

FAO: Mr Martin Hall, Bidding Manager

Medway Council
Gun Wharf, Dock Road
Chatham, Kent
ME4 4TR

Direct Dial: 020 3780 0474

Email: RowanS@leighday.co.uk

Your Ref:

Our Ref: RWS/00265524/1

Date: 16 July 2020

First by email: martin.hall@medway.gov.uk

Copied to: Legal and Corporate Services
(chris.king@medway.gov.uk) Regeneration
(sunny.ee@medway.gov.uk;
dawn.hudd@medway.gov.uk) Director of Place
(richard.hicks@medway.gov.uk)

URGENT – RESPONSE REQUESTED WITHIN 7 DAYS

Dear Mr Hall,

Re: Grant Determination Agreement

1. We act for High Halstow Parish Council, (“**HHPC**”) and Hoo St Weburgh Parish Council (“**HSWPC**”). We write in connection with the proposed signing by Medway Council of a Grant Determination Agreement (“**GDA**”) with Homes England (“**HE**”). We understand the signing to be imminent. The GDA is an agreement to release funding to Medway Council from the Homes Infrastructure Fund (“**HIF**”), to allow it to pursue certain infrastructure development intended to support the development of new homes on the Hoo Peninsula.

Background

2. The Hoo Peninsula, within the area of Medway Council, is a largely rural area that contains significant areas protected by various designations recognising its high biodiversity value: Sites of Special Scientific Interest, Special Areas of

Leigh Day postbox@leighday.co.uk - www.leighday.co.uk

Priory House, 25 St John's Lane, London EC1M 4LB

T 0207 650 1200 - F 0207 253 4433

DX 53326 Clerkenwell

Central Park, Northampton Road, Manchester M40 5BP

T 0161 393 3600 - F 0207 253 4433

Conservation, Special Protection Areas and sites designated under the Ramsar Convention on Wetlands of International Importance.

3. In 2018, Medway Council undertook consultation on its emerging local plan, pursuant to Regulation 18 of the Town and Country Planning (Local Planning) (England) Regulations 2012. The emerging local plan identifies the need for additional housing in the areas of HHPC and HSWPC and proposes a number of high-level scenarios to deliver that new housing. Of these, Scenario 2 'Investment in Infrastructure to unlock growth' refers to significant upgrades to both the road and public transport networks serving the Hoo Peninsula, but stops well short of specifying which projects would be undertaken in order to deliver such a scenario.
4. The emerging local plan was subject to a Sustainability Appraisal, but given the broad nature of the proposals in the emerging plan, the appraisal is necessarily at a high level of generality. For instance, it does not present any quantitative analysis of the impact of the proposals on carbon emissions or on air quality. Indeed, in response to an FOI request by our clients, Medway Council itself has described the appraisal as:

initial high level work carried out on an interim Sustainability Appraisal and Habitats Regulation Assessment considering emerging development options and policies.

5. Medway Council submitted a bid for HIF funding in February 2019. The extent of the proposed increases to road capacity, and the level of detail to which the infrastructure proposals were developed to support the bid, may be seen in the

Report to Medway Council Cabinet on 5 February 2019 (“Housing Infrastructure Fund Bid – New Routes To Good Growth”), at paragraphs 4.7 to 4.15.

6. The detailed work to support the development of the bid was conducted without public consultation, and has not been made available to our clients, despite their request to see it.
7. Furthermore, the extent of environmental appraisal carried out in relation to the bid proposals (if any), is unclear to our clients. In response to an FOI request from our clients (Your reference: MFOI012254), Medway Council refused to disclose information to our clients about whether any ‘environmental impact or sustainability assessment of the specific proposals for development on the Hoo Peninsula as proposed in the HIF bid’ has been carried out. It also refused to confirm whether it had considered the effect of the proposed infrastructure on emissions of carbon and on climate change, or taken into account the UK Government’s commitments under the UN Paris Agreement.
8. While our clients have been informed that a ‘Cumulative Environmental Impact Assessment’ has been or is being undertaken, it is wholly unclear what such an exercise entails, or what the results of it have been. Our clients understand, however, that such an exercise does not purport to fulfil the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”), not least because no public consultation has taken place in relation to the assessment.
9. On 1 November 2019, Homes England informed Medway that their bid had been in principle successful, subject to the signing of a GDA. Although Medway Council have provided our clients with little information about the nature of the GDA or the commitments it contains, they understand that it is a “legally binding

agreement” that contains a number of pre- and post-commencement terms and conditions upon which specific amounts of the HIF funding will be advanced to Medway Council by HE in relation to the outputs and interventions set out in the GDA.

