

Mr. A Waters,
LDF Programme Officer,
Medway Council,
Gun Wharf,
Dock Road,
Chatham,
Kent.
ME4 4TR

My reference: PCA/201119

3rd May 2013

Dear Mr. Waters,

Matters and Issues for Hearing, 22nd May.

I refer to your email dated 12th April, inviting the submission of a written statement addressing the Matters and Issues identified by the Inspector. My clients comprise McCulloch Homes, Rochester Bridgewood and Medway Sport and Leisure Park Ltd. whose responses are as set out below. Input has been provided to this letter by Dominic Woodfield of Bioscan and Richard Turney of Landmark Chambers who will, with me, represent those companies at the resumed hearing.

Matter 1. Policy context. a) South East Plan revocation.

i) What are the implications of the revocation of the South East Plan (in particular paragraph 19.5) for the Lodge Hill allocation?

The SEP is no longer part of the Development Plan. Any proposal or policy cannot be justified on the basis that it derives from, the SEP. Therefore, the Council needs to produce a Local Plan, in accordance with the NPPF and as set out in my letter dated 22nd March. It cannot simply try to amend the submitted Core Strategy: instead, a fresh start needs to be made.

The new Local Plan cannot be predicated on major development at Lodge Hill. Indeed, given its ecological importance (along with the very recent discoveries about its historical/archaeological importance) then it is simply not possible to conceive of any local authority looking to base a new local plan on the allocation of such a site where there is such strong objection to the principle of development. Instead, the Council should issue a "call for sites"; undertake an objective assessment of its housing requirements and enter constructive consultations with neighbouring authorities about how they can co-operate on a range of issues of mutual interest. In this respect of the Council has recently rejected a proposal by Maidstone BC to participate in a combined Strategic Housing Market Assessment, in breach of its duty to co-operate.



Matter 1) Policy context b): The National Planning Policy Framework

i) Does the proposed allocation comply with paragraph 118 which indicates that proposed development on a SSSI should not normally be permitted ...an exception should only be made where the benefits of the development ... clearly outweigh both the impacts it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs?

The proposed allocation does not comply with the quoted passages from paragraph 118 for the following reasons:

- The baseline position is that Natural England has formally notified the site as an extension to the existing Chattenden Woods SSSI. The site therefore qualifies for statutory protection.
- Para 118 states that development within or likely to have an adverse effect on a SSSI should not normally be permitted.
- Development here would not just have an 'adverse effect' on the SSSI extension. It would be catastrophic to the point that future denotification of the SSSI extension would be necessary. This is unparalleled and unwarranted.

The appropriateness of this allocation turns on whether the Council has demonstrated beyond doubt that it is the only option available. The Sustainability Appraisal process indicates that the Council has not demonstrated this, and consequently the proposed allocation fails the test within para 118. It should also be noted that the proposed allocation is contrary to test in paragraph 14 of the NPPF which states that plans should meet objectively assessed needs unless specific policies indicate development should be restricted. Footnote 9 confirms that SSSIs fall within that exception.

Matter 1) Policy context c) Core Strategy

i) Is there an internal conflict between Policies CS6 and CS33?

There is irreconcilable conflict between Policies CS6 and CS33. This is best illustrated by testing the acceptability of the impacts generated by the delivery of the Lodge Hill allocation (CS33) against CS6 as follows:

- CS6 states that "*wildlife habitats and sites, populations of wild species and other biodiversity features will be protected, maintained and enhanced...*" Through wholesale habitat loss or change, this development will remove the breeding habitat for a breeding population of a declining species of national conservation importance, and will remove or irreparably damage a scarce and declining habitat type (MG5 grassland).

