

MAIDSTONE BOROUGH COUNCIL

PLANNING COMMITTEE]

15 OCTOBER 2009

REPORT OF DIRECTOR OF PROSPERITY AND REGENERATION

Report prepared by Michael Thornton and Steve Clark

1. Kent International Gateway – section 106 Undertakings and planning conditions

1.1 Issue for Decision

1.1.1 The Inspector for the KIG planning appeal has required the local planning authority to prepare a set of draft planning conditions and the LPA and Appellant to submit draft Heads of Terms for s.106 Undertakings for consideration at the appeal inquiry. The submissions on these matters by the parties will be used by the Inspector only in the event that he determines to recommend to the Secretary of State that the appeal is up held.

1.1.2 **Appendices 1 and 2** contain draft planning conditions and Heads of Terms for s.106 Undertakings for Members consideration. The recommendations reaffirm the existing delegations and reinforce the delegation to the Director to negotiate on the s.106 in consultation with the Chairman.

1.1.3 It is likely that an Urgent Update Report will be required in light of the ongoing negotiations and discussions on the planning conditions, s.106 and Reasons for Refusal and that revised versions of **Appendix 1 and 2** will be provided.

1.2 Recommendation of Director of Prosperity and Regeneration

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- (i) That the Committee considers the draft planning conditions (Appendix 1) and Heads of Terms for draft s.106 Undertakings (Appendix 2) and agree the requirements to be pursued at the Inquiry.
 - (ii) That the Committee confirm the delegation arrangements agreed on 7 May, namely that the Director of Prosperity and Regeneration be given delegated powers to:

- a) amend the grounds of refusal when the Kent and Medway Structure Plan ceases to have effect because of the adoption of the South East Plan which will become part of the Development Plan;
- b) agree in consultation with the Chairman of the Planning Committee any suggested planning conditions should the scheme be granted planning permission on appeal;
- c) agree in consultation with the Chairman of the Planning Committee and the Political Group Spokespersons the terms of any Planning Obligation or Highways Act Agreement (to include, inter alia, commensurate environmental mitigation measures and improvements to rail) should the scheme be granted permission on appeal; and
- d) withdraw or amend in consultation with the Chairman of the Planning Committee any ground of refusal where lack of sufficient information is cited as the primary reason, upon receipt of sufficient additional information to overcome that objection, or where new evidence is produced to overcome any reason for refusal.

(iii) That the delegations confirmed in (ii) b) above be reinforced thus so that Director of Prosperity and Regeneration be given delegated powers to agree in consultation with the Chairman of the Planning Committee any suggested planning conditions or s.106 Undertakings to be applied in the event that scheme be granted planning permission on appeal.

1.3 Reasons for Recommendation

- 1.3.1 At the Pre-Inquiry meeting on 12 June 2009 the Inspector identified the main matters for consideration at the Inquiry and the documentation required to be produced for the Inquiry by the parties. The list included requirement for a:

"a draft list of conditions... available at the opening of the Inquiry along with Heads of Terms of any s106 Undertakings. Fully executed undertakings will be required by the close of the Inquiry"¹ .

¹ Note of Pre-Inquiry Meeting held on Friday 12 June 2009 – section 4.

- 1.3.2 This is entirely normal practice and in keeping with the spirit and requirements of Circular 05/00: Planning Appeals Procedures - for all parties to "communicate and cooperate in the planning process". It is strictly without prejudice to the Council's position to offer the Inspector its view on the planning conditions and s.106 Undertakings that should be applied in the event that the Secretary of State confirms any recommendation made by the Inspector to uphold the appeal and approve the proposal subject to Planning Conditions and s.106 Undertaking(s).
- 1.3.3 The convention is that the LPA prepare draft planning conditions and the Appellant a draft Heads of Terms for Undertakings. In this case the Council has also prepared a draft Heads of Terms for necessary s.106 Undertakings in consultation with other parties including comments received from the Parish Councils. The Appellant has also entered negotiations with the Highways Agency, Environment Agency and Natural England and this may result in further Unilateral Undertakings or matters that could be rolled into one all encompassing agreement in the event that the appeal is upheld.
- 1.3.4 It is the function of planning conditions and s.106 agreements to operate in tandem rather than duplication, to manage the impact of any development in order to make it acceptable in planning terms. The content of section 106 Undertakings are guided by Circular 05/2005 Planning Obligations ².
- 1.3.5 A planning obligation may be entered into by means of a unilateral undertaking by a developer as well as by agreement between a developer and a local planning authority (section A1 refers). Such obligations may restrict development or use of the land; require operations or activities to be carried out in, on, under or over the land; require the land to be used in any specified way; or require payments to be made to the authority either in a single sum or periodically (section A2 refers). They run with the land so may be enforceable against future occupiers. Section 106(2) provides that a planning obligation may:
- i. be unconditional or subject to conditions;
 - ii. impose any restriction or requirement in 106(1) (a) to (c) for an indefinite or specified period (thus enabling, for instance, an obligation to end when a planning permission expires);
 - iii. provide for payments of money to be made, either of a specific amount or by reference to a formula, and require periodical payments to be paid indefinitely or for a specified period.

