

Popes Field What Next Briefing Report

Produced for Boxley Parish Council

Author Pauline Bowdery Parish Clerk.

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Contents

Introduction

Legal Situation

National Planning Policy Framework

Judicial Review

KCC Highways and Condition 19

Planning Appeal

Status of the "Local Nature Reserve"

Clerk's Summary

Clerk's Conclusion

Appendix 1 Clerk's notes concerning Maidstone Borough Council Meeting 25 April 2019

Appendix 2 (electronic enclosure) Appeal Decision APP/U2235/W/17/3187474 and APP/U2235/W/17/3188248.

Appendix 3 (electronic enclosure) Appeal Decision APP/U2235/W/17/3185916

Appendix 4 Explanation of Materiality and Weight

Introduction

The purpose of this report is to brief members on the situation and also put into context options that are open to the Parish Council and residents.

The Clerk has produced the report based on information publicly available at Maidstone Borough Council, at the parish office and on the internet.

The Clerk is considered competent by the Parish Council however members must consider whether she is sufficiently qualified to give all the advice.

Where the Clerk considers it helpful she has included best and worst case scenarios.

At the very least the production of this report will, if it is decided to go to Appeal, provide a briefing note for any person having to review the background.

Legal Situation

The Parish Council is empowered to undertake legal action where it considers it expedient for the promotion or protection of the interests of its inhabitants Local Government Act 1972 s222 (s111 is also relevant).

Representation

A local authority can authorise a solicitor or any member or officer (but no one else) to conduct proceedings on its behalf at a magistrate's court. A County Court may allow a corporation to appear before it otherwise than by a solicitor or by solicitor and counsel. Otherwise the rule that a corporation must appear by counsel in legal proceedings applies to local councils.¹

Clerk's note: Unusually a barrister may accept a brief from a Clerk of a local authority who is not a solicitor.

The Parish Council is empowered to appear at Public Local Inquiries and has the power to pay the expenses of witnesses.² Costs may also be awarded by the Inspector against the persons/organisations, including Local Authorities³

It is important that it is remembered that the following identification of the role of local authorities carry the full weight of legislation and Government expectation that the duties legally placed on the local authorities are carried out. Clerk's note: This is why much 'weight' is given, by the Planning Inspector, to any decision or reports received from the two bodies.

Maidstone Borough Council is the Local Planning Authority (LPA).

Kent County Council is the local Education Authority and Local Traffic Authority

Clerk's note. Purdah has been mentioned a number of times and it was of course the reason why the MBC Legal Officer recommended not hearing the two planning applications. The Clerk has been advised ⁴ that Purdah appears not to have any legal basis apart from what may have been created by Case Law, a quick investigation by the Clerk did not discover any relevant Court Case decisions that would mean this was an issue in this case. Purdah was never designed to stop the business of a Council and Cllr Clive English identified at the meeting that no councillors on the planning committee were being faced

¹ Charles Arnold Baker Local Council Administration page 208

² LGA 1972 s222(1)(b)

³ LGA 1972 s250

⁴ Kent Association of Local Councils

with elections. (Clerk's note I have not actually checked the accuracy of the Chairman's statement).

National Planning Policy Framework

NPPF 94 states that,

"It is important that a sufficient choice of school places is available to meet the needs of existing and new communities. Local planning authorities should take a proactive, positive and collaborative approach to meeting this requirement, and to development that will widen choice in education. They should:

a) give great weight to the need to create, expand or alter schools through the preparation of plans and decisions on applications"

The Government's 'Policy statement – planning for schools development' (2011) states that,

"There should be a presumption in favour of the development of state-funded schools, as expressed in the National Planning Policy Framework.

Local authorities should give full and thorough consideration to the importance of enabling the development of state-funded schools in their planning decisions."

NPPF 109 states that

"Development should only be prevented or refused on highway grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe". Clerk's note: NPPF 111 requires the production of a Travel Plan and this is a condition in the MBC permission.

JUDICIAL REVIEW (JR)

Deadline for application for a JR is six week from the decision date so 6 June. Subject to the actual date of the MBC decision letter which as at 30/04/2019 was not yet posted.

