to the Core Strategy based target of 10,080 dwellings and
- (b) 578 dwellings in relation to the South East Plan based target of 11,080 dwellings?

6. The current position of the Council is that it has not included a windfall allowance. On the basis of the above figures, setting aside the issue of whether this approach is correct or not, does Counsel believe that if Maidstone did choose to include a windfall allowance that it would in fact have an adequate 5 year land supply on either basis?
7. Given a shortfall of only 201 dwellings on the Core Strategy based calculation, does Counsel believe it would be appropriate to release the entire additional 600 dwellings at Langley Park in advance of the proper Local Plan processes and/or the completion of more work on the calculation of the 5 year housing land supply?
8. Bearing in mind that a figure of 14,800 dwellings has been approved as a working target,

'until such time as the work confirming the borough's housing land supply and the identification of environmental constraints is completed'

(Report to Cabinet, 13<sup>th</sup> March, paragraph 1.6.5) does Counsel consider that the Council would be justified in using this new working target of 14,800 dwellings (which is currently being tested) as a basis for calculating whether the Borough has a 5 year housing land supply?

50. Counsel is asked to advise on this matter and to draft an opinion which may be used by Boughton Monchelsea Parish Council in negotiation with Maidstone Borough Council in relation to community impact mitigation contributions. Counsel is asked to consider whether Maidstone should include windfalls in the calculation of housing land supply and, based on the compelling evidence of the availability of windfall sites, whether Maidstone does in fact have a 5 year land supply in the context of advice contained in paragraph 48 of the National Policy Plan Framework.

Paul McCreery

## **DOCUMENTS**

1. Agenda and Minutes of Maidstone Borough Council Cabinet Meeting held on 13<sup>th</sup> March 2013.
2. Maidstone Borough Council Annual Monitoring Report 2011-12 (undated).
3. Extracts from Maidstone Borough-wide Local Plan Adopted December 2000.
4. Town and Country Planning, England, Regional Strategy for the South East (Partial Revocation) Order 2013.
5. Maidstone Borough Council AMR 2010-2011.
6. Maidstone Borough Council, Strategic Housing Land Availability Assessment (SHLAA) Final Report, May 2009.
7. Maidstone District, Housing Information Audit 2010/11 (January 2012).
8. Kent County Council, Housing Information Audit, Estimated Completions on large and small unidentified sites (windfalls).

## OPINION

1. I am asked to advise Boughton Monchelsea Parish Council in relation to the proper treatment by Maidstone Borough Council of two principal topics, a planning application for 600 dwellings at Langley Park, and the assessment of a five year housing land supply. The relevant background is as follows.
  
2. The Langley Park site comprises some 34 hectares. The site – indeed a slightly larger site – was allocated for development in the adopted Maidstone Local Plan December 2000. The allocation was for an integrated “village” on the edge of the urban area. Some 6 hectares were proposed for employment development (20/21,000 square metres), and 13 hectares were proposed to accommodate some 325 houses. A small part of this allocated site was subsequently developed for employment purposes.
  
3. The South East Plan required 11,080 dwellings to be provided in the period 2006-2026. The Plan was revoked on 25 March 2013. Maidstone Borough Council published a draft Core Strategy (no longer being pursued) which required provision for 10,080 dwellings over the same period. The chronological consideration of housing supply matters, so far as relevant to this Opinion, has been as follows. In May 2009 the latest SHLAA was published. This predicted that windfall sites would provide some 628 dwellings over the period 2013-2018. The 2010/2011 AMR predicted a windfall supply beyond 2021 (in accordance with PPS3) at the rate of 145 dpa, i.e. 725 dwellings over a five year period. Based on a requirement figure of 10,080, and making no allowance for windfalls, the land supply was stated to be 6.4 years.

