

IN THE MATTER OF:

MAIDSTONE BOROUGH COUNCIL HOUSING LAND SUPPLY & WINDFALL ALLOWANCE

ADVICE NOTE

1. I am advising Maidstone Borough Council in this matter. I have seen a further opinion of leading counsel on behalf of Boughton Monchelsea Parish Council dated 30 August 2013 which continues to advise that members are being misdirected about the 5 year housing land supply.
2. Members are not being misled or misinformed by officers in the matter of a windfall allowance. Leading Counsel is apparently being told that there is compelling evidence to include a windfall allowance in the 5 year supply. That compelling evidence does not exist and there is no robust basis on which to conclude that there will be a reliable supply of “windfall” sites in the next 5 years.
3. Errors in the instructions or advice given have apparently arisen from a lack of understanding of, at least, two things:
 - the accurate definition of “windfall site” in the NPPF which officers must apply
 - the extremely wide pool of sites that come to Maidstone’s attention through the SHLAA process, are then assessed by Maidstone and are rejected because they are not suitable for housing or the housing will not be delivered within 5 years.
4. A site cannot be a windfall site if it has been highlighted as available in the course of the emerging local plan process. The definition in the NPPF is sites not specifically identified as available in the Local Plan process.

5. In Maidstone the SHLAA process has gone through a painstaking process of examining land and buildings as potential housing sites. The process has included two recent 'call for sites' as well as a trawl through all other known potential sites. The 'call for sites' process brings forward numerous parcels of land or buildings which are sometimes in active alternative use or are underused and these are assessed for their chances of providing future housing units. For example, these can include on-going commercial businesses which are looking to relocate in the future and redevelop their land for housing.
6. Some sites will be assessed as likely to contribute to the 5 year land supply, some may be assessed as becoming available beyond that period and some may be rejected as housing sites. If they are rejected as housing sites or they are potential housing sites likely to deliver their units beyond the 5 year period then they cannot form a "reliable source of supply"¹ on which to base a windfall allowance for the purposes of the 5 year housing supply.
7. Leading Counsel for the Parish Council asserts that there is compelling evidence that windfall sites have consistently become available in the local area and that such sites will continue to provide a reliable source of supply. These are flawed conclusions and it would not be desirable to put weight on them.
8. In reality the SHLAA process has been² so thorough that the likelihood of land or buildings not assessed by it delivering housing units within the next 5 years is very remote. If a council is to be able to support the inclusion of a windfall allowance, it will have to be reasonably sure that totally unknown sites will be delivering housing units in the next 5 years. Officers have considered how many housing units have come forward from unknown sites in the recent past, have set aside units on garden land, have looked at the advice in the NPPF and have concluded that they could not robustly defend including a windfall allowance in the next 5 year supply figure.

¹ NPPF paragraph 48

² And will continue to be

9. It might be appropriate to include a windfall allowance for the purposes of a 20 year housing trajectory towards the end of the plan period when there has been further churn in the system. This is officers' current view and there is nothing incorrect or misleading in doing this for a 20 year housing trajectory. It does not affect their view about the first 5 year supply.
10. There is no doubt that officers correctly understood paragraphs 47 & 48 of the NPPF. They were well aware that a windfall allowance can be included if there is compelling evidence to do so. 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. It is possible to include an allowance, but in this instance officers were not convinced there was the compelling evidence to do so for the 5 year housing supply calculations.

Megan Thomas
Barrister
6 Pump Court
Temple
London EC4Y 7AR
September 2nd, 2013