² *ODPM Circular 05/2005 - PLANNING OBLIGATIONS - 18 July 2005*

1.3.6 The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet *all* of the following tests (section B5). All the guidance in the Circular should be read in the context of these tests, which must be met by all local planning authorities in seeking planning obligations.

A planning obligation must be:

- (i) relevant to planning;
- (ii) necessary to make the proposed development acceptable in planning terms;
- (iii) directly related to the proposed development;
- (iv) fairly and reasonably related in scale and kind to the proposed development; and
- (v) reasonable in all other respects.

1.3.7 The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms (see B5(ii)).

1.3.8 Similarly, planning obligations should never be used purely as a means of securing for the local community a share in the profits of development, i.e. as a means of securing a "betterment levy". (section B7).

1.3.9 The **Appendices 1 and 2** set out the content of the proposed planning conditions and s.106 Undertakings that are recommended to be put to the Inquiry. The comments of the Committee are sought.

1.3.10 Inevitably it will be necessary to negotiate on these matters during the Inquiry period with limited time available for consultation with the Planning Committee. The recommendation reaffirms and reinforces the delegation arrangements agreed by Planning Committee on 7 May when the proposals were originally considered by the Committee. This reinforcement is a necessary reinforcement to allow the Director in consultation with the Chairman to deal with negotiations on both the planning conditions and the s.106 Undertakings in harmony.

1.3.11 The content of the Undertakings and planning conditions reflect contributions and discussion with other parties including initial discussion with the Appellant. Neither document has been agreed by the Appellant.

1.3.12 It is anticipated that an Update Report will be required to revise these requirements in the light of ongoing negotiations and contributions from parties and will likely contain revised versions of **Appendices 1 and 2**. It is also anticipated that the Update will also address revisions to the Grounds of Refusal pursued at the Inquiry.

1.4 Alternative Action and why not Recommended

1.4.2 This is entirely normal practice and in keeping with the spirit and requirements of Circular 05/00: Planning appeals procedures - for all parties to "communicate and cooperate in the planning process". To not offer planning conditions and s.106 Undertakings would indeed prejudice the Council's ability to influence the possible outcome of this decision that has been recovered by the Secretary of State for determination.

1.5 Impact on Corporate Objectives

1.5.2 No specific matters in relation to this report.

1.6 Risk Management *COMPULSORY*

1.6.2 The Council has mitigated risk by seeking advice from Queens Counsel and Barrister in the conduct of this case and particularly the wording of clauses.

1.7 Other Implications [Insert an 'X' in the boxes below to indicate if the recommendations will have any implications in the specified area]

1.7.2

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

1.7.3 Legal matters are addressed in the report.

1.8 Background Documents

1.8.2 All evidence to the Inquiry including all background documents is available through the Inquiry Program Officer and website:
<http://www.persona.uk.com/kent/>

APPENDIX 1 – Draft planning conditions proposed to the Inquiry

APPENDIX 2 – Draft s.106 Undertakings proposed to the Inquiry

NO REPORT WILL BE ACCEPTED WITHOUT THIS BOX BEING COMPLETED

Is this a Key Decision? Yes No

If yes, when did it appear in the Forward Plan? _____

Is this an Urgent Key Decision? Yes No

Reason for Urgency

[State why the decision is urgent and cannot wait until the next issue of the forward plan.]