10. Meanwhile, HHPC has established a Neighbourhood Forum which is currently preparing a Neighbourhood Plan for the Parish of High Halstow, under the provisions of the Localism Act 2011. Once adopted this would form part of the statutory development plan for the Medway area. HSWPC is also preparing a neighbourhood plan.

Our clients’ concerns about the signing of the GDA

11. In light of the background outlined above, our clients have serious concerns that the by signing the GDA, Medway Council will enter into binding commitments to deliver specific infrastructure projects, thereby (i) foreclosing public debate about potential alternatives that might have been adopted either in the Medway Local Plan or in the Neighbourhood Plans that our clients are developing for their areas; and (ii) constraining the consideration of alternatives during the process of obtaining planning consent for the funded proposals.
12. Such an outcome would, in our view, be unlawful, for reasons that include, but are not limited to, the following:
 - a. Failure to consult: it is axiomatic that to be lawful, consultation must take place at a time when the proposal is still at a formative stage. Moreover, sufficient information must be provided to allow for intelligent consideration and response. At present, it seems that Medway Council expects that the 2018 consultation on the emerging Local Plan will be supplemented by consultation on the draft Local Plan in 2020. However,

this would not amount to lawful consultation, in circumstances where at the first stage, the options and proposals were still at an extremely high level (so as not to permit of a properly informed response); but, conversely, by the second stage the proposals will have become commitments which Medway Council is bound to deliver (and so are no longer at a formative stage). In short, the crucial phase during which the public ought to have had input – namely the bid preparation phase when the proposals were being developed in substance – has been conducted in total secrecy, without any consultation, let alone adequate consultation. The lack of consultation has been exacerbated by the refusal of Medway Council to supply information in response to our clients' FOI requests.

- b. Constraining the development of our clients' neighbourhood plan: the pre-determination of schemes that would have implications for land use in the areas of HHPC and HSWPC, without consultation with either HHPC or HSWPC, would obstruct our clients in carrying out their functions in relation to Neighbourhood Planning under the Localism Act 2011.
- c. Failure to carry out adequate environmental appraisal: it is unclear what, if any, environmental assessment has been carried out on the proposals contained in the HIF bid. In the absence of proper Strategic Environmental Assessment, or of appropriate assessment pursuant to the Conservation of Habitats and Species Regulations 2017, our clients have no confidence that the impact of the funded projects on climate change and commitments to mitigate climate change, such as those contained in the Paris Agreement; air quality; or biodiversity (among other things) have been properly considered.

13. The purpose of this letter is therefore to seek assurances from you that by signing the GDA, Medway Council will not be committing itself to the projects specified in it, in such a way as to foreclose the options presented for public consultation on the Medway Local Plan, or to in any way influence the consideration of the merits of the proposals or their environmental impacts at the stage of planning consent.

14. Accordingly, we ask you to confirm that the signing of the GDA will be without prejudice to:
 - a. The process of developing the Medway Local Plan, including, in particular, that Medway Council will not treat the fact of the GDA, or any aspect of it or matter flowing from it, as being relevant to (let alone supportive of) any or all proposals for development within that Local Plan process (nor will the Council promote or countenance such an approach by anyone else);

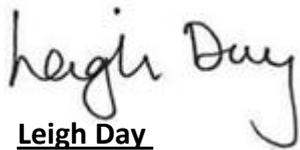
 - b. The processes of developing the HHPC and HSWPC Neighbourhood Plans; and

 - c. The considerations that will be relevant at the stage of obtaining planning consent for the funded schemes, including the consideration of alternatives.

15. If you are unable to give these assurances in full then please explain exactly what limitations there are on your assurances and exactly the basis on which you consider those limitations to arise or to be lawful.

16. Furthermore, we seek Medway's undertaking (i) not to sign the GDA unless or until you have given the assurances sought herein and/or (ii) to notify our clients immediately if or when you do sign the GDA.
17. Depending on your response and your actions in relation to signing the GDA, our clients may, if so advised, notify you of their intention to bring judicial review proceedings against Medway Council.
18. Given the urgency of this matter, please respond within 7 days of the date of this letter. Please send your response to Rowan Smith, solicitor with conduct of this matter, using the contact details in our letterhead. Due to the nature of this letter, we have sent a copy to Medway Council's Legal and Corporate Services team.

Yours faithfully,


Leigh Day