

**BOUGHTON MONCHELSEA
PARISH COUNCIL
HOUSING LAND SUPPLY**

NOTE OF ADVICE

**Christopher Lockhart-Mummery QC
Landmark Chambers
16th September 2013**

1. I have recently advised twice on this issue. I am happy for this further Note to be read out to the meeting on 17th September 2013 on behalf of the Parish Council. I confess to finding it extraordinary that the MBC officers continue to give such obviously wrong advice on this important matter.

2. Two topics now arise. First, the procedural fairness of the procedure that MBC have adopted for this meeting. Second, the substance of the issue.

3. As to procedure, the brief facts appear to be as follows. On 6 September the Parish Council was invited to appear at the meeting. The Guide for External Speakers indicated that documents were to be supplied one week in advance.

This gave one or two working days, an unreasonably short period.

Mr McCreery supplied a bundle of documents of supporting information.

Only one page of this material was accepted. Not only this, but on 13 September a substantial report (68 pages in total) was supplied by the Head of Planning and Development, and is on the agenda.

4. This is plainly an unfair process and would be liable to challenge accordingly. It remains to be seen whether there is any prospect of this unfairness being cured by the proceedings of the meeting.

5. Turning to the substance, it is worth emphasising some important facts:

a. MBC is the only District Council in Kent which both has an alleged 5-year shortfall and includes no windfall allowance.

b. There is the clearest evidence that over recent years windfalls have become available, at a rate in excess of 300 each year.

c. There is likewise the clearest evidence, based on past trends, that windfalls will likewise arise in the next 5-year period, at a rate again in excess of 300 each year (332 dpa or 1660 in total).

d. In contrast, only 74 dwellings each year from this source (less than a quarter) would suffice to give MBC a 5-year supply.

e. Based on the alleged 5-year shortfall, MBC apparently intend to release some 1650 dwellings on greenfield sites in advance of the Plan process.

6. Turning to the topic of windfalls as an element of supply, it seems necessary to repeat really simple prepositions.

The principal element of supply will always be what can variously be described as identified, known, or (in the term used by KCC) extant.

These are broadly, sites with planning permission and allocated sites. These are, in the language of paragraph 47 of NPPF “deliverable” sites.

But this, without question, will by no means be the full supply over any period, including the 5-year period.

6. (cont.) However thorough and rigorous the process of estimating the deliverable sites, there will always be sites coming forward which are not presently capable of assessment as deliverable. They are the “unexpected” sites that constitute the windfall allowance under paragraph 48 of NPPF.

This is simply an allowance for past trends to continue, when there is clear evidence of

- (1) past trends and
- (2) evidence of continuing supply.

There is the clearest evidence in Maidstone that both these tests are met.

7. MBC officers, I am afraid to say, continue seriously to misrepresent the position. I have already written two Opinions on the topic, and will not repeat them. In essence, the original advice being given to MBC was that a windfall allowance could be made in the latter years of the plan period, but not for 5-year purposes – but this was based on the cancelled advice of PPS3. Now it is said (paragraph 1.4.18 of the current Report) that there has been no fundamental change in policy after the cancellation of PPS3 and the introduction of NPPF. What clearer change of policy could there be from old advice that windfalls may not be included, to the present advice that they may be included?

7. (cont.) The clear mistake is seen in the Chief Executive's recent Note:

“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”.

7. (cont.) This is clearly utterly wrong on both counts (latter years, and excluding windfalls on the basis that they are not know about and not identifiable, when this is the express basis for including them).

7. (cont.) But the advice is repeated in the legal advice provided to MBC by Megan Thomas. For example paragraph 10:

“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”.

Not so – it is precisely what policy advises.

8. There is a fear that including a windfall allowance will lead to double-counting. Again not so. By definition, a windfall cannot be an identifiable deliverable site.

9. Having said all this, it seems that the advice being given to MBC has now radically changed.

Megan Thomas states (paragraph 10) that officers were

“well aware that a windfall allowance can be included if there is compelling evidence to do so”.

There plainly is such evidence, it is all one way, see above.

10. It may well be that, following this complete change of position, the suggested reason for now including a windfall allowance is that paragraph 48 advised that such an allowance “may” be made if there is compelling evidence, ie there is a discretion.