4. The 2011/2012 AMR made no allowance for windfalls. It assessed a 4.5 years supply (based on a requirement of 10,080) or 3.9 years supply (based on 11,080).
5. The Provisional Figures dated 27 February 2013 provided by Kent County Council predict, for the five year period commencing 2012/13, an annual windfall completion of 332 dwellings, i.e. 1,660 dwellings over the five year period.
6. A report was taken to Maidstone's Cabinet on 13 March 2013. Paragraphs 1.5.4-1.5.6 stated (so far as relevant) as follows:

*"1.5.4 The November 2012 Cabinet report highlighted the fact that, although the Council continues to experience high levels of dwelling completion rates on sites with planning permission, the windfall sites on previously developed land (brownfield land) that formerly contributed to the borough's five-year housing land supply at a steady pace are no longer materializing at the same rate. The ability to abolish regional strategies is embedded in the Localism Act (2011) but the South East Plan (SEP) has not yet been revoked. Given that Maidstone's Core Strategy target is under review, 5 year calculations should now be based on the SEP target of 11,080 dwellings (as opposed to the draft Core Strategy target of 10,080).*

*1.5.5 The Council's Annual Monitoring Report 2011/12 reveals Maidstone has a 4.5 year land supply against a 10,080 dwelling target and 3.9 years against an 11,080 target. Until such times as a 5 year supply can be demonstrated, planning applications on greenfield sites cannot be refused on the grounds of prematurity and must be assessed on individual merit (including sustainability). The Council has already received a number of residential planning applications on greenfield sites and further applications, particularly for the strategic site allocations, are expected to be submitted after March.*

*1.5.6 It is important to note that four out of the six housing land allocations to the north west and south east of the urban area identified in the Core Strategy Strategic Site Allocations 2012 are residential allocations in the adopted MBWLP 2000: ...Langley Park (SS2a)... These four sites have already been through public examination so not only has the principle of residential development been established, but the sites are also development plan allocations (section 38(6) of the Planning and*

*Compulsory Purchase Act 2004 says that planning decisions must be made in accordance with the development plan unless material considerations indicate otherwise)... ”*

The report went on to recommend that provision be made for 14,800 dwellings between 2011 and 2031. It further stated that: “...national guidance allows the inclusion of a windfall site allowance for the latter years of the plan period”.

7. The Interim Approval of Maidstone Borough Local Plan Policies proposes to allocate the Langley Park site for 600 dwellings. No employment development is proposed.
8. Government policy in relation to a windfall allowance has changed. Paragraph 59 of PPS3 provided:

*“Allowances for windfalls should not be included in the first ten years of land supply unless local planning authorities can provide robust evidence of genuine local circumstances that prevent specific sites being identified...”*

PPS3 was revoked by the NPPF in March 2012. Paragraph 48 provides:

*“Local planning authorities may make an allowance for windfall sites in the five-year supply if they have compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply. Any allowance should be realistic having regard to the Strategic Housing Land Availability Assessment, historic windfall delivery rates and expected future trends, and should not include residential gardens”.*

9. Against that background, I am asked – in effect – to advise on three principal topics. The first relates to the compliance or otherwise of the submitted proposals for Langley Park with the statutory development plan. As noted, the proposals promote one principal use (600 dwellings) together with supporting or ancillary facilities. The Local Plan allocations are for a mixed use village, comprising residential (325 dwellings) but also

comprising a further and substantial primary use, policy ED1(iv) promoting some 20/21,000 square metres of employment development. It is quite clear that the current proposals would constitute a departure from the development plan, in promoting a single primary use and failing to comply with the employment policy. That being so, the advice in the report to Cabinet at paragraph 1.5.6 is a misdirection, and misleading to members. Any planning permission granted on the basis of this advice would be liable to be quashed in the courts.

10. The second question relates to the appropriate requirement figure to be used as the basis for an overall target figure and hence the basis for a five-year assessment of housing supply. There are, in effect, three main candidates for such a requirement figure. There is the South East Plan housing target of 11,080 dwellings over the plan period 2006-26 (554 dpa); the figure of 10,080 dwellings from the previous draft Core Strategy; and the figure of 14,800 dwellings approved in March 2013 as a working target “*until such time as the work confirming the borough’s housing land supply and the identification of environmental constraints is completed*”. One can test the matter this way: if this issue came before an Inspector at a planning inquiry, I have no doubt that he would conclude that the former Core Strategy had no weight; that the emerging Local Plan figure has very little weight at this stage and has not been tested; but that the former South East Plan figure has the merit that it was supported by a substantial evidence base and was subject to independent assessment. He would therefore be likely to use the SEP requirement figure as the basis of the calculation. I have known Inspectors take this approach in many appeal decisions, following revocation of the relevant regional strategy.
11. The third matter relates to the treatment of windfalls. As noted above, the report to Cabinet on 13<sup>th</sup> March 2013 states that: “National guidance allows the inclusion of a