JR deals with the process of reaching a decision not the actual decision itself. So the investigation will review whether the correct decision process was followed, was it a fair and reasonable process. In this case the Wednesbury Court Case would be guidance for the judge.

*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1947] is an English law case which set down the standard of unreasonableness of public body decisions which render them liable to be quashed on judicial review. This special sense is accordingly known as **Wednesbury unreasonableness**.*

The definition arrived at for unreasonableness was a decision that was...

"So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

CPRE has an excellent explanation of what a judicial review is

<https://www.planninghelp.cpre.org.uk/improve-where-you-live/how-to-challenge-a-planning-decision/court-challenges>

The following are sections from that explanation which are of particular relevance.

judicial review provides the only opportunity for further action once a decision to approve development has been made by a local authority. However, it can only consider the lawfulness of a decision and test whether it was legally right or wrong. The best outcome is that a bad decision will be quashed and returned to the relevant authority who must then make a fresh decision. The same decision may be made by the LPA again as long as it is then made lawfully.

What are the issues involved in judicial review?

Any person or group may make an application for judicial review providing that they have sufficient interest or 'cause' in the matter. But Judicial review is not an easy option. It usually requires expert knowledge of the law and can incur considerable costs. Judicial review is considered a remedy of last resort and therefore you must show that there is no other alternative remedy.

If you are thinking of using judicial review to challenge a decision you should make yourself fully aware of the risks and uncertainties, and whether you are willing to take these in. In particular, there is a possibility of incurring substantial financial costs. At the outset you should also establish whether:

- you have adequate cause;*
- you have a provable case;*
- you are confident that the authority's decision was unlawful;*
- you are confident that the authority's decision did not follow the correct procedure; and*
- the decision was (i) irrational; (ii) violating human rights legislation; or (iii) contrary to European Union law.*

Judicial Review.

Best case scenario.

Review is undertaken and it forces MBC to revisit the decisions. MBC decisions changed so that planning permission is not given. Applicant appeals to Planning Inspector and MBC has to foot the Public Inquiry Bill.

Worst case scenario.

Parish Council pays for JR but either MBC is not required to revisit the decision or it is and the decision is still to permit the planning applications.

KCC HIGHWAYS AND CONDITION 19

The Clerk spoke to Brendan Wright (BW) KCC Highway Officer on 29 April about the removal of condition 19, dealing with highways works. At the meeting he told the Planning Committee that if Condition 19 was removed then KCC would have no option but to object on the grounds of child safety, this having been made clear in the KCC response to the planning application. He was asked to clarify what he actually meant and the Clerk received the following response.

BW stated that when KCC responded to the planning application it made it clear that if highway works were not provided then KCC would be "minded to object".

"it would be extremely unlikely that KCC would seek to challenge a LPA on this [the removal of Condition 19]." He did mention that Paul Carter had been receiving updates as he was very interested in the situation, the Clerk's impression was that as the KCC Highway Officer he would not be taking this forward as KCC "has never taken such steps before". However, the mention of Paul Carter seemed to indicate to the Clerk that his was ultimately not the final say.

He also said that the decision to leave out Condition 19 left KCC in a potentially difficult situation in that if the development went ahead and if issues arose it would be up to KCC to find the funding to do any remedial or improvement works.

Clerk's comment. Is it worth testing what County Councillor Paul Carter's position is on this?

PLANNING APPEAL

Material Planning reasons are the only aspect of the MBC decision that will be considered at a Planning Inspectorate Appeal. How a LPA got to the decision (the process) will not be considered at a Planning Appeal.

The Secretary of State can, even after a Planning Inspector's decision, recover a planning application and decide upon it himself; if necessary over ruling the Appeal decision.

<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00930>

The applicant or other 'interested' person/body can apply to the Secretary of State to have a decision reviewed. In this case request a 'call in'. In practice very few applications are called in, the ones that are normally relate to planning applications raising issues of national importance

"Applicants should give clear reasons why they think that the application should be called-in, including why it is of more than local importance".

