

02 August 2014

Dear Uttlesford District Councillor,

Re: Legal advice with respect to Kier appeal for 300 homes on east of Saffron Walden

This is an open letter to UDC Councillors about the upcoming closed-doors (Part II) Full Council meeting on 5th August. During the meeting you will review and discuss legal advice obtained by the Council with regard to the proposed Kier development of 300 new houses on the east of Saffron Walden. It is likely that you will then be asked to vote on a motion not to defend the appeal.

The points we wish to make in this letter are:

- **The legal advice is weak and unsound:** It is likely that the legal advice that you will be presented with will not be factually correct and will be legally weak; the application is not for an adopted Local Plan site, it is highly unlikely that UDC would have to pay costs, and it would be unprecedented for New Homes Bonus or Section-106 obligations to be wiped out;
- **Incomplete and unverified legal advice:** The legal advice has not been independently verified or subject to peer review, multiple opinions have not been sought, and the risks have not been quantified for you. You have little basis on which to make a decision not to defend the appeal;
- **Strong, defensible case for refusal:** There is a strong case to refuse this application because it was refused on many sound and highly defensible grounds, including direct and specific advice from DEFRA about Saffron Walden ;
- **Defending the appeal is the correct decision:** The public expects UDC to defend the decisions it takes for the right reasons, not just through the fear of spending money, especially when UDC is sitting on a surplus;
- **Permanent undermining the of the Planning Committee:** If at the closed-door/Part II meeting you take the highly irregular step to decide that the Council should not fight this appeal, you will be undermining the legitimate and independent operation of the Planning Committee. By overriding their decision, you will make the Planning Committee unable to operate in an independent basis in the future, which it is required to do;
- **Cynical manipulation of democratic process:** This Part II meeting, and likely motion not to fight the Kier appeal, are part of a cynical manipulation of the due-and-proper process of the Council by a few. There is little legitimate reason to hold the debate and any vote under the cloak of a Part II (closed-door) meeting apart from to hide the whole process from the tax-paying public. You are urged not to be coerced or complicit in this.

The appeal and legal opinion

On Tuesday 5th August at your Full Council meeting, the UDC leadership will discuss a legal opinion regarding the appeal by Kier for their application ([UTT/13/2060/OP](#)) to build 300 houses on land to the inaccessible east of Saffron Walden. We would not be surprised that, in a nutshell, the legal opinion will say that *UDC shouldn't fight the appeal because the Kier site is a Local Plan site, and so the Inspector is likely to find for the developer, cost may be awarded against UDC, and that UDC will*

lose any New Homes Bonus and Section-106 benefits. These arguments are not factually correct, are unsound, and the legal advice is weak.

If this meeting goes along the similar lines to the recent one for the Elsenham Fairfield appeal, a Cabinet Member or Deputy will then raise a motion that the Council should not fight the appeal on these grounds. And there will probably be pressure from both the Member and Officer leadership applied to support any motion. This is not a party political issue and Councillors should vote based on what is the right thing to do, what they are expect to do by their constituents, and what they would do if the same thing were to arise for a similar appeal for 300 unsustainable homes in their Ward.

This is primarily about an unsuitable application for which the UDC Planning Committee made the correct planning decision, and secondarily about an attempt by a few people to corrupt the proper and transparent processes of local government.

It seems that this is a political attempt behind closed doors to manipulate Councillors to make a decision that breaches local and national policies, completely undermines the independence of the Planning Committee, and is against the wishes of the people that elected you.

The UDC Planning Committee refusal is sound and highly defensible

Kier's application was refused at the Planning Committee meeting of 30th April this year. It was refused on wholly legitimate and defensible grounds, namely that it would breach policies S1, S7, ENV3, ENV5, ENV13 and would be contrary to the NPPF, including paragraphs 30, 34, 35, 58, 69, 72, 109. It was also refused on direct guidance for Saffron Walden from DEFRA that specifically advised UDC to refuse applications that made the already illegal air quality in Saffron Walden worse, as this application would, or it would pass on fines to UDC. The application was found to be significantly unsustainable.

