

Mr Bill King  
Clerk to Christopher Lockhart Mummery QC

**INSTRUCTIONS TO COUNSEL  
BOUGHTON MONCHELSEA PARISH COUNCIL AND MAIDSTONE BOROUGH COUNCIL  
FIVE YEAR HOUSING LAND SUPPLY**

**Pre-amble**

- (a) Boughton Monchelsea Parish lies to the south of Maidstone. The Parish Council is concerned to prevent the unrestricted further encroachment of the Maidstone urban area into the Parish.
- (b) Over the last 20 or so years Boughton Monchelsea Amenity Trust (BMAT) has acquired control over several hundred acres of land in the Parish between the village centre and the urban edge of Maidstone. The prime objective of BMAT is to preserve the land in an undeveloped condition in the interests of preserving the amenity of local residents.
- (c) Boughton Monchelsea Parish Council and Boughton Monchelsea Amenity Trust work closely together and are not opposed in principle to limited development at the margins of Maidstone provided proper provision is made to protect the amenity of the residents of the Parish.
- (d) The Maidstone Local Plan was adopted in December 2000. Housing provisions in the Plan ran to 2006. The Plan is evidently out of date and in need of replacement.
- (e) There is currently a proposal to make a new Local Plan for Maidstone Borough which is programmed to be adopted in 2015. The new plan will run until 2031. (See Document 1, Page 10.
- (f) Boughton Monchelsea Parish Council has resolved to prepare a Neighbourhood Plan for the Parish in tandem with the proposals for the emerging Maidstone Local Plan. It is hoped the Boughton Monchelsea Neighbourhood Plan will also be made by 2015.
- (g) The emerging Maidstone Local Plan contains a proposal to build 600 houses at a site called Langley Park. All the houses at Langley Park would be constructed in Boughton Monchelsea Parish.
- (h) A hybrid planning application for 600 dwellings at Langley Park (including a first phase of 170 dwellings in detail) was submitted on 28<sup>th</sup> June 2013. The application is accompanied by a formal Environment Impact Assessment. Details of the

application (Reference MA/13/1149) are not included with these instruction but can be viewed on line if Counsel regards this as necessary.

- (i) Boughton Monchelsea Parish Council does not object in principle to the proposal. The site was allocated for a mixed employment and housing development in the 2000 Adopted Local Plan in any event. The Parish Council is however very concerned to ensure that any planning permission makes proper provision to mitigate the not inconsiderable community impacts of the construction of an additional 600 dwellings within the Parish.
- (j) Areas of payment sought by Boughton Monchelsea Parish Council for mitigation include:
  - (i) A small community hall attached to the new primary school proposed to be built on the site (sought by Maidstone Borough Council and at best optional so far as Boughton Monchelsea Parish Council is concerned).
  - (ii) A contribution towards the replacement of the existing village hall within the centre of Boughton Monchelsea Village. (£500,000)
  - (iii) A fit for purpose upgrade for playing pitches and a new multi-use games area (MUGA) adjacent to the exiting village hall. ((£100,000)
  - (iv) The provision of changing facilities for the playing pitches [either as a stand-alone facility or as part of the replacement village hall (see ii above)]. (£150,000)
  - (v) Upgraded footpath/cycleway links between the existing village hall, village centre, primary school and shop and pub on the one hand the proposed housing, new primary school and associated social/community facilities on the other. Counsel should note that some of these upgraded links can be provided on Boughton Monchelsea Amenity Trust land and no third party land would be required (£500,000).
  - (vi) The total sum which is sought for mitigation of community impacts is therefore in the region of £1,250,000.
- (k) In discussion with the Parish Council, Maidstone Borough Council (MBC) and the applicant Taylor Wimpey (TW) have not indicated that they will make provision within a Section 106 Agreement for community mitigation to anything like the amount sought by the Parish Council.
- (l) Maidstone Borough Council has indicated it does not yet know how it will handle community mitigation. Taylor Wimpey has indicated it is frustrated at the slow Maidstone Borough decision making but that it cannot make commitments to any mitigation to Boughton Monchelsea Parish Council until it knows the full extent and cost of the package demanded by Maidstone Borough Council.
- (m) A complication arising from community mitigation is an associated proposal in the emerging Local Plan to construct a further 285 dwellings on a site called 'North of Sutton Road' which lies opposite Langley Park.(See Document 1, pages 144-145) Langley Park lies to the south of Sutton Road (A274). (See Document 1, pages 139-