- CS6 states that the above commitment *"will particularly be the case where they have been identified as being of international, national and local importance and as priorities in the UK and Kent Biodiversity Action Plans or where they are protected or designated under relevant legislation."* The Lodge Hill development is a case where the biodiversity resources at risk are of national importance, cited in the UK Biodiversity Action Plan (MG5 grassland) and subject to legal protection as a SSSI. It is hard to imagine a more clear-cut case of non-compliance with Policy CS6.
- CS6 states *"When development is permitted, opportunities will be pursued and secured for the incorporation, enhancement, re-creation or restoration of wildlife habitat, either on-site, off-site or through contributions to the strategic provision of natural open space. Such strategies should be in place and functioning prior to commencement of the development."* Inherent in the phrase "when development is permitted" is recognition that opportunities for avoidance of impacts must first be tested, in line with the approach set out at para 118.
- This is made more explicit in the Policy: *"Any negative impact on recognised wildlife habitats or other biodiversity features should be avoided or minimised through the appropriate siting and/or design of development"*. However this sequential approach of avoidance and then minimisation required by CS6 has not been adopted by the Council, who have taken a prejudicial approach to the consideration of alternatives in their Sustainability Appraisal.
- Only after avoidance and minimisation through siting has been explored should mitigation and compensation strategies be considered. Where these are adopted, CS6 is explicit: *"Such strategies should be in place and functioning prior to commencement of the development"*. The Council is currently advocating future implementation of an untested and unproven approach as justification for the destruction of a statutorily designated site. Even if there were realistic prospects of such an approach being successful, it would not be "in place and functioning prior to the commencement of the development". The mismatch with Policy CS33 is acute here: CS33 anticipates delivery of 4300 completions within the plan period. With even the most optimistic assessments of the time it would take for compensatory habitat to be 'in place and functioning' being around 10 years, it is clear that there is no prospect of the required rate or quantum of delivery being achieved at Lodge Hill without creating conflict with CS6.
- Policy CS6 states that *"Compensation will normally be provided on more than a like-for-like basis, in order to secure both the maintenance and enhancement of biodiversity"*. Again, the wording here reflects the NPPF (paras 9 and 109) and its objective for developments to result in no net loss, and a net gain in biodiversity where possible. Thus far, compensation requirements have only been assessed on the basis of the impact on nightingales. No offset provision to secure 'no net loss' has been proffered in respect of the MG5 component of the site, nor indeed for other assets of biological importance present. In respect of nightingales, while the land area being sought for compensatory habitat creation is larger than the area of habitat being lost, this is only a function of the application of 'risk multipliers' in recognition of the

uncertainty over delivery. This disguises the fact that the intention is set no higher than achieving 'like for like', even if that is itself possible. The sum total of the compensation commitments made by the Council to date therefore fails the test of CS6. Furthermore, there remains no intention to compensate for losses of MG5 grassland, or any other biological element other than nightingales. The result of this is significant 'net loss' to biodiversity and unsustainable development.

Matter 2) Mitigation/compensation measures.

a) Is providing compensatory habitat, rather than preserving in situ, the right approach for a site with nature conservation value of national importance?

No. The approach of providing compensatory habitat rather than preservation in situ is at odds with government policy and guidance on several levels.

- There is an imperative to seek to preserve important nature conservation sites *in situ* before resorting to compensation for loss. SSSIs have amongst the highest levels of protection in both the NPPF (para 118) and Policy CS6. Damage to SSSIs can only be acceptable if the need for development is overriding and all alternatives have been exhaustively investigated. The key question is whether there has been an exhaustive investigation of alternatives.
- Unfortunately, the Council has largely dismissed such consideration. It has chosen Lodge Hill, and doggedly defended that decision. No confidence exists that this is the best option for development. The proposed allocation therefore fails the requisite tests for development of SSSIs.
- The government's objectives to halt the loss of UK biodiversity rely on avoiding harm where possible, and resorting to compensation only as a last resort. The Council has failed to adequately assess avoidance through use of alternative sites. Compensation /offsetting has not been considered as a 'last resort' in this case, but as a starting point.
- Medway's appropriation of biodiversity offsetting to retrospectively justify the allocation of Lodge Hill has no foundation in policy terms – indeed it flies in the face of the Government's intentions for offsetting. These are as set out in the white paper *'The Natural Choice – securing the value of nature'* (Para 240). Government guidance states that it does not provide a means to bypass existing systems of policy protection for statutory sites, nor the hierarchy of 'avoid-mitigate-compensate' enshrined within the NPPF: *"biodiversity offsetting will generally not be used in relation to areas that have been given special protection under the European Union's Habitats and Species Directive. Developments that impact on Sites of Special Scientific Interest (SSSIs) will also need to follow existing processes, as set out on Natural England's website. Biodiversity offsetting is a mechanism that can be used to implement planning policy: it doesn't change planning policy. Biodiversity offsetting will only be considered when the*

potential to avoid any damage, and mitigate any damage, has been fully considered.
(Biodiversity Offsetting Pilots - Guidance for developers -para 5.)