Clerk's note: KentALC has been contacted with a copy of the MBC Committee Reports and advice is being sought from their Planning Advisor.

Any call-in appeal will require the Planning Inspector to weigh the needs for school places against the issue of sustainability (how the site is accessed by the users) so

presumption for schools vs sustainable development.

The Planning Inspector would consult other Appeal decisions.

Previous Planning Appeals, in Maidstone, concerning Schools

At the MBC meeting it was stated that the council had recently lost two school planning appeals (both Jubilee Free School Gatland House Gatland Road ME16 8PF) APP/U2235/W/17/3187474 and APP/U2235/W/17/3188248. (Appendix 2)

Mention was not made of the Stem School, New Cut Road which was also allowed at Appeal APP/U2235/W/17/3185916. This was taken to appeal by the applicant due to non-determination by MBC however there is, the Clerk considers, a significant difference between the STEM school decision notice and the Jubilee Free School decision.

The Secretary of State actually reviewed the decision of the Planning Inspectorate's decision regarding the STEM school and confirmed it was correct.

KCC's Education Department case was that there was an urgent need for school places to "meet a predicted shortfall of school places in Maidstone Borough. Without it, there is significant risk of the Education Authority being unable to fulfil its statutory obligations".

The Secretary of State's support for the Appeal Decision included the following

Planning balance and overall conclusion

13. For the reasons given above, the Secretary of State considers that the appeal scheme is in accordance with policies SP1 and DM20 and with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.

14. The Secretary of State considers that the loss of trees would cause harm to the area's character and appearance, and that this harm attracts moderate weight against the proposal. **He nevertheless considers that the need for the new school attracts significant weight in favour of the proposals, and that the proposed development's accordance with the development plan is not outweighed by other material considerations.** (bold is Clerk's emphasis)

Clerk's note. The main objections against this development were traffic, effects on the ecology, loss of trees etc. Neither MBC, KCC Education or Highways objected to the planning application.

Public Inquiry caused by request for a call-in

Clerk's note: The award for costs is normally considered if the Inspector feels that the case was not supported by relevant evidence, basically everyone's time has been wasted. If the S of S calls it in there may be no costs awarded, with each organisation having to bear its own costs. Advice would need to be sourced on this.

Best case scenario.

Appeal won and the Parish Council only has to meet its own cost, which with proper representation and professional expert support will be substantial.

Worst case scenario.

Appeal lost and costs granted against the Parish Council, costs that the Parish Council may not be able to cover.

Planning Inspectorate dilutes the MBC Planning Conditions.

Status of the "Local Nature Reserve"

At the request of Cllr Vic Davies an investigation was undertaken into the land referred to as the new Local Nature Reserve, the site upon which the schools are being built. In 2013 outline permission was given for

APPLICATION: MA/13/1163

DATE RECEIVED: 2 July 2013 DATE VALID: 2 July 2013

APPLICANT: Maidstone Medical Campus Ltd

PROPOSAL: Outline application for the development of a medical campus comprising up to 98,000sqm of additional floor space (including additional hospital facilities, clinics, consultation rooms and a rehabilitation centre (classes C2/D1); education and training facilities with residential accommodation (class C2/D1); key worker accommodation for nurses and doctors (class C3); pathology laboratories (class B1); business uses (class B1); ancillary retail services (class A1, A2, A3); and up to 116 class C2 neuro-rehabilitation accommodation units; internal roads and car parks, including car park for residents of Gidds Pond Cottages; hard and soft landscaping including creation of new woodland area with access for consideration and all other matters reserved for future consideration.

LOCATION: LAND SOUTH OF KENT INSTITUTE OF MEDICINE AND SURGERY, NEWNHAM PARK, MAIDSTONE, KENT

GRID REF: 578439, 156913

Clerk's note: Attention needs to be given to the wording on this application which was permitted ***including creation of new woodland area with access for consideration***[Clerk's emphasis].

In 2016 full planning permission was given and a Section 106 document was drawn up including a site plan with the area named as 'community woodland'. However, the Clerk has not been able to find any reference to any agreement about public access to the site. It should be pointed out that the MBC planning website is actually quite difficult to navigate in trying to track all the planning applications and the sheer number of applications for this site means that something may have been missed by the Clerk.