But it would be utterly perverse not to include an allowance in present circumstances.

10. (cont.) It might be different if windfalls had run, and were predicted to run, at marginal rates, and/or the evidence for them was flimsy. But here is firm evidence of substantial supply. Where some 74 dwellings each year would make the 5-year supply a surplus, and there is evidence of supply over 4 times that, it would in my view be legally unreasonable to exclude this element of supply.

What is a Windfall?



TABLE PMC1 (first part)

5 Year Housing Land Supply

| | Requirement | MBC | 5 yr Supply | BMPC |
|----|--|------------|--------------------|-------------|
| 1. | Policy Requirement | 11,080 | 11,080 | 11,080 |
| 2. | Completions | -4,880 | -4,880 | -4,880 |
| 3. | Residual Requirement | 6,200 | 6,200 | 6,200 |
| 4. | Annual Target | 477 | 477 | 477 |
| 5. | 5% Buffer | 24 | 24 | 24 |
| 6. | Annual Target (Including 5% buffer) | 501 | 501 | 501 |
| 7. | Five year Target (Including 5% buffer) | 2,505 | 2,505 | 2,505 |

Table PMC1 (second part)

5 Year Housing Land Supply

| | Supply | MBC | 5 yr supply | BMPC |
|-----|--|------------|------------------------|-------------|
| 8a. | Site Supply (Includes 931 dwellings from Strategic Sites) | 2,135 | 2,135 | 2,135 |
| 8b. | Windfall Supply | 0 | 370 | 1660 |
| 8c. | Total Supply | 2,135 | 2,505 | 3,795 |
| 9. | Shortfall/Surplus | -370 | 0 | +1290 |
| 10. | Percentage Housing Land Supply | 85.23% | 100% | 151.5% |
| 11. | Number of years housing land supply: | 4.26 | 5.00 | 7.57 |

Table PMC2

Analysis of Completions and Windfalls

| Year | All Completions | Windfall Completions | Percentage |
|-----------------------------|-----------------|----------------------|------------|
| 1/4/2006 to 31/3/2007 | 714 | 370 | 52% |
| 1/4/2007 to 31/3/2008 | 992 | 294 | 30% |
| 1/4/2008 to 31/3/2009 | 441 | 251 | 57% |
| 1/4/2009 to 31/3/2010 | 581 | 400 | 69% |
| 1/4/2010 to 31/3/2011 | 649 | 344 | 51% |
| Total 1/4/2006 to 31/3/2011 | 3377 | 1659 | 49% |
| Annual Average 2006/11 | 675 | 332 | 49% |

NOTES

- A. NPPF, paragraph 48, allows a windfall allowance to be included in the five year supply if there is compelling evidence that such sites have consistently become available in the local area and will continue to provide a reliable source of supply.
- B. Table PMC2 is based on data supplied by KCC. Years 2006 to 2011 are the last 5 years for which windfall completion data is available.
- C. Over the years 2006 to 2011 windfall completions averaged 332 dwellings per annum and were just about half (49%) of all completions.
- D. Based on the last five years figures KCC projected future annual windfall average is 332 dwellings per annum (or 1660 dwellings over 5 years). Based on the above figures, PMC Planning agrees with the KCC projection.

E. Table PMC1 shows that based on MBC figures there is a shortfall in the 5 year supply of 370 dwellings, with no windfalls included. That means that windfall completions would only need to average 74 dwellings per annum (370 dwellings over five years) for Maidstone to achieve a 5 year supply of housing land and no shortfall.

F. The most recent completed Strategic Housing Land Availability Assessment (SHLAA) for Maidstone is dated May 2009. Paragraph 6.1.12 (page 41) identifies a windfall capacity of 628 dwellings for 2013-2018 (125 dwellings per annum).

G. The 2010-2011 Annual Monitoring Report (AMR) at Table 3.2, page 20, predicts windfalls at a rate of 145 dwellings per annum for the years 2022/23 to 2025/26 (725 dwellings for a five year period).

H. For the last two years 1/4/11 to 31/3/13 Maidstone Borough achieved annual completions averaging 751 dwellings (873 dwellings plus 630 dwellings). This is above the average level of completions for the previous five years. If nil windfalls are available how could Maidstone have continued to achieve such high levels of completions?