windfall site allowance for the latter years of the plan period”. As set out in paragraph 8 above, this advice was in the now cancelled PPS3, and has been substituted by the quite different advice in NPPF. This is a further misdirection to members, and if it were to be the basis for advice to members on the determination of the planning application, to the effect that there is consequently a lack of a five-year supply, this again would be a legal misdirection. It is quite clear from the figures set out at paragraphs 3 and 5 above, that the twin tests of paragraph 48 of NPPF are met – windfall sites have consistently become available in the local area, and the clear evidence is that they will continue to provide a reliable (and indeed significant) source of supply. Indeed, depending on which prediction is used, and taking the requirement derived from the South East Plan, there would be between 5 and 7 years supply. (I understand that the supply figures in the AMR 2011/12 have since been revised upwards, and hence these supply figures need to be increased further).

**C. LOCKHART-MUMMERY QC**

Landmark Chambers  
180 Fleet Street  
London EC4A 2HG  
30<sup>th</sup> July 2013

**IN THE MATTER OF:**

**BOUGHTON MONCHELSEA PARISH COUNCIL**

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**OPINION**

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**PMC Planning  
Heron Bank  
The Street  
Ulcombe  
Kent  
ME17 1DR**

**Ref: Paul McCreery**

**Our Ref: CLM-131286**

## NOTICE OF MOTION – EXTRA-ORDINARY COUNCIL MEETING 2<sup>ND</sup> SEPTEMBER 2013

### BRIEFING NOTE TO FULL COUNCIL

The information below responds to the Notice of Motion, the Counsel's opinion that has led to it and the instructions that preceded Counsel's opinion.

The purpose of this note is to respond to the three key points

1. Officers have used the wrong guidance in calculating the five year housing land supply and as a result have misled and misdirected members.
2. The five year housing land supply should include windfalls and the calculation undertaken by officers does not include windfalls, and if it did there would be a land supply of 5-7 years
3. If the Council makes a decision to determine the current planning application for Langley Park Farm on the basis of the information and advice in the report to Cabinet on 13<sup>th</sup> March 2013 then the decision, if challenged, would be quashed because of the misdirection arising from the officers' report

The NPPF is key to the issues raised. For ease of reference the key paragraphs (47 & 48 are reproduced in Appendix A to this note).

For ease of reference the Notice of Motion is attached at Appendix B.

Councillor Munford circulated the Boughton Monchelsea Parish Council's instructions to Counsel and Counsel's opinion to you all on 27<sup>th</sup> August 2013 and a further note on the issues I believe on 28<sup>th</sup> August 2013.

Taking the points 1-3 above in turn.

Firstly it is suggested that officers used out of date planning policy guidance to calculate the five year land supply and that if this in turn was used in the determination of the planning application for Langley Park Farm then this would be legal misdirection.

In BMPC's Counsel's opinion its states "The report to Cabinet on 13th March 2013 states that: "National guidance allows the inclusion of a windfall site allowance for the latter years of the plan period". As set out in paragraph 8 above (of Counsel's opinion), this advice was in the now cancelled PPS3, and has been substituted by the quite different advice in NPPF. This is a further misdirection to members, and if it were to be the basis for advice to members on the determination of the planning application, to the effect that there is consequently a lack of a five-year supply, this again would be a legal misdirection"

Our points are that

- The evidence that the opinion relies on is a paragraph in the Cabinet report of 13th March 2013; this paragraph is contained in a section headed “Demographic Forecasts and Housing Target”; this paragraph was not considering the 5 year housing land supply
- The national guidance referred to is for the housing target for the whole plan period (ie 20 years) and not the 5 year period. Para 7 of SHLAA Guidance (July 2007) states...‘As a minimum, it (ie the SHLAA) should aim to identify sufficient specific sites for at least the first 10 years of a plan, from the anticipated date of its adoption, and ideally for longer than the whole 15 year plan period.’
- The Cabinet report refers to national guidance and although PPS3 has been replaced Strategic Housing Land Availability Assessments – Practice Guidance (2007) has not been replaced. The NPPF also gives policy guidance on the housing target/housing supply factors for the whole plan period. Both refer to the role of windfalls. Officers’ advice is to include a windfall provision for the latter years of the plan period.
- The changes in policy brought about by the NPPF have been taken into account by officers in the calculation of the five year housing land supply. This can be seen by comparing the five year housing land supply calculation methodology set out in the 2010/11 and the 2011/12 Annual Monitoring Statements. This comparison shows that the 2011/12 calculation includes a 5% buffer (not included in the previous calculations) in response to NPPF (paragraph 47) and that the housing land supply volume has been reduced. The latter has resulted from a review of the sites in the future land supply in conversation with the developers of those sites (in response to NPPF paragraph 160) and the application of the deliverability tests (NPPF note 11) which are, in our view, more demanding than those in the previous advice in PPG3 for example viability is now more strongly emphasised

