

MAIDSTONE BOROUGH COUNCIL

PLANNING COMMITTEE MEETING

27 April 2017

Head of Planning and Development

Report prepared by Richard Timms

1. **APPLICATION 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 Referral to Planning Committee
 - 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 4 May 2017 (this being the second agreed extension to the original deadline). 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, 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 addresses this matter and recommends that the Council's reason for refusal cannot be defended at the public inquiry October 2017. To ensure the Council complies with the procedural requirements to submit its statement of case by the 4 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 Recommendation(s)

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 2:** To agree that the Council should adopt a neutral position in response to the Appellant's proposed amendments to the appeal proposals.

3.3 **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.

3.4 **Recommendation 4:** To agree that Members delegate authority to the Head of Planning & Development to negotiate the contents of any Section 106 Agreement.

4.0 Reasons for Recommendation(s)

4.1 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 The decision to allow the Appellant to amend the application proposal is a matter for the Inspector, who must consider whether the amended proposals constitute a "substantial alteration" of what had been proposed by the application. The main consideration for the Inspector, amongst others, should be whether the development proposed was so changed that to grant permission would be to deprive those who should have been consulted of the opportunity of consultation. What constitutes a "substantial alteration" will depend upon the facts and circumstances of each case and is a matter within the discretion of the Planning Inspector.

4.3 Should the Inspector refuse to determine the appeal on the basis of the Appellant's proposed amendments, the application proposals do not accord with the emerging Local Plan policy, in particular, policy EMP1(5), as proposed to be modified.

4.4 Whatever the Committee decides, officers require delegated authority to negotiate the terms of a Section 106 Agreement.

5.0 Appraisal

Planning Application 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 maximum a 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 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 as **Appendix 1**) 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."

Maidstone Borough Local Plan Examination

- 5.6 The Inspector appointed to carry out the Examination of the submitted Local Plan, Mr Robert Mellor, BSc DipTRP DipDesBEnv DMS MRICS MRTPI ("the Local Plan Inspector"), held Examination hearings over 20 days between 4 October and 13 December 2016. The Local Plan Inspector provide the Council with a report of his Interim Findings on 22 December 2016 ("Interim Findings"), which addressed key issues in the Examination and the need, or otherwise, for modifications to be made to the submitted Local Plan, to make it sound (within the meaning of paragraph 182 of the NPPF) and enable its adoption. The Interim Findings addressed employment allocations in paragraphs 109 to 112, which can be found at **Appendix 2**.
- 5.7 The Local Plan Inspector held the Examination hearing closing session on 24 January 2017, which included a discussion concerning the Council's additional submissions in response relating to employment issues; proposed changes to the submitted Local Plan; and the future programming of the examination.
- 5.8 On 14 March 2017, the Council's Schedule of Proposed Main Modifications to the submitted Local Plan was approved by the Council's Strategic Planning, Sustainability and Transportation Committee (SPS&T) for public consultation over a seven-week period, which ends on Friday 19 May 2017.
- 5.9 The Schedule includes the proposed Main Modifications to draft Policy EMP1(5) — to be renumbered EMP1(4) — and its supporting text (Reference MM39), which can be found at **Appendix 3**. The principal change to the pre-submission version approved by Full Council on 12 January 2016 and submitted for Examination, is that the site allocation is now required to provide a minimum of 10,000sqm of B1(a)/(b) floorspace, to be safeguarded from alternative uses until at least April 2026, of which 5,000 sqm will be in the form of serviced land.
- 5.10 The Schedule of Proposed Main Modifications records that the Council considers the Main Modifications to Policy EMP1(5) and its supporting text to be necessary:
- "To ensure the policy is positively prepared, effective and deliverable whilst seeking to meet identified needs."*
- 5.11 Subject to the need to convene additional hearings, the Local Plan Inspector will provide the Council with his Final Report on the Examination well before the commencement of the public inquiry.