- This policy backdrop was recognised by EBL who during the workshops accepted that if the site was notified, offsetting in the guise recognised by government policy became sub-ordinate to the normal statutory and planning procedures affecting such sites. This is in line with government guidance that is clear in stating that offsetting sits at the bottom of the mitigation hierarchy.
- The White Paper also clearly states (para 2.42) that Government will decide whether to support greater use of biodiversity offsetting on the basis of "*a body of information and evidence*" emerging from a two-year pilot ending in Spring 2014. In this context it is premature of Medway, a Council that did not seek to participate in the trial period for biodiversity offsetting, to now seek to leapfrog the pilot process, and apply the prototype system to a site of national biodiversity value, using a set of altered and untested metrics. There is no 'body of evidence' emerging from the pilot period that suggests the proposed nightingale compensation will work. Whether the prospects of success were reasonable was the subject of exhaustive debate, but that resulted in no consensus and a high level of *uncertainty* about the degree of success. That uncertainty is reflected in the vacillating conclusions from the technical studies by GGKM and EBL. The workshops did establish consensus on the high degree of *certainty* of significant time lag before success or failure became clear. In that period, there would undoubtedly be net loss of biodiversity.
- There is no policy basis for such experimentation with important biodiversity resources. It represents a clear departure from government policy.

Matter 2) Mitigation/compensation measures

b) i) How much compensatory habitat is required and how likely is it that sufficient land of a suitable type will be made available and what potential adverse impacts may arise, such as loss of good quality agricultural land ?

Because application of the offsetting approach in this case has no policy basis or justification, this should be an academic question. To permit the loss of SSSI and the displacement of nightingales on the basis of nebulous commitments to future habitat creation would constitute use of offsetting as the very "licence to destroy" that the Government has been at pains to say will not be permitted. We note, however, the Inspector's comments regarding BTO's conclusion that compensatory provision is theoretically feasible. We do not dispute that conclusion - it is an unavoidable one considering the sites most favoured by this species, a disproportionate amount of which are ex-industrial land where natural succession has created suitable habitat. The issue here comprises the prospects of turning 'theoretical feasibility' into 'practical delivery'.

The Council has failed to demonstrate that there is a realistic prospect of sufficient land being secured that has the right conditions, is not required for other purposes, has low existing value for biodiversity or agriculture and is likely to be made available at reasonable cost. GGKM reported that landowners have advised that they would only be interested in this as a "business opportunity". No correspondence has been circulated, so the basis upon which interest has been expressed is not known, nor any financial appraisal provided. There is scant consideration of adverse impacts. Without this, there can be no certainty that the result of the proposed compensation would not remain significant 'net loss' of biodiversity.

Matter 2) Mitigation/compensation measures.

b) ii) What are the likely consequences of the time lag between loss of habitat at Lodge Hill and the provision of new habitat if development proceeds as currently proposed? Alternatively what are the implications for the Core Strategy if development at Lodge Hill is delayed to allow for new/restored/improved habitat to become available?

The consequences of time lag can be viewed in both policy and biological terms. In policy terms, there will be an unavoidable period of 'net loss' of biodiversity lasting decades even in the most optimistic of scenarios and a material denudation of the integrity of the national SSSI series. In biological terms a permanent reduction in the UK carrying capacity for nightingales has to be a very real prospect.

Matter 2) Mitigation/compensation.

c) To what extent can the loss of the area of MG5 Grassland be mitigated by changes to the Masterplan and if offsite provision is necessary what are the risks to delivery?

Any changes will impinge on the viability of the scheme, increase greenfield landtake and impinge on the pace of delivery. The survival of the retained Grassland will be compromised. Development of the site is incompatible with retention of the MG5 grassland. For the same reasons as above, there is no policy justification for use of offsite provision, and similar comments about time-lag and risk to delivery apply to MG5. To develop the full complement of soil biota and species associations attendant with a fully functioning unimproved grassland of the type underpinning the SSSI designation at Lodge Hill takes decades – it is not just a question of sowing a seed mix. No information on potential sites for compensatory MG5 creation has been forthcoming from Medway Council – indeed their focus appears to be to seek to dispute the classification.