- 142) Maidstone Borough Council takes the view that the two sites together form a strategic location and that community impact mitigation needs to be dealt with as a whole across the entire 885 dwelling allocation. (See Document 1. Pages 138-139)
- (n) Part of 'North of Sutton Road' lies in Otham Parish and part of it lies in a Maidstone Urban Ward. Maidstone Borough Council is concerned that the urban ward and the nearby parish councils (especially Otham) will also make claims for community mitigation which makes them reluctant to agree to a settlement with Boughton Monchelsea.
- (o) Maidstone Borough Council (as part of the Local Plan Work Programme) has agreed to introduce Community Infrastructure Levy (CIL). The programme is for Community Infrastructure Levy to be introduced during the latter months of 2015. If Community Infrastructure Levy was levied in Maidstone at £10,000 per dwellings (a conservative estimate) and if a Neighbourhood Plan was in place Boughton Monchelsea Parish Council would receive 25% of the Community Infrastructure Levy. The payment for Langley would be £2500 x 600 = £1.5m.
- (p) Counsel will note that the conservative estimate for a Community Infrastructure Levy payment at £1.5m is greater than the amount sought for community impact mitigation under Section 106 (£1.25m).
- (q) Because of the uncertainties associated with the collection of Community Infrastructure Levy payments Boughton Monchelsea Parish Council would prefer to reach an acceptable Section 106 contribution in negotiation with Maidstone Borough Council and Taylor Wimpey.
- (r) One of the issues arising in relation to the Taylor Wimpey application is whether Maidstone Borough Council has a 5 year supply of housing land. It appears to Boughton Monchelsea Parish Council that Maidstone Borough Council do have a 5 year land supply if a reasonable allowance for windfall sites is included in the calculation as allowed in the National Planning Policy Framework.
- (s) Maidstone Borough Council has not included an allowance for windfalls in its most recent calculation of housing land supply in the mistaken belief that:  
'national guidance allows for the inclusion of a windfall site allowance for the latter years of the plan period'.  
(Document 1, paragraph 1.6.3). (Page 37)
- (t) Counsel will be aware that the above reference is to PPG3 which was replaced by the National Planning Policy Framework in March 2012.
- (u) Counsel will also be aware that paragraph 48 of the National Planning Policy Framework states:  
'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.'

- (v) Boughton Monchelsea Parish Council believes that, contrary to the view of the Borough Council, Maidstone does have a 5 year land supply because there is compelling evidence to demonstrate the continued availability of windfalls in the Borough.
- (w) Boughton Monchelsea Parish Council wish Counsel to provide a written opinion to the effect that he agrees that Maidstone do have a 5 year supply. Armed with that opinion Boughton Monchelsea will seek to persuade Maidstone Borough Council and Taylor Wimpey to make proper provision for community mitigation in a Section 106 Agreement for Langley Park.
- (x) If Boughton Monchelsea Parish Council is unsuccessful in securing the above aim, then as a fall-back position the Parish Council will seek to have planning permission at Langley Park not granted until such time as community impact mitigation measures have been properly aired at a Local Plan Examination. By that time Boughton Monchelsea Parish Council believes the matter may well be dealt with under Community Infrastructure Levy in any event.

Please find attached a bundle of paper in relation to housing land supply.