The Planning Appeal

- 5.12 On 22 December 2016, the applicant submitted an appeal to the Secretary of State against the Council's refusal to grant outline planning permission which is due to be considered at a public inquiry which is due to commence on 10 October 2017 and continue for 10 days. As is customary with public inquiries, the Council has appointed a barrister to advise the Council and appear on its behalf at the public inquiry. It is usual practice that the Council and its appointed Counsel review the reasons for refusal before submitting the Council's Full Statement of Case and, thereafter, continually monitor the main issues as part of the Council's preparation for the inquiry.
- 5.13 The Planning Inspector must determine this appeal, having regard to all material planning considerations, as they exist when making the decision. For that reason, the Council's Full Statement of Case must address any material changes in planning circumstances relevant to the appeal, which post-date the Council's refusal decision. That process requires the Council to assess whether, as a result of those changes, its reasons for refusing the application, or any part thereof, can no longer be defended. As stated above, practice guidance requires the main parties to an appeal to inform the Planning Inspectorate as soon as possible of any material changes in planning circumstances relevant to the determination of an appeal. It is also necessary to minimise the risk of an adverse costs award being made against the Council, on the grounds of unreasonable behaviour, which may include failing to produce substantial evidence to defend every aspect of its reason for refusal.
- 5.14 In accordance with those requirements, 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. For the reasons explained below, Officers do not consider the Council's reason for refusal can be defended on appeal.

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

- 5.15 As an application for outline planning permission, consideration of matters relating to layout, scale, appearance, and landscaping were and continue to be reserved for future consideration. Accordingly, the main issues for consideration by the Committee were the principle of the development proposed and the acceptability of the access to the site. As such, it is reasonable to conclude that, when determining the application, the Committee did not consider matters reserved for later consideration. For example, 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.

- 5.16 As an 'in principle' objection, the decision is fundamentally contrary to draft policy EMP1(5) of the submitted Local Plan. As was outlined in the original Committee report, this policy allocates the application site for 49,000sqm of employment floorspace and the application was considered fundamentally to comply with that policy. At the time of the Committee's decision, the Council had taken a democratic decision to submit its Local Plan for Examination, which included policy EMP1(5) allocating the land for employment development (Full Council, February 2016). As such, the Council had endorsed this policy on the basis that the development proposed in the site allocation was necessary to meet the identified employment needs in the Borough over the Plan period, to ensure the submitted Local Plan was sound and legally compliant. For these reasons, officers advised the Committee that policy EMP1(5) should be accorded significant weight in the determination of the application. Since February 2016, the Council has considered the site to be appropriate for employment development, subject to suitable mitigation. However, when determining the application, the Committee did not identify any basis upon which the proposal failed to accord with the criteria within draft policy EMP1(5) in the reason for refusal but, instead, decided to attach limited weight to the emerging allocation policy, and significant weight to the saved policies of the adopted Local Plan (2000) in reaching its decision; and considered that the public benefits of the proposal would not outweigh harm identified.
- 5.17 Following the Committee's decision to refuse the application, the Council did not remove the site allocation policy from the Local Plan and has defended the employment floorspace allocation in policy EMP1(5) during the Local Plan Examination hearings, which have now concluded.
- 5.18 In his Interim Findings, 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 recommended in his Interim Findings, which safeguard the majority of the proposed employment floorspace for B1(a)/(b) (office/research & development use). 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. In those circumstances, Officers consider it very unlikely that the Inspector's final recommendations concerning the adoption of the Local Plan will be inconsistent with his Interim Findings, and certainly not to the extent that he recommends the deletion of policy EMP1(5) site allocation.