This site is in the Local Plan as a Landscaped Area and whilst Local Nature Reserve status can be recommended by MBC it has to either own the land or have the support of the landowner to do so. At the MBC meeting much criticism was aimed at previous poor management and action by the Planning Department due to not enforcing or having poorly written conditions and it would appear that the issue of access to the site was never bought up or legally resolved.

Clerk's Summary

I recognise that the following comments are not necessarily going to be popular or well received but it is the job of the Clerk/Responsible Financial Officer to point out issues and to keep members fully briefed so that their actions/decisions are rational, well informed and open and accountable.

It should be clear that the Clerk is attempting to clarify the many demands and statements being made about the issue by members and residents. If an issue is not covered in this document or below then members should ask for it/them to be added.

As far as the Clerk can discern there are three options open to the Parish Council and prior to taking a decision on options 1 and 2 members must identify exactly what outcome they want to achieve:

Options

- Judicial Review
- Secretary of State Call in
- Do nothing

It is clear from the many comments being received that there are many things residents and parish councillors want so a roundup of the most common sentiments are below with the Clerk's summary of the situation.

1. Get MBC to rerun the meeting and get the decision changed.

There is no guarantee that even if a Judicial Review was successful that a) it would require MBC rerun the meeting and b) if the meeting was rerun that there would be a different decision on both planning applications.

If MBC did choose to change its mind and go to Appeal then there is no guarantee that it would win and the schools would not be built. Potentially MBC could lose what it considers important conditions and could be faced with having costs awarded against it.

2. Ask for a Secretary of State Call In.

If this was successful it would result in an Appeal at which the applicant, MBC, KCC and possibly the Department of Education would be present. Should the Appeal go against the Parish Council or whatever body 'called in' the decision then that organisation could have costs awarded against it. Evidence from KCC Education Department concerning school places will carry significant weight with the Planning Inspector.

3. It's the principle and money shouldn't come into what the Parish Council decides to do.

A Parish Council like all public bodies has to act prudently with tax payers money and it has to act reasonably (see the Wednesbury Rule) and expenditure must be commensurate with gain. In her role as Clerk and Responsible Financial Officer the current Clerk would advise against the Parish Council committing funds to challenge a decision unless it has a clear 'provable' case, as the potential costs maybe beyond its ability to fund, especially if it went to appeal at the request of the Parish Council.

4. It's not fair and this was a decision taken before the meeting/members were predetermined on the second application/members of the Planning Committee were misadvised

The behaviour of Borough (and Parish) Councillors is subject to the Seven Principles of the Code of Conduct Selfishness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership.

If a parish councillor or member of the public feels that any of these principles were broken then they can go to the MBC to report the errant councillor/s. A Parish Council as a Corporate body cannot make a complaint that the Code of Conduct was broken.

MBC can be taken to the Local Ombudsman by a person, but not a corporate body.

MBC has a complaints system which has to be used before any complaint to the Local Ombudsman.

5. This is pure politics and someone should pay

The MBC Planning Committee is made up of elected members, however none of the Ward Members are on the Planning Committee. Residents have an elected Kent County Councillor and also elect their MP. Residents have every right to cast their votes as they wish and also a right to stand for election to any local authority, including Parish Councils.

6. The Parish Council would have a good case to get the decision overturned

Maidstone Borough Council is the Local Planning Authority and responsible for its Local Plan. It has the right, if it can show it is being reasonable, to ignore its Local Plan.

KCC Highway Department is responsible for Road Safety and it looks like it is not going to challenge the decision or the removal of Condition 19 .

KCC is the responsible Education Department and it has ruled that school places are needed.

The Department of Education has supported the provision of the Academy Schools, as has the MP.