Secondly it is suggested that the MBC calculation of the five year land supply is flawed because it does not include a windfall provision. The argument put forward is that the NPPF (paragraph 48) says that local planning authorities may make such a provision and that MBC should do so because historically there have been windfalls. It is implied that the historical record is a reliable predictor of future windfalls. Various figures are quoted in an endeavour to quantify the provision that MBC should make. On the basis of this it is asserted that an allowance should be added to the housing land supply figures used by the Council. Mathematically it is claimed this would mean that Maidstone has a 5-7 year land supply.

BMPC’s Counsel’s opinion is that “It is quite clear from the figures set out at paragraphs 3 and 5 above [in his opinion document], that the twin tests of paragraph 48 of NPPF are met – windfall sites have consistently become available in the local area, and the clear evidence is that they will continue to provide a reliable (and indeed significant) source of supply. Indeed, depending on which prediction is used, and taking the requirement derived from

the South East Plan, there would be between 5 and 7 years supply. (I understand that the supply figures in the AMR 2011/12 have since been revised upwards, and hence these supply figures need to be increased further)".

Our view is that

- Care needs to be taken in the use of the term windfall
- The definition of windfall in the KCC document relied on by BMPC is "A housing site not previously identified in the planning process"
- The definition of windfall in the NPPF is "sites which have not been specifically identified as available in the Local Plan process. They normally comprise previously developed sites that have unexpectedly become available"
- MBC's housing land supply calculations do include windfalls
- The MBC housing completions calculation includes housing constructed on sites not previously identified in the planning process ie sites that have not been allocated in the local plan
- Housing that would be built on land that has not been identified in the planning process and which is realistically deliverable in the future 5 year period has also been included in the 5 year land supply calculation. Our methodology includes reviewing every site with planning consent, including housing sites not previously identified in the planning process.
- The provision made for this type of windfall in MBC's calculation of the future five year land supply in the Cabinet report of March 2013 is as follows. Total five year land supply for 2012/13 to 2016/17 is stated as 1983 dwellings; of the 1983, 1562 dwellings have been included from sites not previously identified in the planning process at that date.
- We have not seen the whole of document 8 listed in the instructions to BMPC's Counsel and which his opinion relies on. From what we understand at the moment we believe that the historical information referred to in this document "Kent (KCC area) estimated completions on large and small unidentified sites ("Windfalls") refers to housing built on sites not previously identified in the planning process. We have assumed this because in Document 7, which was also produced by KCC and which refers to but does not include an analysis of windfalls, the definition of windfall used is "A housing site not previously identified in the planning process" and it is reasonable to assume that the definitions used in KCC documents are consistent.