- 5.19 During the Examination hearings, several changes to the submitted Local Plan were identified as being necessary to address the Local Plan Inspector's concerns about the soundness of the submitted Plan, and in response to his specific requests. The Inspector has confirmed the proposed changes which should be identified as proposed 'Main Modifications', which must be subject to public consultation. Main Modifications are those changes which the Inspector considers necessary to make the submitted Plan sound and legally compliant. It is important to note that, without those Main Modifications, including the proposed main modification 'MM39' to policy EMP1(5), the Local Plan Inspector cannot recommend the adoption of the Local Plan.
- 5.20 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 before the inquiry opens. At that stage, the Council may also have adopted the Local Plan, including the site allocation, subject to Main Modifications recommended in the Inspector's Final Report. Indeed, this is the Council's anticipated timetable for adoption of the Local Plan. In that event, the policies of the adopted Local Plan will become part of the statutory development plan and will replace the saved policies of the MBWLP (2000), including those cited in the Council's reason for refusal.
- 5.21 Accordingly, the Council's Full Statement of Case must also take account of the circumstances and relevant planning considerations which are likely to prevail from October 2017 onward. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires the Inspector to determine this appeal in accordance with the development plan, which at that stage, is likely to be the newly adopted Local Plan. 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.
- 5.22 The Committee justified its decision to refuse outline planning permission by according limited weight to the relevant emerging Local Plan policies identified in the original Committee report. However, for the reasons set out above, matters have moved on significantly, 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 those 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.

- 5.23 With regard to the specific issues identified in the Council's reason for refusal, in respect of the alleged landscape impact, the Committee's reason for refusing permission does not explain how the proposals will cause harm to the character and appearance of the countryside, the Special Landscape Area, and the setting of the AONB, or the extent of that harm. Also, the Committee attached significant weight to saved policies of the Maidstone Borough-Wide Local Plan (2000) without citing relevant policies in the emerging Local Plan.
- 5.24 The Landscape and Visual Impact Assessment (LVIA) accompanying the application provides an assessment of the proposed development including viewpoints, the character and appearance of the countryside and Special Landscape Area, and the setting of the AONB. The Council's Landscape Officers considered the key principles of the Landscape and Visual Assessment to be acceptable. The proposed development also incorporates the landscape requirements of Policy EMP1(5), which as outlined above, must now be accorded substantial weight.
- 5.25 In relation to the setting of the listed building identified (Woodcut Farm), the reason for refusal does not explain how the setting of the Woodcut Farm (Grade II listed) contributes to its significance, the importance of that setting to the significance of the designated heritage asset, and how the proposal causes harm to the setting and thereby the significance of that asset. In respect of this aspect of the Council's reason for refusal, Members followed the advice of the Council's conservation officer. Again, this is set against the context of the Council having allocated the site for development, and thus accepting some impact upon the listed building. Nevertheless, even if the Inspector concluded that the proposed development would cause 'less than substantial harm', paragraph 134 of the NPPF requires the public benefits of the development proposal to be weighed against that harm.
- 5.26 Finally, having regard to the material changes in planning circumstance outlined above, the presumption in favour of sustainable development (within paragraph 14 of the NPPF) requires permission to be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole. Applying that test, the Council's reason for refusal cannot be sustained.
- 5.27 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.
- 5.28 The main parties agree that the public inquiry is likely to extend to 10 days to accommodate the examination of the evidence submitted by at least seven professional witnesses and the usual business of a public inquiry. As such, 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 2: To agree that the Council should adopt a neutral position in response to the Appellant's proposed amendments to the appeal proposals.

- 5.29 As outlined above, since the Planning Committee's decision to refuse outline planning permission, the Council now accepts the Local Plan Inspector's recommendation that significant changes to the draft Local Plan site allocation policy are necessary to make the submitted Local Plan sound. The Council's SPS&T has now approved the Schedule of Proposed Main Modifications for public consultation to give effect to the Inspector's recommendations in his Interim Findings. The most significant changes to draft policy EMP1(5) are to provide at least 10,000sqm of B1(a)/B1(b) floorspace, which shall be safeguarded from any other uses until April 2026; and for 5,000sqm of this floorspace to be provided with access and be serviced prior to occupation of any other uses on site. The delivery of this much needed floorspace is a key priority of the allocation and the Local Plan's employment strategy.
- 5.30 The application proposal was based on the draft Local Plan policies, including the site allocation policy EMP1(5), as submitted to the Examination in May 2016. Due to the Proposed Main Modifications, which the Council accepts are necessary to make the submitted Local Plan sound, it is now necessary to consider whether the application proposal accords with draft Local Plan policies, in particular, policy EMP1(5), as proposed to be modified.
- 5.31 Understandably, to date, the Appellant has yet to respond formally to the Local Plan Modifications Consultation (and will no doubt do so during before the consultation ends on 19 May 2017). However, to inform the preparation of the Council's Full Statement of Case, at Officer's request, the Appellant has outlined its position in response to the proposed Main Modifications for the purposes of this appeal, as follows (Full Letter attached at **Appendix 4**):

"Overall, it is the Appellant's intention to adhere as closely as possible to the additional requirements that have been introduced through the Proposed Modifications to Policy EMP1(5)."