Unless the Parish Council can come up with concrete and new evidence then the 5 bullet (renumbered) points from the CPRE website comes into play and members must ask themselves whether they

1. *have adequate cause;*
2. *have a provable case;* Clerk's note: Against what exactly? The decision may be unacceptable but what concrete facts and arguments have been identified?
3. *are confident that the authority's decision was unlawful;* Clerk's note. MBC has the legal power to make decisions on planning issues.
4. *are confident that the authority's decision did not follow the correct procedure;*
and
5. *the decision was (i) irrational; (ii) violating human rights legislation; or (iii) contrary to European Union law.*

Clerk's Conclusion

It is with great regret that I have to say that I cannot identify a solid case for the Parish Council to financially invest in challenging the MBC decision.

The Parish Council may wish to take advice on a possible Judicial Review, regarding the procedure, but if this is the decision it should identify a clear limit to the expenditure it is willing to commit.

The Clerk strongly advises against requesting a Secretary of State Call in unless it can clearly identify a 'provable' case for this and that it has also undertaken a risk assessment regarding cost for representation, possible costs awarded against it etc. Once an Appeal has started it can be very difficult to bring to a halt as this can only be at the discretion of the Planning Inspector.

APPENDIX 1

MBC PLANNING COMMITTEE MEETING 25 APRIL 2019.

Clerk's notes concerning Maidstone Borough Council Meeting 25 April 2019

Planning Applications 18/506656 and 18/506609

Borough Councillor Clive English, Chairman of the Planning Committee (PC) opened the discussion with an explanation of why he was thought that the Legal Officer's recommendation should not be followed. He spoke of the independence, from politics, of the PC and the need that its members took a decision on the two items at that meeting rather than defer them. He put forward a proposal that the committee should consider the planning applications.

Prior to taking a vote he allowed a committee member to make a comment. The member stated that it was a shame that the Legal Officer's recommendation had been put forward as he felt it had stopped many residents who may have planned to come to the meeting from attending.

The members voted to proceed with the two planning applications.

18/506656 Application for the two schools.

The Planning Officer gave a summary of the planning application.

The Chairman called for the speakers:

Mr Richard Coward Resident

Mrs Pauline Bowdery Parish Clerk on behalf of Boxley Parish Council

Cllr Fabienne Hughes Bearsted Parish Councillor

A speaker on behalf of the applicant.

Borough (and Parish) Councillor Bob Hinder

Borough (and Parish) Councillor Wendy Hinder

Cllr Mike Cuming Borough Councillor also speaking on behalf of Cllr Val Springett and Cllr Nick De-Wiggondene

Members of the Committee then debated the planning application it was not an easy debate with much frustration coming from members some of whom felt that their independence as a Local Planning Authority was being squashed/undermined by Government regulations. The following issues were raised:

- MBC had previously lost two similar applications at Appeal because the Government guidance that schools had to be built meant the Planning Inspector always decided for the schools.
- Decisions at Appeal nearly always meant that conditions negotiated or imposed by the LPA were not supported by the Planning Inspector and so the development went ahead with fewer mitigation measures. *Clerk's note: the two applications mentioned did not include the STEM school application. A statement was made that typically Planning Inspectors remove Planning Conditions, the experience of the Parish Council is that this sadly is a correct statement of fact.*
- Whether the decision to change the boundary of the education areas, made by KCC recently, was actually done for the right reason. Whether the North Education Area was actually a 'fair' area and were the boundaries actually correct.

- Whether the KCC Education Department should be challenged on its statements concerning school needs etc. Whether this application could be deferred to allow this challenge. *Clerk's note: The Chairman notified the member that as KCC was the Education Authority if the application went to Appeal then the Inspector would question by MBC thought it knew better*
Then the KCC Education Department which was the professional body. Unless MBC could come up with clear evidence of misinformation then the Planning Inspector would not consider this as evidence.
- Whether it was right for members of the Planning Committee to state/think that they had no choice but to allow the application because they would lose at Appeal.
- Whether the risk of losing mitigating conditions was worth the gamble, one many members felt they would lose, on an Appeal decision.
- The lack of KCC engagement at the Local Plan stage that meant that MBC was not asked to identify possible school sites.
- The need for school places.
- Better landscaping was needed.
- Whether condition 19 (Highway changes at and to the East of Gidds Pond Cottages) was needed as pupils would not be walked from Bearsted along Bearsted Road but would use the footpaths in the estates. *Clerk's note*: there was some suggestion that this be removed but the KCC Highway Officer said it could not be or KCC would have to object to the planning application. ~~This removal did not seem to be part of the final vote.~~ Amended 26 April 2019 this condition was removed. KCC Highway Officer contacted and has indicated that it will be extremely unlikely that KCC would seek to challenge A LPA, KCC has never taken such steps before.*
- The car park being insufficient and unable to cope with the traffic. *Clerk's note. The Planning Officer notified the committee that the applicant had offered, at the loss of some landscaping, an extra 6 spaces.* Strong statements were made by members, along the lines of this parking is inadequate and isn't going to work.
- Involving Ward Borough Councillors and Parish Councils in the discussions relating to the draft travel plan (Condition 18).