Matter 3) SA Addendum.

a) Does the SA Addendum provide a robust assessment of alternative options? In particular i) Are there other reasonable alternatives that should be evaluated in greater detail bearing in mind the changing circumstances in relation to Lodge Hill? For example,

is it right to reject a more dispersed pattern of development without a more detailed evaluation of what that might mean in practice? Should neighbouring authorities be approached under the duty to co-operate in order to avoid development at Lodge Hill if there really is no reasonable alternative within Medway?

The SA and its addendum are based upon the premise or, indeed, the requirement, that Lodge Hill must go ahead. In that respect, it mirrors the stance taken by the Council itself in producing the Core Strategy. Despite growing and dramatic evidence that the proposed allocation of Lodge Hill is completely contrary to national planning policy, the Council has continued to reject all alternative avenues for meeting its housing requirement. (Indeed, this itself is based on the SEP rather than on any objective assessment of requirements).

The same has to be said of the SA. It has not questioned the need to look at alternative strategies and sites: instead it appears to be little more than a rubber stamping of the Council's strategy. An analysis of the SA and its Addendum suggests that it has been written to justify the Lodge Hill allocation.

The Council has, from the start, rejected a more dispersed pattern of growth. Furthermore, it has failed in its promise (as made at last year's Hearing) to issue another "call for sites." As a result, such sites have not been properly assessed, on an individual or collective basis.

It is submitted that neighbouring authorities should be approached under the duty to co-operate. Moreover, before doing that, the Council should accept that it does need to seriously assess alternative development proposals, rather than pretend that, to do so, would undermine their strategy based on re-generation of difficult brownfield sites. Such a strategy was found to be flawed in the past – hence the withdrawal of the previous Core Strategy. Instead of adopting a revised approach, the Council has simply gone for the same approach again. That strategy based on resisting green field development was rejected in the past. It now remains for this Inspector to do so again.

ii) Does the SA Addendum meet the requirement established in Heard v Broadland that alternatives must be appraised as thoroughly as the preferred option; and the implications of Cogent Land LLP v Rochford DC and Bellway Homes Ltd (as reported in JPEL issue 2 2013 (pages 170-192) that an addendum report must be a genuine exercise rather than a mere justification for the decisions that have already been taken.

The matters that led the judge in Heard v Broadland to quash the Core Strategy apply with equal, if not greater, force to this case: see [58] to [71] of that judgment. At no point does the SA Addendum properly grapple with the substance of the objection to Lodge Hill: i.e. that development would be flatly contrary to national planning policy. Further, there is no assessment of the risk of that conflict to the delivery of Lodge Hill. Even if allocated, it is far from clear that planning permission will be granted for the development in light of that conflict.

The addendum exercise is plainly an ex post facto justification for an earlier decision to promote Lodge Hill. That decision was taken (as the Council must accept) without important environmental information being provided. It is now being justified after the event with no recognition of the fact that serious harm to a SSSI could be avoided through a more dispersed pattern of growth. The SA Addendum fails to include in the scoring an assessment of whether the proposal would be contrary to national policy; whether the proposal would directly harm a SSSI; and whether the proposal would require the provision of extensive ecological mitigation. If those relevant factors were taken into account, Lodge Hill would score very poorly indeed.

Matter 4 Is the "very positive" score given to the Lodge Hill option in relation to previously developed land justified?

No. That score should be far lower. This is a crucial point as it is one of the key drivers for concluding that Lodge Hill should be favoured over other sites.

a. How much of the development area meets the definition of previously developed land as set out in Annex 2 to the Framework?

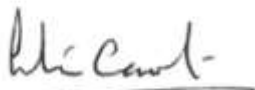
It is immediately apparent that very little of the site meets that definition. Most of the area has not been occupied by any permanent structure. The definition in Annex 2 makes clear that land lying within the curtilage of buildings should not be assumed to be suitable for development. This is plainly such a case where the land has an extraordinarily high environmental value, and therefore the presence is neither here nor there in the planning balance.

b. Should the scoring be tempered by the Framework's core planning principle that reusing previously developed land should be encouraged, provided that it is not of high environmental value?

Yes. Indeed, there is a substantial failure in the SA Addendum because it assumes that previously development land should be scored more highly than other land, without considering whether the land is of high environmental value. There is no presumption in favour of developing previously developed land which forms part of a SSSI. Indeed there is a presumption against such development. Accordingly the high scoring for this site in the SA and SA Addendum is fundamentally flawed.

We look forward to articulating these points in more detail on the 22nd May.

Yours sincerely



Peter Court
Director