- 5.32 The Appellant considers the appeal background documents (e.g., the Environmental Assessment supporting the application, which includes the Transport Assessment) adequately assess the likely impact of the 10,000sqm increase in floorspace proposed in 'MM39'. However, the 'Building Areas Parameters Plan' submitted with application proposed 7,864sqm of Class B1(a)/B1(b) floorspace (within Plots C1-2 and D1-

- 2) and, as submitted, the shortfall of 2,136sqm does not comply with a key requirement of emerging development plan policy.
- 5.33 The Appellant proposes to address that shortfall by way of a section 106 planning obligation to secure the following measures:
- "(a) Notwithstanding the previously submitted Parameter Plans, the area of Plots A1-2 would be excluded from the proposed development. As a consequence of this change, reserved matters applications could not be submitted for Class B8/B1c development in the area of Plots A1-2 pursuant to the current proposed;*
 - (b) The Appellant would commit to submitting a new planning application for at least 2,500sqm of Class B1a/B1b floorspace, to be located within the excluded area, within a period to be agreed with MBC and use reasonable endeavours to obtain planning permission; and*
 - (c) The excluded area would be safeguarded from any other uses until April 2026, or until otherwise allocated through a Local Plan Review, or until alternative provision for at least 2,500 sqm of Class B1a/B1b floorspace is secured on an alternative plot in the vicinity of the excluded area."*
- 5.34 The Appellant's proposed amendments to the application scheme are intended to address the additional requirements introduced by proposed Main Modification 'MM39', including adjustments to the maximum unit sizes which are outlined in the draft Statement of Common Ground prepared by the Appellant and shown on the revised Building Areas Parameters Plan to be attached thereto. In terms of addressing the new policy requirement concerning the Minerals Safeguarding (i.e., the potential extraction of minerals prior to development), the Appellant proposes to deal with this by way of a planning condition. Otherwise, to the extent appropriate at the outline planning permission stage, these other changes could be secured by planning conditions, or a section 106 planning obligation.
- 5.35 Although planning appeals should usually be determined by reference to the application proposals considered by the local planning authority, in certain circumstances, amendments to the application proposal may be considered on appeal. In such circumstances, the Inspector must consider whether the amended proposals constitute a "substantial alteration" of what had been proposed by the application. The main consideration for the Inspector, amongst others, should be whether the development proposed was so changed that to grant permission would be to deprive those who should have been consulted of the opportunity of consultation. What constitutes a "substantial alteration" will depend upon the facts and circumstances of each case and is a matter within the discretion of the Planning Inspector.

