

Our Ref: TAAC/SOL136-0739533  
 Your Ref:  
 14 December 2011

The Chief Executive  
 Basingstoke & Deane Borough Council  
 Civil Offices  
 London Road  
 Basingstoke  
 RG21 4AH

**By fax and post**

Dear Chief Executive

**Manydown Site (BAS098)**

Introduction

1. We act on behalf of Save Our Loddon Valley Environment ("SOLVE") and Country Watch. Please note our interest.

Details of the matter being challenged

2. On behalf of SOLVE and Country Watch we impugn the legality of the purported decision of the Council that Manydown is "*unavailable*" for consideration for housing development. We further impugn the legality of the Council's purported decision to exclude Manydown as an available site to be considered for allocation through the 2012 Core Strategy for future housing land supply, all the more so as Manydown was considered as a potential housing site throughout the Council's Strategic Housing Land and Availability Assessment exercise.
3. The Manydown site is agricultural land with some woodland and was identified as a potential Major Development Area by Hampshire County Council in its Structure Plan.
4. The Council's interest in the Manydown site (999 year lease) was purchased for the purpose of housing development. It was not purchased for the purpose of preventing the carrying out of housing development. In its decision making as landowner the Council was, and is, subject to the fiduciary duty owed to local taxpayers: for a recent decision where a local authority was held on grounds of breach of fiduciary duty to have acted unlawfully in exercising its property functions see *Charles Terence Estates Ltd v Cornwall Council* [2011] EWHC 2542 (QB).

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5. Notwithstanding that the Manydown site was purchased for housing development it was excluded from consideration for inclusion in the Council's 2012 Core Strategy for future housing land supply (which is to be subject to public consultation in 2012) on the ground that the Council as landowner had decided that the Manydown site was "*unavailable for development*". This purported decision was reported to the Cabinet on 17 October 2011 as a "*show stopper*". The said exclusion of Manydown is unlawful on at least the following grounds:

- (a) the Council has at no time decided that the Manydown site was "*unavailable for development*". The Council therefore unlawfully fettered its discretion and/or made a fundamental error of fact and/or failed to take into account a relevant consideration (that it was not debarred from considering the Manydown site on its merits) and/or took into account an irrelevant consideration in excluding the Manydown site from such consideration;
- (b) the Council has sought to overcome this difficulty by referring to two decisions. The first decision was a decision taken by the Council in 2006 to suspend for the time being the active promotion of the Manydown site for development. It is patent on the face of the minuted decision that the Council did not take a decision to declare the Manydown site "*unavailable for development*". It took a decision to suspend "*active promotion*" of the Manydown site for the time being and to consider Manydown as an option under the preparation of the Local Development Framework. The second decision was taken by the Manydown Executive Committee on 23 June 2009. That decision proposed changes to the Joint Development Partnership Agreement between the Council and Hampshire County Council. Again it is patent on the face of the minuted decision that the Manydown Executive Committee did not take a decision that the Manydown site was "*unavailable for development*". We reserve our position with regard to whether the Manydown Executive Committee had delegated authority to take the decision that it did take. Be that as it may, the Council misdirected itself in proceeding on the basis that it could not even consider the Manydown site for inclusion in the Council's 2012 Core Strategy for future housing land supply as a consequence of the said decision of the Manydown Executive Committee;
- (c) but further and in any event, even if the Council had decided in 2006 and/or 2009 that the Manydown site was "*unavailable for development*" the Council was and is under an obligation, in considering the sites to be included in its 2012 Core Strategy for future housing land supply, to reach decisions on their merits having regard to the situation as it exists in 2012 and to reconsider (in its capacity as landowner) the merits of earlier decisions which would otherwise (in the view of the Council) have precluded the consideration by the Council (in its capacity as local planning authority) on

objective criteria of which sites should be included in the Council's 2012 Core Strategy for future housing land supply. By refusing even to consider on an objective basis whether or not Manydown should be included in the Council's Core Strategy for future housing the Council unlawfully fettered its discretion and/or failed to take into account a relevant consideration and/or took into account an irrelevant consideration and/or reached a decision that was irrational. On any rational basis and on the consistent application of the methodology applied to other sites, Manydown would have been included in the 2012 Core Strategy approved for consultation;

