

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

31st May 2013.

Dear Mr. Waters.

Medway Core Strategy: Closing Submission from hearings on 22/23 May

1. At the end of the Hearing on 23rd May, the Inspector offered the opportunity to those present to make written closing submissions. This statement has therefore been produced by Richard Turney, Dominic Woodfield and myself on behalf of our clients, McCulloch Homes, Rochester Bridgewood and Medway Sport and Leisure Parks Ltd. We have identified a series of key points, which are set out below.

The Council's intransigence

2. The Council's strategy was defined by Mr McCutcheon in his opening address on the morning of 22nd May when he said that Lodge Hill had been around since 1995 and that the Council was intent upon pursuing it, irrespective of the SEP. The fact of the situation is that the Council has maintained this determination to allocate this site – whatever the consequences and despite any changes in circumstances. The designation of the site as a SSSI has not led the Council to change course.
3. The Council's unwillingness to respond to the changing circumstances at Lodge Hill in a logical and policy-compliant manner is illustrated by their change of position over the environmental impacts of developing the site. Prior to the full significance of the nightingale population being recognised, and before the emergence of the SSSI issue, the Council openly aspired to avoid 'net loss' of biodiversity through a compensation package that, in accordance with Policy CS6 and the development brief pursuant to CS33, would need to be 'in place and functioning' prior to the commencement of development.
4. In response to the suggestion and then realisation of SSSI notification of the site over the past ten months, the Council has rapidly backed away from that commitment to now occupy a position where, as the Inspector heard, they now consider substantial net loss of biodiversity as acceptable for at least the duration of the plan period, and quite possibly permanently. Furthermore, they now only seek to secure paper commitments to compensation effort (a signed S106) before allowing development to commence. During this process of changing their stance



on the acceptability of net biodiversity loss they have left Policy CS6 and CS33 behind, such that both would now require revision to resolve conflicts between them (see below).

5. Flexibility in plan making allows for revisions to policy, but not where this leads to conflict with the NPPF, and in this instance it is difficult to see how the necessary revisions can be made without arriving at conflict with national policy in respect of the high level of protection afforded to SSSIs and the need to follow the avoid-mitigate-compensate hierarchy when dealing with significant impact on a nationally important biodiversity resource. Such considerations would apply even if the Council's case was accepted that the social and economic 'strands' of sustainable development were best served by development at Lodge Hill. We submit that the chosen location and timescales for this development make for an entirely flawed, and thereby unsound CS. It is plain that a better site or sites should be sought.

Compliance with NPPF Para 118

6. Medway's position is that the proposed allocation of Lodge Hill for 5000 houses is not in conflict with para 118 of the NPPF because that allows for development of SSSI land in exceptional circumstances. Those exceptional circumstances include overriding need and a lack of alternatives. We comment on each below:
 - 1) On the question of overriding need, the NPPF allows local authorities to under-provide against their "objectively assessed needs" where this would otherwise clearly conflict with the protection of nationally important sites such as SSSI (para 14). In these circumstances it would therefore be open to Medway Council to make a case that non-delivery of the development at Lodge Hill was justified in the face of that site's SSSI designation, and to be compliant with the NPPF in taking that position. The Council may not have been aware of that option, but it is clear from the hearings that they would eschew it in any event. The Council have approached this exercise with a closed mind.
 - 2) On the question of alternatives, the Inspector has now heard a good deal of evidence from several parties that these were not adequately considered even before the emergence of the SSSI designation. In any normal scenario, one would expect the emergence of the SSSI designation to be a 'game changer' that requires, at the least, a thorough and unbiased reassessment of both the favoured alternatives and back-up options at that stage, and also a re-appraisal of other reasonable alternatives to meeting the objectively assessed needs. This was plainly not done: all that was carried out was a superficial re-scoring of the five main options in a manner that the Council now appear to accept was simply erroneous in respect of key considerations such as loss of agricultural land, and which we contend was flawed throughout. Tracing other lines of assessment (e.g. transport) is made difficult by a lack of transparency: as demonstrated by Medway's list of multiple document references submitted to the Inspector in response to her questions on this topic, trying to understand the assessment

requires a 'paper chase' to be conducted in a manner found to be unlawful in other cases.

