

MAIDSTONE BOROUGH COUNCIL

PLANNING REFERRALS COMMITTEE

11 May 2017

Head of Planning and Development

Report prepared by Richard Timms

1. **APPLICATION MA/15/503288/OUT – LAND AT WOODCUT FARM, ASHFORD ROAD, HOLLINGBOURNE, MAIDSTONE, KENT.**
 - 1.0 Issue for Decision
 - 1.1 To consider not defending the grounds for refusal at the Public Inquiry appeal into the above-mentioned planning application.
 - 1.2 To consider the Council's position on potential amendments to the appeal proposals by the appellant.
 - 2.0 Reason for Urgency
 - 2.1 The appeal commenced on 27 January 2017. The Council is committed to the agreed appeal timetable, which requires the submission of its Statement of Case by 18 May 2017 (this being the third agreed extension to the original deadline following the Planning Committee on 27 April). A pre-inquiry meeting is scheduled for 5 June 2017 and the parties are required to submit proofs of evidence in September 2017, four weeks prior to the commencement of the public inquiry on 10 October 2017. At present, the inquiry is estimated to continue for 10 days.
 - 2.2 To date, the Council has expended resources dealing with the appeal in terms of officers' work and Counsel's advice. Clearly, the appellant has also invested a significant amount of resources in support of its appeal. Both parties' costs will continue to rise as the appeal progresses.
 - 2.3 The main parties to a planning appeal are subject to a duty to ensure that the Planning Inspectorate are informed of any material changes in planning circumstances relevant to the appeal, in particular, any changes in national or local planning policy that are relevant to the planning authority's reasons for refusal, and whether those reasons are still defensible. This report and the **Appendix** addresses this matter and recommends that the Council's reason for refusal cannot

be defended at the public inquiry in October 2017. To ensure the Council complies with the procedural requirements to submit its statement of case by the 18 May 2017 deadline and to reduce the Council's overall costs liability, in particular, by avoiding the risk of an adverse cost award against the Council, it is important that any decision is taken as soon as possible.

3.0 Recommendations (Numbered as per original Planning Committee Report)

3.1 **Recommendation 1:** To agree that the sole reason for refusal recorded in the Council's decision notice, should not be defended on appeal.

3.2 **Recommendation 3:** In the event that the appellant does not apply to amend the proposals, or if the Inspector does not accept the amendments, to defend the appeal, if necessary, on the basis that the application proposal does not accord with emerging Local Plan policy, in particular, policy EMP1(5) as proposed to be modified.

3.3 (Planning Committee made decisions on recommendations 2 and 4)

4.0 Reasons for Recommendations

4.1 Recommendation 1: There is considered to be no realistic prospect of defending Council's reason for refusal at appeal. Attempting to defend the Council's reason for refusal will expose the Council to a high risk of a very significant adverse costs award, on the grounds of unreasonable behaviour, by failing to produce substantial evidence to defend every aspect of the Council's reason for refusal. This risk of an adverse costs award is in addition to the Council's costs of defending the appeal, which would also be significant.

4.2 Recommendation 3: Background information on the potential amendment of the appellant's application is outlined below at paragraph 5.22. Should the appellant not apply to amend the proposals or should the Inspector refuse to determine the appeal on the basis of the potential amendments, the application proposals do not accord with the emerging Local Plan policy, in particular, policy EMP1(5), as proposed to be modified. In this situation the Council should object to the proposals.

5.0 Background

5.1 The appeal relates to planning application 15/503288/OUT, which was an outline application for a mixed commercial development comprising B1(a), B1(b), B1(c) and B8 units, with a maximum floorspace of 46,623sqm. All matters were reserved for future consideration, save

- for access to the proposed development, the arrangements for which were detailed in the application.
- 5.2 The application was originally reported to Planning Committee on 30 June 2016 with an officer recommendation to grant outline permission subject to conditions and a Section 106 legal agreement.
- 5.3 Contrary to that recommendation, Members voted to refuse the application (by 7 FOR /6 AGAINST) on the following grounds:
- "The proposed development would be harmful to the character and appearance of the countryside, Special Landscape Area, and the setting of the Kent Downs Area of Outstanding Natural Beauty and any benefits are not considered to outweigh this harm. It would also cause less than substantial harm to the setting of the Grade II listed building 'Woodcut Farm' and any public benefits are not considered to outweigh this harm. The development would therefore be contrary to saved policies ENV21, ENV28, and ENV34 of the Maidstone Borough-Wide Local Plan 2000 and advice within the National Planning Policy Framework 2012."*
- 5.4 Members were not given a costs warning before making their decision.
- 5.5 On 6 July 2016, the Council issued a decision notice (attached at the **Appendix**) notifying the applicant of its decision to refuse planning permission. The notice recorded the Council's sole reason for refusing planning permission in the following terms:
- "(1) The proposed development would be harmful to the character and appearance of the countryside, Special Landscape Area, and the setting of the Kent Downs Area of Outstanding Natural Beauty and any benefits are not considered to outweigh this harm. It would also cause less than substantial harm to the setting of the Grade II listed building 'Woodcut Farm' and any public benefits are not considered to outweigh this harm. The development would therefore be contrary to saved policies ENV21, ENV28, and ENV34 of the Maidstone Borough-Wide Local Plan 2000 and advice within the National Planning Policy Framework 2012."*
- 5.6 The appeal commenced on 27 January 2017 with the public inquiry on 10 October 2017, which at present is estimated to continue for 10 days.
- 5.7 Before submitting its Full Statement of Case, Officers have reviewed the Council's reason taking account of any material changes in planning circumstances relevant to the appeal and taken advice from Counsel. Consequently, four recommendations were reported to the