- (d) the further suggestion by the Council that the 2006 decision with regard to the Manydown site "*binds all councillors*" and precludes the Manydown site being considered on its merits for inclusion in the Council's 2012 Core Strategy for future housing only has to be stated to demonstrate its fallacy. The 2006 decision was taken in the Council's capacity as landowner. That decision cannot constrain the Council in the exercise of its functions as Local Planning Authority. Moreover Councillors must discharge their functions in the public interest as they see it at the time that they are called upon to exercise discretion; the attempt by the Council to preclude objective consideration of the Manydown site involves an error of law and an unlawful fetter on the exercise by Councillors of their functions in the public interest;
- (e) in failing to promote the purpose for which the Council purchased an interest in Manydown and in purporting to take decision for the improper purpose of preventing appropriate consideration of the Manydown site for housing development the Council acted in breach of its duty to local taxpayers and unlawfully : cf the *Cornwall* case cited above following *Bromley London Borough Council v Great London Council* [1983] 1AC 768;
- (f) in purporting by the exercise of its property functions to fetter the exercise by the Council of its functions as local planning authority the Council also acted in breach of the principle established in *Padfield v Minister of Agriculture* [1968] AC 997 and subsequent cases.

6. It is symptomatic of the unlawful manner in which the Council has proceeded that at the meeting of the Planning and Infrastructure Overview and Scrutiny Committee held on 20 September 2011 the Chair and officers advised Members that they were not permitted to consider the Manydown site and that consideration of availability of the Manydown site was not for the Council as Local Planning Authority but was for the Economic, Prosperity and Performance Overview and Scrutiny Committee in its capacity as landowner. When the matter of Manydown came before the latter committee on 23 November 2011 members were given advice by a senior officer which was in direct contradiction to the advice given to members at the Planning and Infrastructure Overview and Scrutiny Committee held on 20

September 2011. The advice given on 23 November 2011 was that it was the Council acting as Local Planning Authority which had deemed Manydown not available, not the landowner!

7. The Cabinet did not in any event await the decision of the EPP Committee before taking a decision on 17 October 2011 approving "*the recommended sites and locations for development ... for allocation in the ... Core Strategy for future development*". The recommended sites and locations did not include the Manydown site which was not even considered for inclusion in the identified sites included in the 2012 Core Strategy.
8. The said decision of the Cabinet on 17 October 2011 is unlawful for the reasons given above. In our view it is unlawful for further reasons including predetermination (not just predisposition), the exercise of disciplinary powers to fetter and/or to attempt to fetter the exercise of discretion by individual members in planning matters, acting for an improper purpose and/or taking into account an irrelevant consideration. With a view to promoting an early settlement, we do not detail these matters here. The grounds of unlawfulness set out above should be sufficient to enable the Council to agree to the modest action which our clients invite the Council to take.
9. For completeness we mention that it appears to us there are further grounds of challenge which are available to the Manydown Trustees.
10. Against that background and, in our view, there is an overwhelming case that the Council has acted unlawfully in excluding the Manydown site from the sites to be included in the Council's 2012 Core Strategy for housing development land supply (for public consultation in 2012). On the application of any objective methodology and criteria the Manydown site would be included in the 2012 Core Strategy and has been excluded on grounds which, as we explain above, are not sustainable.

#### Details of action that you are expected to take

11. We therefore invite the Council to agree that Manydown be included in the 2012 Core Strategy for housing development land supply going to public consultation and to agree to review the position having regard to the results of public consultation and to the consistent application of objective methodology and criteria. No local planning authority acting reasonably and lawfully would do otherwise.
12. Pending your reply all rights are reserved including as to the commencement of judicial review proceedings.
13. Please ensure that this letter is seen by all the members of the Council prior to the Council meeting on 15 December 2011.

Details of prospective Claimants' legal advisers

14. DAC Beachcroft are the Claimants' legal advisers. Our contact details are given in this letter. Please contact Tony Child (100 Fetter Lane, London EC4A 6BN, tel: 0207 894 6633 [tchild@dacbeachcroft.com](mailto:tchild@dacbeachcroft.com)) or Frances Robinson (100 Fetter Lane, London EC4A 6BN, tel: 0207 894 6579, [frobinson@dacbeachcroft.com](mailto:frobinson@dacbeachcroft.com)).

Details of any interested parties

15. In the event that it is necessary to commence judicial review proceedings, Hampshire County Council and the Manydown Trustees will be interested parties.

Information requested

16. The Claimants seek, within the next 7 days, full disclosure of all correspondence (electronic or otherwise) passing between officers of the Council and/or Members of the Council relating to and/or leading to the inclusions/exclusion of the Manydown site from the Council's 2012 Core Strategy.

Protective costs order

17. In the event that it is necessary to make an application for judicial review, our clients will make an application for a protective costs order.

Address for reply

18. Please see paragraph 14 above.

Proposed reply date

19. Please reply within 7 days of the date of this letter.

We look forward to hearing from you.

Yours faithfully

*DAC Beachcroft LLP.*

**DAC Beachcroft LLP**