Internal inconsistency in the plan

7. Policies CS6 and CS33 are plainly in conflict. The first of these purports to protect natural assets, while the second proposes the development of 5000 dwellings on a SSSI. The statement by Mr. McCutcheon that there was no "essential conflict" between the two was beyond belief. The real problem is that both policies were drafted in ignorance of the SSSI status, and accordingly its inherent unsuitability for development, of Lodge Hill.
8. Minor modifications of CS33 and CS6 to insert an 'exception' clause, as appears to be proposed by Medway, would not resolve this, even if such modifications were acceptable on their own terms. Modification of CS6 to allow development on a SSSI would result in clear inconsistency with the NPPF, as well as setting a highly dangerous precedent that would, as the RSPB rightly said, undermine the protection of other statutory sites in the District. The "in place and functioning" requirement for compensation in CS6 would have to be stripped out to accommodate Medway's comprehensive change of position from not accepting 'net loss of biodiversity' to the current position where they merely favour a 'paper' commitment to attempted (not guaranteed) compensation that even if successful would not even begin to be realised until the development is at best near-complete. This cannot be the correct approach for a statutory SSSI of national biodiversity importance that forms part of the 'critical natural capital' integral to meeting the government's commitments to halting biodiversity loss. It also cannot be the legal approach for an authority charged with duties to protect and further the conservation of SSSIs under S28G of the Wildlife and Countryside Act.

Deliverability of Lodge Hill

9. It remains unclear as to when the Council expect the first dwellings to appear at Lodge Hill, despite the delivery rate at this site being critical to the housing trajectory. The statements by Mr. McCutcheon and Miss Mason in this regard were inconsistent and hard to believe. It cannot be expected that development will begin 24 months following the grant of outline permission, especially as no developer has acquired an interest in the site. The subsequent statement by Miss Mason that, over the five year period beginning in 2013, Lodge Hill will provide 900 dwellings and that, over the plan period, 3,900 units will be developed simply cannot be accepted. Indeed, the failure of the Council to provide an up to date housing land trajectory only adds to our strong suspicions about this matter. What is clear is that even on the Council's own figures, it will not have a five year housing land supply for another 3 years.

Sustainability appraisal

10. We have no confidence in the SA process and in its reporting for the reasons given at the hearing. The work from 2009 onwards can only possibly be read as having the sole purpose of justifying the allocation of Lodge Hill. There was no evidence of a proper cascade process or a proper assessment of alternatives. Indeed, and as the Inspector pointed out, no evidence was produced to show that a new settlement was necessary.
11. It was difficult to follow the Sustainability Assessment process from start to finish. Whilst accepting that the process is iterative, there was no comprehensive assessment. Indeed, several objectors described their attempts to analyse the assessment as a "paper chase." Despite this, there was a widespread feeling by objectors that the analysis of options had been inconsistent. Miss Carroll's response that the SA process was simply a method to inform decision-making, and did not constitute the only information that needed to be taken into account was both revealing and provided no basis for confidence in the work that had been undertaken
12. The SA Addendum is deeply flawed. The stance that Option 1 avoided the loss of the best and most versatile agricultural land was plainly wrong – and only begrudgingly acknowledged on the final morning of the Hearing. In assessing the impact of development at Lodge Hill, full account has been taken of the proposed mitigation measures, the details of which were provided in the outline planning application. This approach was not adopted when considering the impacts of other options.
13. In short, the SA process is legally flawed and accordingly the plan is unsound.

Previously developed land

14. The Council has sought to justify Lodge Hill on the basis that a substantial element of the site is PDL.
15. The Inspector heard varying assessments of the extent of PDL (as defined by Annex 2 of the NPPF) on the site, but what was clear is that the Council's weighting in favour of Lodge Hill has been skewed by inflated assumptions of the degree to which the development would be accommodated on PDL. Mr McCutcheon refuted the assertion that the Council's 2009 Issues and Options Paper assumed that all of the development would be accommodated on PDL, but the wording of paragraph 4.447 is clear. That incorrect assumption at an early stage in the plan making process can be traced unchallenged through the iterations of the Strategy and the Sustainability Appraisal.
16. It is now plain that the vast majority of the site is not PDL, having blended into the landscape in the manner described in NPPF Annex 2, but in any event the weighting attached to the presence of PDL would be incorrect because the NPPF

specifically excludes from the presumption in favour of development on PDL those sites that are of high environmental value. Lodge Hill is now notified as a SSSI and two of the three special interest features cited in that designation are associated with land claimed by the Council to be PDL. There can hardly be a more obvious example of land being of high environmental value, regardless of any debate as to the extent to which it has blended back into the landscape.

17. This point is of particular importance given that all the other options dismissed through the SA process were heavily scored down on the basis of the failure to use PDL, whilst Lodge Hill was heavily scored up on the basis of the demonstrably false PDL assumption.