- 5.36 The Planning Inspectorate's 'Planning Appeals Procedural Guide' confirms (within Annex M) that the Inspector will take account of these considerations, which are known as the "Wheatcroft Principles" when deciding whether the proposals can formally be amended on appeal. In this case, the Appellant contends that the amended proposals would fully accord with the Wheatcroft Principles, because the amended proposals already accord with the vast majority of the new criteria introduced by proposed 'MM39'; the changes proposed in the revised Building Areas Parameters Plan would be minor and would not affect the overall amount or location of the proposed floorspace; the changes would not affect the conclusions of the Environmental Assessment Addendum; and would not prejudice anyone involved in the appeal.
- 5.37 The Appellant's proposed amendments are a direct response to the proposed Main Modification 'MM39', which significantly alters the aims of draft policy EMP1(5) and the Council's aspirations for the development of the Site, within the wider context of the employment strategy in the Local Plan. The proposed Main Modification 'MM39' introduces a new key priority for the Woodcut Farm site (i.e., the delivery of at least 10,000sqm of new office/research & development floorspace (B1a/b), which importance of which is reflected in the new policy requirement to safeguard the land specifically for B1(a)/(b) and no other purpose, pending improvements in the viability position for such development improving in the latter part of the plan period.
- 5.38 Prior to Main Modification 'MM39' which the Council confirmed on 31 January 2017, the Appellant could not have foreseen the recently proposed key policy priority and associated safeguarding requirement, or the significance of the modifications to draft Local Plan policy. The Council's reason for refusal does not contend that the application proposals failed to accord with draft Local Plan policy EMP1(5), to the contrary, Officers considered the application to comply with the Council's policy priorities for the site at the time. Against that background, the Appellant's attempts to amend the proposals to adhere, as closely as possible, to the additional requirements that have been introduced through proposed MM39, will be relevant to the Inspector's decision whether to determine the appeal by reference to amended proposals.
- 5.39 Whether those amendments would result in a substantial alteration of the development proposed in the application will be a matter for the Inspector's judgement, taking proper account of the specific facts and circumstances of this case. The Wheatcroft Principles require the Inspector to consider, amongst other things, whether the amendment proposals would be "so changed that to grant permission would be to deprive those who should have been consulted of the opportunity of consultation".
- 5.40 Had the Appellant proposed similar amendments at the application stage, Officers consider that full re-consultation and advertisement

would have been carried out on the amendment proposals. Although the proposed amendments are intended to ensure compliance with recently proposed modifications to emerging development plan policy, it is impossible to know whether consultation responses would raise issues that, to date, have not been considered. As such, unless the amended proposals are subject to further consultation, the possibility that someone who should have been consulted being deprived of the opportunity of consultation, cannot be excluded.

- 5.41 Although details of layout, appearance, scale and landscaping are reserved, the application was accompanied by illustrative plans to show how the proposed amount of development could potentially be accommodated on the site. To date, the Appellant has stated that key site parameters, including the finished ground levels, and maximum height of buildings would be established through any grant of outline permission. By contrast, the Appellant's proposed mechanism for addressing the shortfall in B1(a)/(b) provision will require the submission of a second planning application to secure full compliance with the modifications to policy EMP1(5).
- 5.42 Although the proposal represents a reduction in the total amount of development, unlike other cases, the amendment does not result in any reduction in harm, or secure compliance with development plan policy. To the contrary, the Appellant accepts that compliance with proposed MM39 cannot be achieved by the Inspector granting outline planning permission in this appeal. The key priority of policy EMP1(5) can only be achieved through the submission of an additional application for planning permission and a further grant of planning permission. As such, the scope of the Inspector may conclude that the amended proposals, in qualitative and quantitative terms, constitutes a "substantial alteration" of the development proposed by the application.
- 5.43 The complex mechanism required to address the significant shortfall in B1(a)/(c) provision, could be avoided if the Appellant submitted a new application for outline planning permission, that comprehensively addresses the proposed changes necessary to secure compliance with the modifications to policy EMP1(5) and addresses the appeal proposal's shortfall in B1(a)/(b) provision, without the need to submit an additional planning application for at least 2,500sqm of B1(a)/(c) in the vicinity of the proposed excluded area. Doing so would allow interested persons to consider the amended proposals in their entirety and make representation, in the context of the significant modifications to policy EMP1(5), before outline planning permission has been granted for part of the development proposed.
- 5.44 The Council accepts that the Wheatcroft Principles are the main but not the only consideration which the Inspector must take into account when considering whether to determine the appeal by reference to the amendment proposal. The circumstances of the present case are

unusual and the Inspector should take account of the Appellant's reasons for proposing the amendments; the history of the planning application and appeal; the public interest in delivering development on the site that accords with the key priority of emerging development plan (as modified); the futility of determining the appeals on the basis of scheme that neither the Appellant or the Council supports; and the prejudice which the Appellant is likely to suffer if the Inspector refuses to determine the appeal on the basis of the amended proposals.