1. Document 1 is the Agenda and Minute of a Cabinet Meeting held on Wednesday 13<sup>th</sup> March 2013. Page 10 of the Document 1 sets out a programme for the preparation of a Local Plan for Maidstone leading to adoption in July 2015.
2. Page 35 of Document 1. (paragraph 1.5.1) sets out that until recently Maidstone Borough Council had a moratorium on the release of greenfield housing sites on the basis that the Council had a healthy 5 year housing land supply.
3. Paragraph 1.5.2 goes on to explain the new NPPF requirement to specify deliverable sites for 5 year housing land calculations.
4. Paragraph 1.5.4 notes that windfall sites on previously developed land (brownfield land):  
  
‘are no longer materialising at the same rate’.  
  
Counsel will note this document does not say NIL windfalls are materialising.
5. Paragraph 1.5.5 notes that the 2011/12 Annual Monitoring Report (AMR) (Document 2) states that Maidstone Borough Council has a 4.5 year supply against a 10,080 dwelling target and a 3.9 year supply against a 11,080 target. (More on targets below).

6. Paragraph 1.5.6 refers to a number of Core Strategy Strategic Site Allocations (2012) including Langley Park (SS2a). All of the houses proposed at Langley Park (600 dwellings) lie within the Boughton Monchelsea Parish. The Report makes reference to the Development Plan. Langley Park is allocated in the adopted Maidstone Local Plan December 2000. (Extracts at Document 3). Paragraph 1.5.4 notes that the South East Plan (SEP) 'has not yet been revoked' and advised the Council to use SEP for the calculations of housing land supply.
7. Paragraph 4.88 of the December 2000 Adopted Maidstone Local Plan(Document 3) describes the Langley Park proposals as an integrated village incorporating employment, land, housing and other uses.
8. Policy H8 provides for housing development on 13 hectares within the land at Langley Park Farm West. Paragraph 4.93 and Policy H1 (xiii) confirms the housing allocation as 325 dwellings.
9. Paragraph 4.92 confirms the employment content on 6 hectares at Langley Park Farm West as 20,000 m2. Policy ED1 (iv) of the 200 Adopted Local Plan Provides for 13,000 m2 of B1 and 8000 m2 of B2 at Langley Park Farm West.
10. Counsel is asked to confirm that the current proposal to build 600 houses instead of 325 houses and 13,000 m2 of B1 and 8000 m2 of B2 on the land at Langley Park Farm West is a departure from the Development Plan and should be treated as such.
11. Counsel may wish to consider whether Borough Councillors were misled by the comments in the Cabinet Report at paragraph 1.5.6 (pp. 36-37) regarding planning decisions in accordance with the development plan when the current proposal at Langley Park (600 dwellings) is so much at variance with the Development Plan (325 dwellings and 21,000 m2 of employment space).
12. On the basis of the AMR lack of 5 year land supply the Council is recommended at paragraph 1.1.7 (page 37) to revoke the current moratorium on the release of housing sites allocated in the 2000 Local Plan. This recommendation was accepted by the Borough Council.
13. Counsel will note the proposed Interim Local Plan Policies for Langley Park (policy SS2c) at pages 139 – 142. The site is described as 34 hectares (paragraph 4.8). The capacity is given as 600 dwellings (paragraph 4.11) and Policy SS2a (1) (page 141).

14. The extent of the site is shown on a plan at page 142. Counsel will note this is slightly different from the site in the adopted Local Plan in that a small part of the allocated 2000 site has been built out for employment use.
15. The Report to Cabinet (document 1) at paragraph 1.6.3 (page 37) states that:

‘national guidance allows the inclusion of a windfall site allowance for the latter years of the plan period.’
16. The Report to Cabinet (paragraph 1.5.5, page 36) refers to the AMR in relation to the 5 year housing land supply. The supply of 3.9 years is in relation to the delivery of the South East Plan target of 11,080 dwellings between 2006-2026 for Maidstone. (AMR paragraph 3.2, page 18).
17. As Counsel will be aware the South East Plan was revoked on 25<sup>th</sup> March 2013 so far as Maidstone housing figures are concerned (Document 4).
18. As this imminent revocation was in the public domain does Counsel believe Maidstone Borough Council should have relied on South East Plan requirements in relation to the 3.9 year South East Plan based target in the Report to Cabinet of 13<sup>th</sup> March 2013.
19. The Maidstone Borough Council Annual Monitoring Report 2010-2011 (undated) deals with housing land supply at paragraphs 3.2 to 3.7 (pages 19 to 23). (Document 5)
20. At paragraph 3.2 the Report only tests the lower Core Strategy target of 10,080 new dwellings. Counsel will note the different approach to the 5 year supply of housing land in the AMR earlier.
21. The 2010-2011 AMR (Document 5) includes an Annual Housing Trajectory. Counsel will note that windfalls are included as 36 dwellings for 2021/22 and 145 dwellings per annum for 2022/2023 to 2025/2026.
22. The 2010-2011 AMR at paragraph 3.5 (page 22) lists the elements of supply. The 6<sup>th</sup> entry is an allowance for windfall sites (or previously unidentified sites) from 2021 onwards:

‘in accordance with national guidance (planning Policy Statement 3)’.

23. Counsel will of course be aware that Planning Policy Statement 3 (PPG3) was replaced with the advent of the National Planning Policy Statement NPPF in March 2012.
24. The 2010-2011 AMR is undated but it is believed it would have been produced in October/November 2011 i.e. before the advent of NPPF in March 2012.
25. The 2010-2011 AMR (paragraph 3.7, page 23) notes that there was a 5 year housing land supply at that time (6.4 years) without including an allowance for windfall sites.
26. The 2011-12 AMR presents housing land supply slightly differently. Paragraph 3.6 and Table 3.2 list the elements which constitute the 5 year land supply. No mention is made of an allowance for windfalls and no windfall sites are included in the 5 year land supply.
27. The 2011-12 AMR at paragraph 3.7 concludes that Council does not have a 5 year land supply. The supply is listed at 4.5 years in relation to a target of 10,080 dwellings based on the emerging Core Strategy.
28. Based on the South East Plan target of 11,080 dwellings the supply is listed as only 3.9 years. The 2011-2012 AMR is undated but is believed to have been produced in October/November 2012. The South East Plan was revoked on 25<sup>th</sup> March 2013. (See Document 4)
29. The Borough Council's position is that windfalls can no longer be relied upon to come forward because Maidstone has been relying on windfalls since 2000 and the opportunities are reducing.
30. In the 2010-2011 AMR (Table 3.2, page 20) Maidstone Borough Council rely on windfalls at a rate of 145 dwellings per annum.
31. The most recent Strategic Housing Land Availability Assessment (SHLAA) for Maidstone is dated May 2009. (Document 6). Paragraph 6.1.12 (page 41) identifies a windfall capacity of 628 dwellings for the period 2013-2018. (125 dwellings per annum.)
32. Maidstone Borough Council has seen housing completions at an average rate of 650 dwellings per annum 2000/01 to 2010/11. The average was 675 dwellings per annum over 5 years 2006/7 to 2010/11. See document 7, Table 1, page 9. Document 7 includes, at page 6, a note on Windfall Supply. Based on PPG3, windfall allowances are excluded from estimates of future supply in Document 7.