Officers were consulted at various stages during the debate.

Many members voiced that they were unhappy with the situation and felt that they had no choice

The vote was 7 for and 5 against, so the application was permitted.

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18/506609 Change of Use planning application.

The Planning Officer gave a summary of the planning application.

The Chairman called for the speakers:

Mr Keith Clark Resident

Cllr James Willmott Boxley Parish Councillor

Cllr Fabienne Hughes Bearsted Parish Councillor

Borough (and Parish) Councillor Bob Hinder also speaking on behalf of Cllr Wendy Hinder

Cllr Mike Cuming Borough Councillor also speaking on behalf of Cllr Val Springett and Cllr Nick De-Wiggondene

The Chairman tried to explain that failure to approve the planning application, as the schools had been permitted, could result in a loss at Appeal and no replacement site being identified. *Clerk's note: I'm not sure many of those sitting in the public section may have picked this up.* It was a very emotion introduction as the Chairman was extremely frustrated/angry that the situation had got to this and was insisting that this should never happen again.

Members of the Committee then debated the planning application and many expressed their frustration/anger that:

- The original condition supplying the LNR had been insufficient to ensure a) it was built and b) ownership remained with the landowner.
- Further conditions should be tighter requiring such sites to be developed as soon as other development work started.
- The Local Plan was being ignored.
- The site being offered was smaller and not compatible.
- It wasn't a gain but a net loss of biodiversity.
- Unless it came into public ownership the substituted NR land could be put forward for development in the future.
- The new site was tiny and had fragile habitats that would suffer from public use, dogs etc. and unsympathetic management. The suggested management plan, with mown areas and the site being open to the public, was totally unacceptable. *Clerk's note: the current site would not have been open to the public.*

Clerk's note: The Planning Officer was challenged about a statement that was made that the term Local Nature Reserve in the Local Plan didn't actually mean LNR and that MBC couldn't designate LNR.

Criticism of previous decisions made by MBC were strongly voiced and the issue is to be reported to an MBC committee for investigation.

Permitted subject to negotiations to get the land into MBC ownership so it can never be developed. *Clerk's note; might have been 8 for, 1 against and 2 abstentions.*

Clerk's note: MBC's decisions are now quasi legal, they will go ahead. There is no right of Appeal by objectors, the only course of action is a request to the Secretary of State that the decisions are called in but as the Secretary of State is the body demanding new schools be supported and built and as the schools application is supported by the Department of Education, KCC Education, KCC Highways, the local MP and the Local Planning Authority (MBC) then it is certain not to be successful. The Secretary of State rarely intervenes.

Appendix 4

Explanation of

Materiality and weight

These are **two of the most important concepts in planning** and it is very important that you understand them

Materiality: *whether – given the individual circumstances of a case - a matter is relevant to the planning decision on the development and use of land, and so should be taken into account as a material consideration in coming to a decision*

This is a matter of **law** and there is a huge amount of case law on it.

Weight: *the relative importance to be attached to a material consideration in coming to a decision*

This is an individual matter of **judgement for the decision maker** (who may be an elected councillor on a Planning Committee , a planning officer making a recommendation , the Secretary of State, or one of his Inspectors)

In exercising this judgement , **the decision maker must act reasonably** and the reasons for the decision should be clear and rational. (Planning authorities have been challenged in the courts for " acting perversely")