- KCC have produced provisional projected five year annual average windfall (based on the period 2006-7 to 2010/11 – there are no figures included for 2011/12) for Maidstone – which is 332; the product over five years if these completions were used pro rata to estimate the future supply would be 1660. The quantum included in the MBC calculation for the same period is 1562.
- To add a further quantum of housing to the housing supply calculation in the 2011/12 AMR based on the historical KCC data as BMPC’s Counsel suggests would in our view result in double counting of windfalls
- Other references are made in the BMPC’s instructions to Counsel to numbers which indicate that windfalls are relevant to the calculation; the figure of 145 has been used by MBC in the context of the latter part of the plan period ie not the five year and supply and we suggest that translating this for application to the five year calculation would not be appropriate; the figure of 628 produced by Barker Consultancy was the basis of the calculation for the 145 figure mentioned above.
- MBC have not made a provision for windfalls that are wholly unknown about. We have not ruled out these additional windfalls completely just because they cannot be identified now. We have exercised our discretion. This is consistent with the NPPF policy which says that local planning authorities may take windfalls into account. We reached this judgement in our calculation of the 5 year housing land supply in the 2011/12 AMR because we believed that there was not compelling evidence that such sites will provide a reliable source of supply in the future. Our starting point was the objective behind the NPPF housing policy which is to identify a supply of specific sites and those specific sites should be developable. Planning authorities must identify a robust supply of housing land. The policy tests in terms of what land can be considered to form part of the supply is clear. “To be considered deliverable sites should be available now, offer a suitable location for development now and be achievable with a reasonable prospect that housing will be developed on the site within 5 years and in particular that the development of the site is viable”. This reinforces the fact that any windfall allowance included has to be realistic and based on a compelling case. As prospective windfalls are not identifiable they go against the grain of policy and a local planning authority must be very sure of its case if including any allowance. We will continue to monitor the position and consider the issue in our annual review of housing land supply. Furthermore the policy context in the future will be different than that for the last 5 years in that it is expected that a new Local Plan will be in place in 2015.
- We have noted that the BMPC documents do not bring forward any evidence about completely unexpected windfalls. There is a suggestion that the “shortfall” in supply, which is 201 or 578 depending on the target (10080 or 11080), would only mean 40

or 116 windfalls would be needed to meet the 5 year supply (paragraph 41). However no evidence is brought forward to substantiate this beyond reference to historical windfalls arising from dwellings built on housing sites not identified through the planning process – and these, as demonstrated above, have already been factored into the Council’s calculation of housing land supply.

The third issue relates to the compliance or otherwise of the submitted proposals for Langley Park with the statutory development plan. BMPC’s Counsel states that “the proposals promote one principal use (600 dwellings) together with supporting or ancillary facilities. The Local Plan allocations are for a mixed use village, comprising residential (325 dwellings) but also comprising a further and substantial primary use, policy ED1(iv) promoting some 20/21,000 square metres of employment development. It is quite clear that the current proposals would constitute a departure from the development plan, in promoting a single primary use and failing to comply with the employment policy. That being so, the advice in the report to Cabinet at paragraph 1.5.6 is a misdirection, and misleading to members. Any planning permission granted on the basis of this advice would be liable to be quashed in the courts.”

Our view is that

- The current proposals put forward by Taylor Wimpey if approved would result in a departure from the Local Plan and, in accordance with normal practice, this has been advertised and the issue will be considered in the evaluation of the proposals.
- Paragraph 1.5.6 of the 13<sup>th</sup> March 2013 Cabinet report is contained within a section of the report covering “Moratorium on the release of greenfield housing sites allocated in the Maidstone Borough Wide Local Plan 2000”. The paragraph lists sites which have a housing allocation which has been “frozen”. This includes Langley Farm (SS2a)
- Counsel does not explain why this paragraph, which is descriptive and does not contain any advice, is misdirection or misleading. One explanation is that the reference to site Langley Park (SS2a) does not refer to employment use as well as the housing use.
- We say that this would miss the point of the purpose of paragraph 1.5.6 – which is to describe greenfield housing site allocations which had been frozen and where agreement was being sought to lift the moratorium. Its purpose was not to deal with allocations in the new plan, or the current planning application.

We therefore conclude that there have been no mis-directions by officers, and that Members have not been misled.

### Extract from National Planning Policy Framework

**Paragraph 47** – To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable <sup>11</sup> sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
- identify a supply of specific, developable <sup>12</sup> sites or broad locations growth, for years 6-10 and, where possible, for years 11-15;
- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances.

<sup>11</sup> *To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or site have long term phasing plans.*

*<sup>12</sup> To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.*

#### **Paragraph 48**

Local planning authorities may make an allowance for windfall sites in the five-year supply if they have compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply. Any allowance should be realistic having regard to the Strategic Housing Land Availability Assessment, historic windfall delivery rates and expected future trends, and should not include residential gardens.

**Notice of Motion – 2 September 2013**

We the undersigned, hereby requisition an extraordinary meeting of Maidstone Borough Council to consider the following notice of motion.