33. Because of the moratorium, allocated greenfield housing sites have not been released in Maidstone (to provide any significant number of units) over the last 5/10 years. Document 1 paragraph 1.5.4 confirms the high level of windfall completions previously.
34. The shortfall is either 578 dwellings (South East Plan target) (11,080 dwellings) or 201 dwellings (Core Strategy target) (10,080 dwellings).
35. The SHLAA (Document 6) identifies a windfall capacity of 628 dwellings for the 5 year period 2013-2018.
36. The 2010-2011 AMR includes windfalls at 145 dwellings per annum, i.e. 725 dwellings over 5 years.
37. Completions (without greenfield site allocation release) have averaged 675 dwellings per annum over 2006/7 to 2010/11. Document 8 is an estimate of windfalls produced by Kent County Council and marked 'provisional 27 February 2013'. No estimate of windfalls is given for Maidstone for 2011/12. For 2010/11 (the most recent year for which windfall estimates are available) the figure is given as 344 dwellings. In the column marked 'projected 5 year annual average (based on the last five years) the estimate of windfalls for Maidstone is given as 332 per annum.
38. National Planning Policy Framework (paragraph 48) states local planning authorities may make an allowance for windfall sites if certain criteria are met. In the case of Maidstone these criteria are met.
39. It appears Maidstone Borough Council acted in error in the March 12<sup>th</sup> Cabinet Report which stated national guidance allows for the inclusion of a windfall site allowance only 'in the latter years of the plan period.'
40. It appears the higher South East Plan target is no longer relevant, although bearing in mind the windfall figures given above, even with a South East Plan shortfall of 578 dwellings, it would also appear Maidstone does have a five year land supply if windfalls are included.
41. To achieve a 5 year housing land supply on the lower Core Strategy target Maidstone only needs to include a windfall allowance of 40 dwellings per annum. In view of the previous delivery and previous estimates it seems unreasonable for Maidstone not to regard windfalls as a reliable source of supply. Most windfall sites in Maidstone are redundant industrial land and so excluding residential garden land will not materially impact on the above conclusion.



42. Boughton Monchelsea Parish Council (BMPC) wishes to support the proposal to build 600 houses within the Parish at Langley Park. BMPC believe the addition of 600 houses to the Parish would justify the payment of section 106 contributions of between £500,000 to £1,500,000 to mitigate community impacts.
43. Maidstone Borough Council has not agreed to ask the developer for such mitigation payments. Maidstone Borough Council appears to be more concerned with strategic transportation (see Document 1, pages 138-139) than important local community impact mitigation. (See NPPF paragraph 171).
44. By publicly stating that they do not have a 5 year land supply, Maidstone Borough Council appear to be inviting planning applications for development in accordance with its emerging Core Strategy.
45. If Maidstone Borough Council will not agree to appropriate Section 106 contributions to mitigate community impacts, Boughton Monchelsea Parish Council would wish to object to the application for 600 houses on the basis that the community impacts of the emerging Core Strategy/Local Plan proposals should properly be subjected to community consultation (2013 and 2014) and public Independent Examination in February/March 2015.
46. If taken through the proper processes the Local Plan would be adopted in 2015 (i.e. only 2 years' time). It seems to Boughton Monchelsea Parish Council that Maidstone Borough Council has acted in error in saying it does not have a 5 year housing land supply, lifting the moratorium and effectively inviting planning applications on various housing sites including Langley Park.
47. As the shortfall is 201 dwellings it seems to Boughton Monchelsea Parish Council that Maidstone Borough Council would be perverse to pursue a planning permission for 600 dwellings at Langley Park, which is clearly a departure from the adopted Local Plan (2000).
48. It appears to Boughton Monchelsea that the actions of Maidstone Borough Council appear to be denying proper process and preventing payment of CIL revenue.
49. Counsel is asked to advise as follows:

1. The proposals for Langley Park in the Maidstone Borough-Wide Local Plan (Adopted December 2000) (the Development Plan) are for 325 houses [policy H1 (xiii)], 13,000 m2 of B1 and 8000 m2 of B2 [policy ED1 (iv)]. The current application at Langley Park (MA/131/1149) is for 600 dwellings and ancillary facilities. Does Counsel consider the current application to be a Departure from the Development Plan and does he therefore consider the Borough Council should follow departure procedures should it wish to grant consent to the application?
2. The Report to Cabinet of 13<sup>th</sup> March 2013 makes references to section 38(b) of the Planning and Compulsory Purchase Act 2004. The Report states that planning decisions must be made in accordance with the development plan unless material considerations indicate otherwise. Does Counsel consider that the current proposals at Langley Park are so much at variance from the Development Plan that the Borough Council would be in error to progress with the current proposals at Langley Park on the basis of the advice set out in the Report to Cabinet?
3. The Report to Cabinet on 13<sup>th</sup> March 2013, at paragraph 1.5.4, states that the South East Plan 'has not yet been revoked'. The Report therefore advises the Council to rely on the South East Plan housing target of 11,080 dwellings. In view of the fact that the South East Plan was actually revoked on 25<sup>th</sup> March 2013 (some 12 days after the Cabinet meeting) does Counsel consider the Council should rely on South East Plan targets for the calculation of its 5 year housing land supply calculations?
4. The Report to cabinet on 13<sup>th</sup> March 2013 states (at paragraph 1.6.3) that:

'national guidance allows the inclusion of a windfall site allowance for the latter years of the plan period.'

