

**Borough Green Bypass - Lawful Development Certificate**

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A report by Head of Planning Applications Group to Planning Applications Committee on 11 September 2007.

**Summary** – Notification of Legal Challenge to Lawful Development Certificate for Borough Green Bypass – TM/07/587

**Recommendation:** for information

Local Member: Mrs V Dagger

Unrestricted

1. This report relates to a Lawful Development Certificate (LDC) which is a matter delegated to officers set down in the Written Constitution of the Kent County Council under Appendix 2 part (3) " Functions delegated by the Council to officers ", and was first reported to the Planning Applications Committee on 19 June 2007 (Item E1).
2. In March 2007, H + H Celcon Limited submitted an application to the County Council for a Certificate of Lawful Proposed Use or Development in relation to the completion of the Borough Green Bypass and implementation of the roundabout access into the Celcon site at Ightham Sandpit, Borough Green Road, Ightham. A Certificate was issued on 11<sup>th</sup> May 2007. The Certificate was sought to assist the applicant and the Planning Inspectorate at the planning inquiry into the recovered application for the development of a second factory and associated works at the site.
3. Members may recall that it considered the Celcon factory application in May 2006. The Committee resolved that *very special circumstances* existed to override the presumption against such inappropriate development in the Metropolitan Green Belt and Area of Outstanding Natural Beauty, and that the application be referred to the Secretary of State as a departure to the development plan and, subject to her giving no direction to the contrary, permission be granted subject to
  - a) Prior completion of a legal agreement to make provision for Celcon funding and in conjunction with CEMEX, making land available to enable completion of the Borough Green and Platt bypass prior to the opening of the new factory; improvement works to the White Hill roundabout; various improvements on the A227 to improve road safety at Wrotham School, traffic calming measures on the A25 between Dark Hill Roundabout and the A25/A20; and Celcon meeting KCC's reasonable legal costs associated with the agreement;
  - b) Celcon providing further details to address outstanding matters including landscaping, ecology, groundwater and noise; and the
  - c) Imposition of appropriate conditions

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4. The factory application was made subject to decision making by the Secretary of State following the referral, and an inquiry for the factory proposal commenced in May 2007.
5. In July 2007, the County Council received notice that Keep Boroughs Green, a local amenity group, was seeking to judicially review the decision to issue the Lawful Development Certificate.
6. The decision to issue the Certificate was based upon the collective assumption within the County Council going back to the early 1990s that the bypass was lawfully implemented by the construction of the railway bridge and section of the road in 1992. This view has been consistently stated by senior officers and Members over the years and was the stance taken by the former Head of Planning Applications in the officer report to Planning Applications Committee in May 2006 that considered the merits of H+H Celcon's application for a second factory at its Ightham site. It also reflects widely established planning practice across the country that the commencement of development on site implements planning permission. The decision to issue the Certificate was taken following Legal advice.
7. Following receipt of the judicial review application, Counsel's advice was sought and an internal review of the basis upon which the Certificate was issued was undertaken. Whilst the burden of proof for LDC applications rests with the applicant, Counsel advised that there was insufficient evidence within the application upon which the Certificate could have been issued by KCC. The Certificate decision was therefore vulnerable to the legal challenge. The vulnerability arose due to lack of evidence within the application that all conditions on the bypass permission had been satisfied and no ready explanation for this in the application. In light of Counsel's advice, a decision was taken not to contest the judicial review, following which Celcon formally withdrew their application.
8. It is important to note that the quashing of the LDC is not a determination that there is no extant planning permission for the uncompleted sections of the bypass.
9. Counsel also advised that the legal challenge did not alter the Council's position at the Planning Inquiry for the factory proposal. Support for the factory proposal in relation to the bypass was given by this Committee on the basis that permission would be subject to a '*Grampian*' style condition ( i.e. a condition requiring certain works to have taken place, which in this particular case related to the completion of the bypass ) preventing any export of materials from the new blockworks until the Bypass was fully constructed and open to traffic. This was to be supported by a section 106 legal agreement relating to funding and land provision as set out in para. 3 above.
10. The factory (and the bypass) would only have been built had Celcon been successful at the planning inquiry. If successful, the permission was expected to have had a '*Grampian*' style condition and a supporting legal agreement regarding the pre-provision of the bypass. The consequence of the legal challenge introduced a further planning process for the bypass which may or may not have affected timescales, but it did not undermine the principle behind the justification for the

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factory application. In drawing this conclusion, it is of note that the provision of the bypass remains a firm element within the Development Plan and with the lead-in time for ground remediation and translocation of species relating to the factory proposal, any net delay to the overall timescale would be minimal.