- 5.45 In all the circumstances, Officers consider that the appeal process should not be used to circumvent that the procedural protections afforded by the Part III of the Town and Country Planning Act 1990, which cannot be guaranteed by the Appellant's proposed amendments to the application scheme, which considered as whole, constitute a substantial alteration to the proposals considered by the Council's committee in June 2016. For the reasons set out above, the Appellant should submit a new application for outline planning permission for the amended proposals, the determination of which will ensure that interested persons are given a proper opportunity to consider and comment on the proposals and participate in the decision-making process.
- 5.46 The appeal process cannot replicate the procedural protections guaranteed by the planning application process and should not be used to evolve proposals for development. The prompt submission of a new application would allow the merits of the proposals to be considered in advance of the public inquiry. Submitting a new application for planning permission would not require the Appellant to withdraw this appeal and, whatever the outcome, the determination of the new application will be relevant to the conduct and, if necessary, the determination of the appeal.
- 5.47 For the reasons set out above, at this stage, Officers do not consider it necessary or appropriate to support the Appellant's proposed amendments to the application proposals, and should encourage the Appellant to submit a new application for outline planning permission for its amended proposals, before formally applying to amend the appeal proposal. Subject to raising the concerns identified above, the Council should adopt a neutral position in response to the Appellant's proposed application to amend the appeal proposals.
- 5.48 Unless and until the Appellant withdraws this appeal, the Inspector must hold the planning inquiry before determining the appeal, even if the Council decides not to defend its reason for refusal. In those circumstances, the Council must attend the inquiry and submit evidence. However, if the Council decides not to defend its reason for refusal, its evidence will be limited to explaining the basis upon which it no longer objects to the proposed development, and the basis upon which outline planning should be granted. In such circumstances, the primary role of the Local Planning Authority will be to assist the

Inspector and, although the Council will not challenge the Appellant's evidence or cross-examine the Appellant's witnesses, the Council will actively participate in important aspects of the inquiry process, including, for example, the usual round-table discussion on conditions and planning obligations.

- 5.49 The Council's evidence may also address relevant matters upon which the Appellant and the Council may not agree, subject to the proviso that any disagreement between the parties does not justify withholding outline planning permission.

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.

- 5.50 Should the Inspector refuse to determine the appeal on the basis of the Appellant's proposed 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. For the reasons stated above, the application proposals do not accord with policy EMP1(5), as proposed to be modified.

- 5.51 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.

Recommendation 4: To agree that Members delegate authority to the Head of Planning & Development to negotiate the contents of any Section 106 Agreement.

- 5.52 As the application was refused by the Planning Committee, the Constitution requires the Committee to delegate authority to officers to negotiate the terms of any Section 106 Agreement. Whether or not the Council defends the reason for refusal, it must negotiate the terms of a section 106 planning obligation to ensure that development is acceptable in planning terms, if the Inspector allows the appeal.

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 these 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 2: The alternative course of action would be to actively object to the Appellant's proposed amendments to the appeal proposals. Officers advise the proposed changes would not cause prejudice to the conduct of the Council's case, and indeed support the Council's emerging policy for the site.

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

6.4 Recommendation 4: The alternative course of action would be not to agree delegated authority to negotiate the Section 106. This would deny the Council the opportunity to negotiate an appropriate legal agreement for the scheme and the risk of planning permission being granted for development that is unacceptable in planning terms. Failure to negotiate the terms of a section 106 planning obligation would constitute unreasonable behaviour and expose the Council to the risk of an adverse costs award.

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 refusal 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, the Council should not defend the reason for refusal to minimize the risk of incurring costs. It is not possible to quantify the level of costs but they are likely to be significant.

10.0 Legal Implications

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

11.0 Conclusions

- 11.1 For the reasons set out in this report, 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 refusing to submit a new application for planning permission, the Council should adopt a neutral position in respect of the Appellant's proposed amendments, and object to the application proposal if the Appellant pursues the appeal on that basis. The Council will continue to negotiate the contents of any Section 106 Agreement; and to provide evidence on any relevant matters relating to the appeal.

12.0 Relevant Documents

- 12.1 Appendices

Appendix 1: Decision Notice

Appendix 2: Local Plan Inspector's Interim Findings

Appendix 3: Main Modification of Policy EMP1(5) (Ref. MM39)

Appendix 4: Barton Willmore Letter on behalf of Appellant