Bearing in mind that PPG3 was revoked by the introduction of the National Planning Policy Framework in March 2012, and that the National Planning Policy Framework contains different guidance on how windfalls may be dealt with, does Counsel consider that the Council Office has made a mistake in its guidance to Council Members in the Report to Cabinet?
5. Recent evidence on windfalls includes the following:
  - i. The 2010-2011 Annual Monitoring Report (AMR) includes a windfall allowance of 145 dwellings per annum for 2022/23 to 2025/26.

- ii. The most recent strategic Housing Land Availability Assessment (SHLAA) at paragraph 6.1.12 identifies a windfall capacity of 628 dwellings for the period 2013-2018 (125 dwellings per annum).
- iii. An estimate of windfalls produced by Kent County Council marked 'provisional 27<sup>th</sup> February 2013' gives a 2010/11 estimate as 332 dwellings per annum as a projected 5 year annual average (based on the last 5 years).

Given the above evidence and bearing in mind the new advice in the National Planning Policy Framework, does Counsel believe that Maidstone is correct in not including any allowance for windfalls and therefore stating that it has a 5 year housing land shortfall of:

- (a) 201 dwellings in relation to the Core Strategy based target of 10,080 dwellings and
- (b) 578 dwellings in relation to the South East Plan based target of 11,080 dwellings?

6. The current position of the Council is that it has not included a windfall allowance. On the basis of the above figures, setting aside the issue of whether this approach is correct or not, does Counsel believe that if Maidstone did choose to include a windfall allowance that it would in fact have an adequate 5 year land supply on either basis?
7. Given a shortfall of only 201 dwellings on the Core Strategy based calculation, does Counsel believe it would be appropriate to release the entire additional 600 dwellings at Langley Park in advance of the proper Local Plan processes and/or the completion of more work on the calculation of the 5 year housing land supply?
8. Bearing in mind that a figure of 14,800 dwellings has been approved as a working target,

'until such time as the work confirming the borough's housing land supply and the identification of environmental constraints is completed'

(Report to Cabinet, 13<sup>th</sup> March, paragraph 1.6.5) does Counsel consider that the Council would be justified in using this new working target of 14,800 dwellings (which is currently being tested) as a basis for calculating whether the Borough has a 5 year housing land supply?

50. Counsel is asked to advise on this matter and to draft an opinion which may be used by Boughton Monchelsea Parish Council in negotiation with Maidstone Borough Council in relation to community impact mitigation contributions. Counsel is asked to consider whether Maidstone should include windfalls in the calculation of housing land supply and, based on the compelling evidence of the availability of windfall sites, whether Maidstone does in fact have a 5 year land supply in the context of advice contained in paragraph 48 of the National Policy Plan Framework.

Paul McCreery

## **DOCUMENTS**

1. Agenda and Minutes of Maidstone Borough Council Cabinet Meeting held on 13<sup>th</sup> March 2013.
2. Maidstone Borough Council Annual Monitoring Report 2011-12 (undated).
3. Extracts from Maidstone Borough-wide Local Plan Adopted December 2000.
4. Town and Country Planning, England, Regional Strategy for the South East (Partial Revocation) Order 2013.
5. Maidstone Borough Council AMR 2010-2011.
6. Maidstone Borough Council, Strategic Housing Land Availability Assessment (SHLAA) Final Report, May 2009.
7. Maidstone District, Housing Information Audit 2010/11 (January 2012).
8. Kent County Council, Housing Information Audit, Estimated Completions on large and small unidentified sites (windfalls).