Planning Committee on 27 April 2017. (The full Planning Committee Report and appendices are attached at the **Appendix**). The first recommendation was the key issue, seeking agreement that the sole reason for refusal not be defended on appeal. The other recommendations related to potential scenarios that may occur (2 & 3), and seeking delegated powers to negotiate on a legal agreement (4).

- 5.8 The Planning Committee voted against recommendation 1, and decided that the Council should defend the appeal based on the reason for refusal. In line with the Council's Constitution, as this decision could have significant cost implications for the Council's budget, the decision was referred to the Planning Referrals Committee (PRC) by the Head of Planning & Development. Recommendation 3 was also referred to PRC as it is connected to recommendation 1.
- 5.9 Planning Committee made decisions on recommendations 2 and 4.
- 5.10 The reasoning for both recommendations is set out in detail in the original Planning Committee Report and appendices attached at the **Appendix**, and a summary is provided below.

Recommendation 1: To agree that the sole reason for refusal recorded in the Council's decision notice, should not be defended on appeal.

- 5.11 The application was an outline planning application, and therefore consideration of specific matters relating to layout, scale, appearance, and landscaping were, and continue to be reserved, for future consideration. The main issues for consideration by the Committee were the principle of circa 46,000sqm of business floorspace and the acceptability of the access to the site. The Committee did not (and could not) refuse the application because buildings might be too tall or because of their location, simply because these details were not up for consideration. On that basis, the Committee's reason for refusal must be construed as an 'in principle' objection to the proposed development.
- 5.12 An 'in principle' objection is fundamentally contrary to draft policy EMP1(5) of the submitted Local Plan. This policy allocates the application site for 49,000sqm of 'B' class employment floorspace (offices, research and development, light industry, general industry and warehousing).
- 5.13 The reasoning behind this allocation is the evidence base for the emerging Local Plan, which inter alia has to quantify the employment need (as measured in floorspace) for the Plan period (2011-2031). The need for 'B' class employment is 32,565sqm, which includes 24,600sqm of office floorspace. The evidence base also identifies a

qualitative need for a new employment site at a location with good strategic road access to markets (i.e. by the M20 motorway). The Council had taken a democratic decision to submit its Local Plan for Examination which envisages the delivery of all of this floorspace within the administrative boundaries of Maidstone Borough including with land allocated at Woodcut Farm through policy EMP1(5) (Full Council, February 2016). The Plan was submitted for Examination in May 2016 prior to the Planning Committee's decision on the application.

- 5.14 The employment allocation at Woodcut Farm provides for 49,000msqm of mixed employment floorspace and this is by far the greatest 'B' class employment allocation in the emerging Local Plan (compared with Barradale Farm, Headcorn and Pattenden Lane, Marden). As this is a strategic employment allocation, if the site were to fall away, then other sites would have to be identified in the Local Plan in order to cater for the need.
- 5.15 Following the Committee's decision to refuse the application, the Council did not remove the site allocation policy from the Local Plan and defended the employment allocation during the Local Plan Examination hearings, which have now concluded.
- 5.16 In his Interim Findings report on the Examination, the Local Plan Inspector endorsed the general principle of the employment site allocation in policy EMP1(5), finding it necessary to meet identified need for employment development over the plan period, subject to the modifications. The Inspector has not signalled rejection of either this site (as he has done for some housing allocations), or the assessed employment need. Indeed, the Local Plan Inspector considers, in the absence of alternative provision (beyond Woodcut Farm and other Local Plan site allocations) that there is likely to be a shortfall in office floorspace in the Borough over the plan period. This is why the latest iteration of the Local Plan as agreed by SPS&T Committee (currently out to consultation) contains a proposed modification to the site allocation increasing the office floorspace to at least 10,000sqm, and this represents a further endorsement of the allocation by the Council.
- 5.17 As the public inquiry into this appeal will not take place until October 2017, it is very likely that the Local Plan Inspector will have delivered his Final Report on the Examination of the Local Plan and the Plan is adopted by the Borough before the inquiry opens. Indeed, this is the Council's anticipated timetable. In those circumstances, the Inspector must accord full weight to relevant Local Plan policies, including policy EMP1(5), as modified, when determining the appeal. Importantly, upon adoption of the Local Plan, the saved policies cited in the Council's reason for refusal will no longer be part of the development plan.

