

NOTICE OF MOTION – EXTRA-ORDINARY COUNCIL MEETING 2ND 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 13th 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 27th August 2013 and a further note on the issues I believe on 28th 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Firstly it is suggested that officers used out of date planning policy guidance to calculate the five year land supply and that if this in turn was used in the determination of the planning application for Langley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 it 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 13th 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 ¹¹ 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 ¹² 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.

¹¹ *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.*

¹² *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.