In light of the fact that Boughton Monchelsea Parish Council has obtained **Leading Counsel's Opinion** which states, that:

1. MBC does have between a 5-7 years land supply; and
2. Members were misdirected by using advice in the now cancelled PPS3 instead of the quite different advice contained in NPPF and that if this advice was used in determination of planning applications, (to the effect that there is a lack of a five year supply,) this would be a legal misdirection, and
3. The twin tests of paragraph 48 of the NPPF relating to windfall sites have been met and that windfall sites have consistently become available in the local area, and the clear evidence is that they will continue to provide a reliable (and indeed significant) source of supply; and
4. Members have been given information regarding the Langley Park Farm development which was a misdirection and misleading, and that any planning permission granted based on this advice would be liable to be quashed in the courts as it is clearly a departure from the Local Plan.

We propose that:

1. With some urgency, an all party investigation is carried out by members to address the situation where we (the members) are being given unsound advice (in the opinion of Leading Counsel) and that the investigation team has delegated powers, if necessary, to seek a further opinion from Counsel on this matter.
2. The investigation team should report back to full Council with its recommendations for future actions to be taken by this Council regarding this matter.

**From:** Debbie Snook  
**Sent:** 02 September 2013 12:31  
**To:** Debbie Snook  
**Subject:** FW: URGENT Update for Meeting 2nd Sept  
**Attachments:** aaCLM-BOUGHTON MONCHELSEA PARISH COUNCIL (2) (2).pdf  
  
**Importance:** High

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**From:** Stephen Munford [mailto:steve@munfords.fsnet.co.uk]  
**Sent:** 01 September 2013 09:00  
**To:** Steve Munford (Cllr); Councillors (MBC)  
**Subject:** URGENT Update for Meeting 2nd Sept  
**Importance:** High

Dear Members

Boughton Monchelsea Parish Council has referred to Christopher Lockhart-Mummery Q.C. the Note from the Chief Executive, which commented on his original Opinion, relating to housing land supply. A further Opinion has been obtained and this is attached. You will see that Mr. Lockhart-Mummery is still of the view that there have been misdirections from officers. Indeed, he has said *“the Note strongly confirms my previous advice to the effect that officers have seriously misunderstood policy in NPPF, and—subject to a Council meeting on 2nd September 2013—are leading Members to misdirect themselves in this important respect.”*

Clearly, the ascertaining of the figure for the 5 year housing land supply in the context of windfall sites is quite a complex matter.

The Note from the Chief Executive states that we have exercised our discretion over the issue of windfall sites. However, the Report to Cabinet on 13th March 2013, contains no reference to the up to date policy in NPPF, (paragraph 48), which states that we can make an allowance for windfall sites in the all important 5 year housing land supply.

Neither does the Report make reference to Maidstone’s excellent track record on windfall sites continuing to come forward and providing a reliable source of supply. Such data is published and is readily available. The fact is that windfall site completions in **Maidstone have averaged 332 dwellings per annum over the last 5 years** for which data is available. The Map Depot Site, Marden Committee Report (MA/13/0115) contains at pages 44 to 45 (para 5.3.15) the Council's 5-year housing land supply position at 1 April 2013. This states that the shortfall in the 5 year supply is **370 dwellings**.

On the basis of the approach taken by Leading Counsel, this means that **we only need to find a further 74 dwellings per annum from the windfall allowance allowed for in NPPF** (paragraph 48) in order to have a five year land supply, so that there is no need to release a number of large greenfield sites in advance of their examination by democratically elected Members, in the proper Local Plan Review process.

We must decide on Monday to have an open and publicly accountable investigation - to be conducted quickly and fairly to resolve the issue once and for all. Unless we take control of this situation by having the investigation, I fear this will become an ongoing problem which could even serve to undermine the rapid progress which the Borough Council should be making on the preparation of the new Local Plan at this time. **36**

Bearing in mind comments in the press (see Friday's KM pages 13 AND 30) it is imperative that

we continue with the investigation proposed in our notice of motion. This is too complicated and too important an issue to be "brushed under the carpet" in any ad-hoc summary session on Monday night.

A leading expert in planning legislation (Mr. Lockhart-Mummery is preeminent in his field) has advised us that there is a serious misunderstanding of policy.

I request that you support the motion on Monday evening and resist the temptation to decide the substantive issue then, without a proper investigation. Let us not fear an investigation; this is a complex area of planning, which needs to be understood once and for all.