- 5.18 As such, matters have moved on significantly since the original decision in July 2016, and will continue to do so in the months ahead before the inquiry opens and thereafter when the Inspector determines this appeal. The level of weight to be accorded to draft policies, in particular, the modified version of policy EMP1(5), should increase over time, as progress is made toward the Council's adoption of the new Local Plan. Consequently, it is no longer tenable for the Council to defend the Committee's reason for refusal, as it would be unreasonable for the Council to accord relevant draft Local Plan policies anything other than substantial weight.
- 5.19 With regard to the specific issues identified in the Council's reason for refusal (landscape and heritage impact), advice on these issues can be found at paragraphs 5.23 to 5.25 of the Planning Committee Report.
- 5.20 For all these reasons and the matters addressed in Counsel's advice, Officers do not consider the reason for refusal can be sustained at appeal and, in those circumstances, it would be unreasonable for the Council to defend the appeal by reference to its reason for refusal.
- 5.21 The amount of any adverse costs award is likely to be very substantial and the Council's liability to pay any adverse costs award will be in addition to the Council's usual liability to bear its own costs associated with defending the appeal. For the same reasons, those costs are likely to be very substantial.

Recommendation 3: In the event that the appellant does not apply to amend the proposals, or if the Inspector does not accept the amendments, to defend the appeal, if necessary, on the basis that the application proposal does not accord with emerging Local Plan policy, in particular, policy EMP1(5) as proposed to be modified.

- 5.22 The background on potential amendments to the application is outlined at paragraphs 5.29 to 5.49 of the Planning Committee Report. This explains that the draft policy has changed since the decision in 2016 through the Local Plan Examination, and so the appellant's proposals no longer comply with the modified policy. The appellant has however indicated that they intend to comply with the modified policy by potentially seeking amendments to their application as explained at paragraphs 5.31 to 5.34 of the Planning Committee Report.
- 5.23 Should the appellant seek amendments but the Inspector refuse to determine the appeal on the basis of the amendments, or in the event the appellant does not apply to amend the appeal proposals, the Inspector must determine the appeal on the basis of the development proposed in the application.

5.24 Having regard to the material changes in planning circumstances referred to above, in the unlikely event of the appellant pursuing the appeal on the basis of the application scheme, or the Inspector refusing to accept the amendments, it would be reasonable for the Council to resist the appeal on the grounds that the application proposals do not accord with Local Plan policy EMP1(5) as proposed to be modified. For the avoidance of doubt, this is not to defend the reason for refusal recorded in the Council's decision notice.

6.0 Alternative Action and why not Recommended

6.1 Recommendation 1: The alternative course of action would be to continue to defend the grounds of the refusal. However, for the reasons explained, that alternative would be unreasonable and very likely to fail, thereby exposing the Council to a very significant adverse costs award.

6.2 Recommendation 3: There is no alternative course of action open to the local planning authority.

7.0 Risk Management

7.1 In the circumstances, attempting to defend the appeal by reference to the Council's reason for refusal would expose the Council to a very high risk of an adverse and substantial costs award. That risk can be avoided or mitigated by confirming in its Full Statement of Case that the Council will not defend the appeal by reference to the sole reason for reason recorded in the decision notice refusing to grant planning permission.

8.0 Other Implications

1. Financial	X
2 Staffing	
3 Legal	X
4 Equality Impact Needs Assessment	
5 Environmental/Sustainable Development	X
6 Community Safety	
7 Human Rights Act	
8 Procurement	

9 Asset Management



9.0 Financial Implications

9.1 The Council should ensure that it minimizes the risk of incurring costs that can and should be avoided. Having regard to the advice in this report and **Appendix**, the Council should not defend the reason for refusal to minimize the risk of incurring costs. As the Development Manager outlined at the Planning Committee meeting on 27 April, this is estimated to be between £350,000 and £450,000 based on the Council's own costs at the Waterside Park public inquiry and costs claims by appellants for two recent hearings.

10.0 Legal Implications

10.1 The legal implications and issues are set out in the body of the report and **Appendix**.

11.0 Conclusions

11.1 For the reasons set out in this report and **Appendix**, the Council's reason for refusal cannot be sustained at appeal and attempting to defend the Council's reason for refusal would be unreasonable and very likely to fail, thereby exposing the Council to a very significant adverse costs award, in addition to having to bear the its own costs defending the appeal.

11.2 In the event of the appellant not amending the application proposals or if the Inspector refuses to determine the appeal on the basis of the amendments, the Council should object to the proposal as it would fail to comply with Local Plan policy EMP1(5) as proposed to be modified.

12.0 Relevant Documents

12.1 **Appendix:** Committee Report, Appendices & Urgent Update (27 April 2017)