There were a number of red-herrings thrown into the debate, including donation of land for sports facilities and an eastern link road. The sports provision is a side show designed to deflect from the core issue. The eastern link road doesn't mitigate the sustainability, traffic and pollution impacts of the application because it just moves traffic around the east of the town. This proposed road does nothing to solve the east-west problem, and in fact ECC state that this link road will actually increase pollution inside the Air Quality Management Area in certain parts of the town (against DEFRA guidance). Additionally the delivery of this road is outside of the control of Kier and also non-deliverable because the landowner doesn't want it on their farmland.

At the UDC Planning Committee meeting, the application was refused by a majority of Members; it would have been an almost unanimous refusal without the votes of the Cabinet Members and their Deputies, who should not be considered impartial because the site is part of their draft Local Plan allocation. The application was also opposed by the Saffron Walden Town Council and many members of the public.

The Kier application is in the wrong place and the infrastructure required to mitigate the issues make the proposed application unviable. The Planning Committee found it unsustainable because it is unsustainable.

Weak and unsound advice

With regard to the specific legal advice you are likely to receive, in summary it will probably say:

1. **“It is a Local Plan site so you can’t refuse it”**. The site is not a “Local Plan site” as you will likely be guided. The site is part of the **draft** Local Plan, but this draft Local Plan has only just been sent to the Inspector for review and so **legally carries little or no weight** in the consideration at this time. The site allocation in the draft Local Plan is wholly dependent on the suggested eastern link road, which it is clear is not going to be built and, even if it were, doesn’t solve the traffic and pollution issues; and the draft Local Plan itself is very likely to be rejected by the Inspector, despite the claims by Cabinet and Officer leadership. The currently adopted Local Plan, by which the application should be considered, says that the site is specifically protected against development. The adopted Local Plan does carry legal weight. Our legal advice is that you should be guided by that, not the draft Local Plan.
2. **“The Kier application is part of the Local Plan [sic]”**. There is a difference between “site” and “application”. Even if the “site” were considered to be acceptable in the currently adopted Local Plan (which is isn’t), a specific application for that site isn’t part of any Local Plan, draft or otherwise, because there are many different applications that can be presented for a specific site. Each individual planning application for a site needs to be decided on its own merits. The Planning Committee rightly found that this particular 300-house application by Kier to be unsustainable for all the reasons listed above. Given previous advice, the legal advice you will be presented with is likely to intentionally blur the lines between “site” and “application”. The fact of the matter is that this specific application has been found unsustainable. You should not be fooled into pulling out of this appeal by this “site vs. application” sleight of hand.
3. **“UDC shouldn’t fight the appeal because UDC may be awarded costs if they lose”**. This is a spurious risk argument. It makes the assumption that (1) the Council will lose and (2) that the Council’s position is weak and so costs would be awarded. It isn’t; this application has been found unsuitable for many sound and legitimate and defensible reasons. The evidence shows that the UDC Planning Committee considers the merits of each application in reaching their decision – i.e. they don’t turn down most applications, only the worst, and this is one of the worst. There are unsurmountable issues with regard to this application that, on our legal advice, would stand up at a hearing. Because the reasons for refusal are numerous and sound, it is highly unlikely that a Planning Inspector would award costs even in the event of Kier winning the appeal. In any case, does the future of the District come down to only how much it costs to plan it properly? The public expects UDC to defend the decisions it takes for the right reasons, not just through the fear of spending money, especially when UDC is sitting on a large cash surplus.

4. **“If UDC loses the appeal it will lose New Homes Bonus and any Section-106 benefits”.**

Again this is a spurious risk argument designed to worry you into a poor decision. Whilst the national government has threatened this type of action for New Homes Bonus, they have never enacted this change in policy let alone implemented it (and would be unlikely to do so in an election year anyway). If in the slim likelihood that they did, it would be a poor decision by the Council to prioritise proper planning as part of a cash-grab. Again, voters expect UDC to plan properly and defend the decisions it takes. With regard to Section-106, it would also be highly irregular and unprecedented for a Planning Inspector to allow any high-level obligations to be waived – again it is very unlikely to happen. You may also be guided that the sports benefits are significant and no risk should be taken to lose them. Any discussion about sports provision is a side-show and designed to distract you from the core of the issue – this application is unsuitable, unsustainable, and breaches many policies.