Kind Regards

Cllr Steve Munford

Boughton Monchelsea and Chart Sutton Ward

BOUGHTON MONCHELSEA PARISH COUNCIL

FURTHER OPINION

1. I asked briefly to respond to a Note (the “Note”) from the Chief Executive of Maidstone Borough Council which is effectively a response to my Opinion dated 30<sup>th</sup> July 2013. I confine my response to the issue relating to the role of windfall sites in the calculation of the 5 year housing supply.
2. In summary, the Note strongly confirms my previous advice to the effect that officers have seriously misunderstood policy in NPPF, and—subject to a Council meeting on 2<sup>nd</sup> September 2013—are leading Members to misdirect themselves in this important respect.
3. The Note makes the error crystal clear: *“Officers’ advice is to include a windfall provision for the latter years of the plan period...MBC have not made provision for windfalls that are wholly unknown about...As prospective windfalls are not identifiable they go against the grain of policy...”* (emphasis supplied).
4. This shows a continuing and substantial misunderstanding of national policy. Paragraph 47 of NPPF requires the inclusion within the supply of “specific deliverable” sites, which include (amongst others) allocations and “sites with planning permission”. These are, manifestly, sites that are known about. Equally obviously, there will be many sites in this category (especially those with planning permission) that were not previously known about, but have now become specific and deliverable.
5. Paragraph 48, by contrast, introduces an additional allowance, by definition sites not known about at the time of the overall calculation.
6. The Note wrongly claims that windfalls are included in the MBC supply on two bases. First, *“The MBC housing completions calculation includes housing constructed on sites not previously identified in the planning process ie sites that have not been allocated in the local plan”*. Of course it does, but this has nothing whatever to do

with the calculation of future supply which is the current issue. Second, it is claimed that “..the methodology includes reviewing every site with planning consent, including housing sites not previously identified in the planning process”. Again, of course it does, but these are sites that are now known about, ie they are paragraph 47 sites.

7. The misunderstanding is seen again in the claim that the NPPF approach would “result in double counting of windfalls”. Not so—as set out above, there will be sites that now have planning permission which were not previously known about (ie they were unplanned windfalls). But they are now in the known supply for the purposes of paragraph 47. They are now part of the known existing supply, but are distinct from the proper allowance for future windfalls.
8. I refer again to the claim that “as prospective windfalls are not identifiable they go against the grain of policy...”. This is simply a rejection, a misunderstanding of policy. Paragraph 48 allows an allowance for windfalls where two criteria are met, consistent supply in the past, and evidence of future reliable supply. The evidence is quite clear that both criteria are met.
9. For these reasons, there are continuing misdirections by officers.

Christopher Lockhart-Mummery QC

Landmark Chambers

30 August 2013

PMC Planning

CLM-131286

## NOTICE OF MOTION – EXTRA-ORDINARY COUNCIL MEETING 2<sup>ND</sup> SEPTEMBER 2013

### FURTHER BRIEFING NOTE TO FULL COUNCIL

The purpose of this note is to provide advice arising from review of the Further Opinion produced by Counsel to Boughton Monchelsea Parish Council dated 30<sup>th</sup> August 2013 and which was circulated to elected members on 1<sup>st</sup> September 2013.

This Council has sought its own advice from Counsel and this is attached for Members to consider.

At the heart of the matter is appropriate application of the NPPF and the significant detailed information available to inform officer judgements about the likelihood of windfalls occurring in the 5 years from 2012/13 to 2016/17.

The NPPF says that windfalls **may** be taken into account not that they must be taken into account.

When the calculations of land supply were undertaken prior to the March Cabinet officers had formed the view that there was not a compelling enough case for a provision to be made for wholly unexpected sites coming forward in the future. Our judgement on such an allowance has had regard to the Strategic Housing Land Availability Assessment not just historic experience. We do not believe that BMPC have brought forward compelling evidence. Nuggets of information were highlighted in the instructions to Counsel whereas officers have a fuller and more comprehensive understanding of the analysis that has been undertaken including for the Strategic Housing Land Availability Assessment in 2012/13. We do not believe that this information was included in the list of documents supplied to BMPC's Counsel.