11. The County Council issued a Position Statement to the Planning Inquiry for the factory proposal in August 2007, in order to assist the Inspector at the Inquiry in light of the legal challenge to the LDC and Celcon's decision to withdraw the planning application. A copy of the Council's Position Statement is attached at Appendix 1. The Council's Position Statement included a commitment to promote a fresh planning application for the balance of the bypass, and to fund such an application, should such an application be necessary.

#### **Recommendation**

12. Members are asked to note this report.

Case Officer: Sharon Thompson
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APPENDIX 1

**POSITION STATEMENT**

**Kent County Council Position Statement to Present to Planning Inquiry  
In Respect of Planning Inquiry for Application TM/03/2563  
(Appeal Reference APP/W2275/V/06/1199658)  
Development of Factory and Associated Works, Ightham Sandpit,  
Borough Green Road, Ightham**

This statement has been prepared to assist the Inspector at the Inquiry into the recovered application for the above proposal, in light of the recent legal challenge to the County Council's decision to issue a Certificate of Lawful Proposed Use or Development ("the Certificate") for the Borough Green Bypass and the Applicant's letter of 30<sup>th</sup> July 2007 withdrawing the planning application.

**Implications of the Judicial Review Process**

Following an intimation of a legal challenge to the Certificate issued on 11<sup>th</sup> May 2007, the County Council gave further consideration to the substantial planning history and documentation existing and available to the County Council when issuing the Certificate. It further examined the contents of the application which sought the issue of the Certificate and had further regard to Circular 10/97/1997 "Enforcing Planning Control", more particularly to Annex 8 thereof.

Following this re-consideration and review of the basis upon which the Certificate was issued, the County Council concluded that there was insufficient evidence upon which the Certificate could have been issued. It therefore did not contest the application for judicial review.

It is important to note that the quashing of the Certificate is not a determination that there is no extant planning permission for the uncompleted section of the Bypass. That is not the purpose of the LDC process. This is a persistent misunderstanding which appears to have recurred throughout correspondence on the issue. A refusal to issue such a certificate is not a determination that no planning permission exists for a particular development. It is a determination that the applicant for such a Certificate has not provided sufficient evidence to allow such a certificate to be issued.

It was open to the Applicant ("Celcon") to seek a fresh determination on the available evidence or make a further application for such a certificate on a similar or modified basis.

The burden of proof on such an application remains with Celcon and would be determined on the merits and on the evidence presented to the County Council. There may be further evidence presented on any future application in addition to that currently available to the County Council.

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**APPENDIX 1**

**The Position of the County Council**

Clarification has been sought to assist the Inquiry as to whether this consideration altered the County Council's position at the Inquiry. The County Council's position is that it does not.

Support for the factory proposal in relation to the Bypass was resolved in May 2006 and given on the conditional basis that permission would be subject to a 'Grampian' condition requiring the provision of the Bypass. This was to be supported by a section 106 agreement relating to funding and land provision. This position was set out in the Rule 6 statement of the County Council for the Inquiry. **This position has not changed.**

The factory (and the Bypass) would only have been built had Celcon been successful as a consequence of the Inquiry. If successful, the permission was expected to have had a 'Grampian' style condition and the supporting section 106 agreement regarding the pre-provision of the Bypass. The consequences of the judicial review would have been to introduce a further planning process for the Bypass which may have affected the timescale, but it does not undermine the principle behind the justification for the factory application. Indeed, with the delay to any development necessitated by the ground remediation and translocation of the protected site species, any net delay to the overall timetable would be minimal.

It was understood initially by the County Council that Celcon would be content with a "remedial" proposal whereby the County Council would promote and fund any additional application for planning permission that would be necessary for planning permission for the remaining section of the Bypass to be achieved.

**The County is and remains willing and able to promote a fresh planning application for the balance of the Bypass, and to fund such an application in full, should such an application be necessary.** The Council would agree to a clause within the section 106 agreement (in the event that the LDC is quashed) covenanting the County Council to submit such a new planning application for the remainder of the Bypass.

The provision of the Bypass remains a firm element within the Development Plan and any application would be likely to be determined in accordance with the principles in section 38(6) of the Planning and Compulsory Purchase Act 2004. The road scheme remains a policy commitment in the Kent and Medway Structure Plan 2006 (to be secured by developer funding) and is also safeguarded in the Tonbridge and Malling Borough Local Plan. It should be noted that the objections to the construction of the Bypass *per se* were not a central issue at the Inquiry. On current evidence and planning policy, the Secretary of State would have been able to arrive at a robust conclusion on whether any application for planning permission for the balance of the Bypass would be likely to be granted.

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**APPENDIX 1**

It is the County Council's view that the position before the Inquiry was for all practical purposes largely unchanged by the judicial review process and that the withdrawal of the application on this basis alone is regrettable.

*P.P.* *Leigh Herington*  
Leigh Herington  
County Planning Officer  
Kent County Council  
6<sup>th</sup> August 2007