Unverified legal advice

Any unprecedented decision to override the Planning Committee’s decision by voting not to fight the appeal would need to be taken on very solid legal advice.

Has the legal advice presented to you been subjected to independent legal peer review? Have you been furnished with the findings of any independent peer review? Have multiple law firms been asked to provide similar advice so you can compare? What were the frames-of-reference that were provided when the opinion was sought?

Unless all of this has happened, and without the verification of further opinions or independent scrutiny, it is very difficult for the Council to take the significant and unprecedented step to not defend this appeal.

Unquantified risks

The opinions that will be presented about the risks of fighting the appeal have not been qualified or quantified for you. How big are the individual risks both in terms of likelihood and impact? How have they been calculated and on which real cases have they been based? What is the cumulative effect? What are the risk mitigation options you have been offered? And if you decide not to defend the appeal, would the Inspector award costs against UDC for wasting their and Kier’s time? The detail you will be given about the risks wouldn’t pass muster in a private-sector company, so unless they are qualified against real and directly relevant cases, it is just a list of risks, and they should be considered as unlikely.

The reality is that the Cabinet must know that the draft Local Plan is likely to be rejected and so they appear bent on ensuring that applications for as many of their own preferred sites are approved outside the proper process and regardless of their suitability or sustainability. By attempting to clear the way for the Kier application in this way, the Cabinet are making you complicit in these activities.

Lack of transparency

The UDC leadership has decided to hold the discussion of the Kier appeal as a behind-closed-doors (Part II) agenda item. Clearly the Council or residents would not want to give undue advantage to the appellant, but Kier already know all the arguments. By barring the public, the Council leadership is denying the proper and correct scrutiny of the advice it gets from consultants that are paid for by the taxpayer.

Additionally it is not clear why the whole item should be Part II. Even if the advice was client-attorney privileged, there is no legitimate procedural or legal reason that any debate, motions raised and voting about it should not be held in public. Your electorate expect the workings of the Council to be transparent and for you to make decisions on valid advice that can be held up to scrutiny. By applying secret meeting, Part II status to the debate and any motions, you are (once again) demonstrating to the voting and Council Tax paying public that the current Council doesn't care about their opinions and wants to push through its own agenda, at any democratic cost. I'm sure that's not why you got into local politics.

Riding roughshod over proper procedures

But there are also bigger issues at stake and they relate to corruption of process, lack of democracy and weak accountability to the public. If you take the highly irregular step to decide that the Council should not fight this appeal, you will be undermining the legitimate and independent operation of the Planning Committee. By overriding their decision, you will make the Committee unable to operate on an independent basis in the future. Its Members are already complaining about coming under completely improper pressure to "vote the right way" – and its impartiality has already been called into question because, unusually, its composition includes Cabinet and Deputy Members. By overriding the Committee now, you will in effect be giving the green light to a small number of Cabinet and Officer leaders to meddle when they don't like the democratic outcome. You have seen this with the poor way the Elsenham Fairfield application was repeatedly taken to the Planning Committee and when they didn't get the answer they wanted, it was pushed through a similar "legal advice" stunt.

The voters of Uttlesford wish for a transparent Council that is run for the benefit of the people, not for the very few that pull the strings. That is not why they elected you and it's probably not why you stood for public service in the first place.

Please see through the "advice" you are being given on Tuesday and the motivation behind it for what it is, and make sure that UDC backs the Planning Committee in its sound and legitimate refusal of this application. UDC should fight this appeal.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Dan Starr', is written over a light blue horizontal line.

Dan Starr
Chair, WeAreResidents.org