Officers formed the view that provision should not be included for unexpected windfall sites because

- The policy context in Maidstone is changing as the Local Plan is developed and hence the next 5 years will not be comparable to the last 5 years
- In order to inform the content of the Local Plan extensive and detailed work has been undertaken to trawl potential sites that could become available for housing use and evaluate them. This has been achieved through the call for sites in 2009 and that which subsequently took place in 2012/13. To complement this officers have identified sites currently in other uses and which could conceivably become housing sites in the future and sites which currently have an employment designation and which could conceivably be considered for housing in the future (including Langley Park Farm) ie the likelihood of wholly unexpected sites coming forward and being developed within the 5 years is uncertain
- Windfalls on garden land cannot be included and hence any previous track record on this cannot be projected forward
- Preparation for the Local Plan has also included viability assessment and advice
- There has been extensive dialogue with housing providers

As indicated previously the Five Year Housing Supply is regularly reviewed which gives the opportunity to cast our minds over the material considerations again.



**IN THE MATTER OF:**

**MAIDSTONE BOROUGH COUNCIL HOUSING LAND SUPPLY & WINDFALL ALLOWANCE**

**ADVICE NOTE**

1. I am advising Maidstone Borough Council in this matter. I have seen a further opinion of leading counsel on behalf of Boughton Monchelsea Parish Council dated 30 August 2013 which continues to advise that members are being misdirected about the 5 year housing land supply.
2. Members are not being misled or misinformed by officers in the matter of a windfall allowance. Leading Counsel is apparently being told that there is compelling evidence to include a windfall allowance in the 5 year supply. That compelling evidence does not exist and there is no robust basis on which to conclude that there will be a reliable supply of “windfall” sites in the next 5 years.
3. Errors in the instructions or advice given have apparently arisen from a lack of understanding of, at least, two things:
  - the accurate definition of “windfall site” in the NPPF which officers must apply
  - the extremely wide pool of sites that come to Maidstone’s attention through the SHLAA process, are then assessed by Maidstone and are rejected because they are not suitable for housing or the housing will not be delivered within 5 years.
4. A site cannot be a windfall site if it has been highlighted as available in the course of the emerging local plan process. The definition in the NPPF is sites not specifically identified as available in the Local Plan process.

5. In Maidstone the SHLAA process has gone through a painstaking process of examining land and buildings as potential housing sites. The process has included two recent 'call for sites' as well as a trawl through all other known potential sites. The 'call for sites' process brings forward numerous parcels of land or buildings which are sometimes in active alternative use or are underused and these are assessed for their chances of providing future housing units. For example, these can include on-going commercial businesses which are looking to relocate in the future and redevelop their land for housing.
6. Some sites will be assessed as likely to contribute to the 5 year land supply, some may be assessed as becoming available beyond that period and some may be rejected as housing sites. If they are rejected as housing sites or they are potential housing sites likely to deliver their units beyond the 5 year period then they cannot form a "reliable source of supply"<sup>1</sup> on which to base a windfall allowance for the purposes of the 5 year housing supply.
7. Leading Counsel for the Parish Council asserts that there is compelling evidence that windfall sites have consistently become available in the local area and that such sites will continue to provide a reliable source of supply. These are flawed conclusions and it would not be desirable to put weight on them.
8. In reality the SHLAA process has been<sup>2</sup> so thorough that the likelihood of land or buildings not assessed by it delivering housing units within the next 5 years is very remote. If a council is to be able to support the inclusion of a windfall allowance, it will have to be reasonably sure that totally unknown sites will be delivering housing units in the next 5 years. Officers have considered how many housing units have come forward from unknown sites in the recent past, have set aside units on garden land, have looked at the advice in the NPPF and have concluded that they could not robustly defend including a windfall allowance in the next 5 year supply figure.

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<sup>1</sup> NPPF paragraph 48

<sup>2</sup> And will continue to be

9. It might be appropriate to include a windfall allowance for the purposes of a 20 year housing trajectory towards the end of the plan period when there has been further churn in the system. This is officers' current view and there is nothing incorrect or misleading in doing this for a 20 year housing trajectory. It does not affect their view about the first 5 year supply.
  
10. There is no doubt that officers correctly understood paragraphs 47 & 48 of the NPPF. They were well aware that a windfall allowance can be included if there is compelling evidence to do so. The core of NPPF policy is for councils to identify sites which will deliver housing and in that sense including a windfall allowance is against the grain of policy. It is possible to include an allowance, but in this instance officers were not convinced there was the compelling evidence to do so for the 5 year housing supply calculations.

**Megan Thomas**  
**Barrister**  
**6 Pump Court**  
**Temple**  
**London EC4Y 7AR**  
**September 2nd, 2013**