Ecological impacts

18. Natural England, under no small amount of pressure (because of Lodge Hill's crucial role in the Core Strategy), have been satisfied that the site should be designated as having national conservation importance not just because of its (now undisputed) importance for nightingales, but also because of the habitat interests, and specifically the extensive representations of the scarce and declining lowland meadow habitat, here manifested as MG5 grassland. As others have said, the designated interest features represent only the cherry on top of the biodiversity cake, and there is still clearly much to discover about the site's high biodiversity importance. With all that said, it can only be the case that preservation in situ must be the first principle for a site of this high environmental value, and compensation equally has to be the last resort option. That approach accords with the 'avoid-mitigate-compensate' hierarchy that has long been a part of national planning policy and guidance on how high value biodiversity resources should be treated in both forward planning and development control. The Council's proposals seek to turn that hierarchy on its head.
19. However, even assuming that this blatant and unjustified breach of national planning policy is upheld, the compensation proposed is plainly deficient.
20. The Inspector has received extensive evidence as to the amount of compensatory habitat required, from around 350 ha up to 900 ha if the full suite of applicable 'risk multipliers' were used in the biodiversity offsetting calculations. She also heard the Council's position (via GGKM) that they were confident that appropriate sites could be found. The question has to be asked as to why more effort has not been expended by the Council in seeking to provide confidence of a reasonable prospect on this point. It seems likely that they fear the emergence of a ransom situation, however it is impossible to see how that fear would not become an unavoidable reality, and one that will count negatively against the viability of the Lodge Hill development once the costs of the compensation package are factored in. The Council have also failed to factor in the negative impacts of the compensation scheme into their SA process, leading for example to Lodge Hill being given a disproportionate positive weighting in terms of effect on agricultural land (the loss of due to the compensation requirement will outstrip any of the other options assessed

in the SA by some considerable margin if the current suite of favoured compensation 'sites' is considered). The socio-economic impacts of the compensation scheme on the delivery of other development sites or other local plans do not appear to have been considered, nor effects on landscape character, existing biodiversity resources and other factors.

21. Compensatory habitat will take many years to be "functioning". The effect is either a huge delay to the delivery of Lodge Hill, or a huge risk to biodiversity during the time lag. The Inspector heard from the Council that they did not expect any consequences for housing delivery arising from time lag because commencement and progression of the development will not wait for the compensation scheme. In other words the Council envisage destroying first and attempting to compensate afterwards. In taking this position the Council have at least (and at last) recognised that the issue of time-lag is unavoidable. But particularly given the SSSI status of the site, it is an approach that runs contrary to all applicable policy. The consequences would be net loss of biodiversity for the life of the Core Strategy, and possibly far beyond. We are not in a position to say whether the 'after the event' compensation strategy would have any prospect of eventual success.
22. It has been confirmed that there was no scope for changes to the masterplan to be effected to retain the MG5 unimproved grassland resource in situ. Compensatory provision offsite is therefore being proposed as a means to address the loss of this additional special interest feature from the SSSI notified land area. In their Hearing Statement the Council firstly disputed the presence of MG5 grassland at the site, and then took a position of saying that mitigation (through translocation) and/or compensation (through recreation) was straightforward - even to the point of suggesting that SSSI-quality MG5 grassland could be replicated by sowing a seed mix.
23. The Council heard the contrary position forwarded by Mr Woodfield and not challenged by either the Council's own expert, nor by Natural England, that in reality, translocations of SSSI quality grassland were both a rarity and uncertain in terms of prospects for success. In effect, the higher the quality of grassland, the more involved, well designed and expensive the process needs to be to have any prospect of success in terms of re-establishing something close to the donor plant community. But even then crucial aspects of the associated ecosystem (e.g. soil fauna) may be damaged or lost. Because of these uncertainties surrounding translocation as a mitigation or compensation tool, NE normally require a 'failsafe' package of backup habitat creation, or secured retention and enhancement of other MG5 resource over a larger area, over and above any agreed 'last resort' translocation package. This is the appropriate response to ensure no net loss of biodiversity and yet it would appear to be the Council's intention to sanction wholesale departure from this. Because the Council appear to be determined not to address the MG5 issue in any meaningful way, matters such as the additional compensatory land required, and the effects of this on delivery timescales and scheme viability over and above the similar ramifications in respect of the

nightingale issue, stand as additional serious uncertainties that undermine the soundness of the allocation.

A reality check

24. It is simply impossible to believe that any reasonable planning authority would come up with a Core Strategy which depended upon a 5000 unit new settlement located on a SSSI for its deliverability. The proposed allocation of land at Lodge Hill is plainly ridiculous. It is therefore requested that the Inspector now concludes that this Core Strategy is unsound.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Peter Court', with a horizontal line underneath.

Peter Court.
Director