The Kent Environment and Community Network

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Economic Commission for Europe
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Dear Ms Smagadi

Re: Communication 45-KECN Response to Defra's answers to questions from the ACCC and KECN response to Defra's further submission on LIPs

Please find below KECN's response to Defra's answers to the questions from the ACCC, arising from the hearing, on the 27th June 2012 and our response to Defra's further submissions on LIPs.

Question 1- Please provide a short description (as explained at the hearing) of the procedure available at the Secretary of State and the Independent Inspector and how they are related.

1. KECN's point is that under Article 6 there has to be the opportunity for effective participation at all the various stages. The opportunity to participate when the developer appeals against a refusal of permission is of no relevance or value if permission is granted. Third parties have no rights of appeal by way of PINS or the Secretary of State. The fact that a third party can submit evidence to an appeal lodged by an applicant for planning permission is not the issue. The issue is that aggrieved third parties have only one possible way of appealing an Article 6 decision themselves and that is by judicial review. This requires obtaining permission from the Court with arguable legal procedural grounds-(not substantive merits) and importantly one must have sufficient funds to pursue such a risky and expensive option. Article 6 Proposals require a substantive **and** procedural review remedy under Article 9.2(b). Therefore, unlike applicants for planning permission, there are no substantive review procedures available for third parties.

2. As argued before the Committee on June 27th 2012, Article 6 has to have a wider application than given to it by the UK Government. This is because under Annex 1, at paragraph 20, EIA proposals are made subject to Annex 1 procedures. Therefore Article

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6.1(b) has to apply to other proposals that may have a significant effect but are not EIA. The wider application of Article 6 to non-EIA proposals has been overlooked by the UK.

3. The discretionary call-in procedure afforded to the Secretary of State for proposals 'considered of national importance' is no remedy for third parties. The power is rarely used. In 2011, the SoS called in only 17 proposals-See below at page 37. http://www.planningportal.gov.uk/uploads/pins/statistics_eng/10_11/stats_report_final_2010_2011.pdf

Question 2- Please provide a short description of the administrative or judicial procedures that are available to members of the public to raise non-implementation of conditions on the execution of a project by way of a permit authorising that project.

4. The key point here is that members of the public are entitled to procedures by which they can challenge acts/omissions contravening environmental law by **private persons** as well as by public authorities: see Article 9(3). Under the system operated by the Party Concerned, it is for the local authorities to enforce planning conditions not third parties. The enforcement of planning conditions is discretionary even if the planning permission would in principle be deemed invalid without compliance with the condition. However, in KECN's experience conditions are often not discharged and this view is supported in the Government's Killian Pretty Review 2008. http://www.planningportal.gov.uk/uploads/kpr/kpr_final-report.pdf For example, at page 77 of the Killian Pretty Review it says

> "*The general view was that, because far too many conditions are being imposed on some permissions, councils are often then unable to effectively discharge, monitor or enforce them.*
>
> *It was suggested that timescale targets for the discharge of conditions should be introduced, and, if not met, then conditions should be deemed to have been complied with. Our case study research findings were consistent with this view, with "… considerable (and consistent) poor practice shown in the discharge of pre-commencement conditions… with most authorities [in the case study] discharging conditions by letter or other similar informal submission. As a result, case files*

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rarely contained any systematic overview of the extent of conditions discharged".

5. Article 9.3 clearly states that the citizen should have a right to enforce directly or indirectly acts and omissions of private persons and public authorities. Defra's arguments are not convincing with regard to its purported compliance with Article 9.3 for the following reasons;

i) It is difficult to judicially review a discretionary power and secondly, even if one has excellent grounds, the risk and expense of judicial review would deter third parties from going to Court. Judicial review cannot be used against private persons. In the **Ardagh Glass** case cited by Defra the local authority had made a clear legal error;

ii) The Local Government Ombudsman is not an effective remedy for reasons already explained to the Committee. It cannot enforce conditions, it can only recommend a certain course of action to a local authority, it also cannot investigate breaches by private persons outside local government and the complaint process takes too long;

iii) A private nuisance action is not a procedure for challenging a breach of a planning condition, and itself involves considerable risk and expense;

iv) With regard to variation and the lifting of conditions, third parties again have no right of appeal if the condition is lifted or varied by the local authority;

v) The report *Enforcing Planning Control* by Robert Carnwath (now Lord Carnwath) was written in 1989, well before the adoption of Aarhus Convention and the new understanding and importance attributed to third party participation in environmental decision making that came with it. The Convention radically changes the old position. The modern consensus as evidenced by the Aarhus Convention is that third parties should be able to enforce planning conditions. The Aarhus Convention should inform Government policy not the other way round!

Local Investment Plans

Article 7

6. Article 7 requires early practical public participation in the preparations of plans and programmes when all the options are open. Even if the Committee decides that a LIP is not in

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itself a plan or programme, it has to be at least an important part of the *preparation of* a plan or programme and therefore public participation under Article 7 should occur on that basis.

7. At page 115 of the Aarhus Implementation Guide (AIG) under the title *Understanding "plans and programmes",* the Convention establishes a set of obligations for Parties to meet in public participation during the *preparation of* plans and programmes relating to the environment. The AIG gives guidance on how to determine whether a particular plan or programme relates to the environment by referring to the implied definition of "environment" found in the definition of "environmental information" at Article 2.3 of the Convention. The AIG expressly says in the guidance that plans and programmes relating to the environment may include land-use and regional development strategies, and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc… The LIP does relate to land use, transport, regional development strategies, water resources etc...

8.On further analysis of the AIG, it is clear that plans and programmes related to the environment would necessarily include the preparation of a LIP because the proposals information relating to the decision-making would be environmental information under Article 2.3(b), the information relating to the quality of air or water would be environmental information under Article 2.3(a) and the information in many circumstances about the affected social conditions would be environmental information Article 2.3(c). See page 39 of the AIG.

The nature of a LIP

9. The Government correctly argues that LIPs have no statutory basis and are not referred to in any planning or other legislation. This is not contested by KECN. LIPs are a consequence of a new breed of planning by partnership working, a policy that was fully enabled by the well-being powers under s.2 of the Local Government Act 2000. The fact that these new plans are considered non-statutory does not mean that they do not play an important in the planning process and Article 7 makes no distinction between the two categories.

The nature of local strategic partnerships and local enterprise partnerships

10. The partnerships responsible for LIPs were called Local Strategic Partnerships (LSPs). Initially, the LSPS, were developed through policy by the Government to create single partnership bodies that would enable *'strategic decisions to be taken and is close enough to individual neighbourhoods to allow actions to be determined at community level*.' See http://www.communities.gov.uk/documents/localgovernment/pdf/133634.pdf.

11.LSPs were supposed to be partnerships between the public, private, community and voluntary sector organisations, that would improve the quality of life by achieving the benefits

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of sustainable growth across the country; to enable social and physical regeneration in deprived areas, to improve public services to meet people's needs, to empower local people in decision making and in improving their neighbourhoods; and to ensure that business, the community and voluntary sectors can play a full and equal part.

12. Unfortunately, LSPs did not develop in this way. They did not achieve the envisaged accountability to the public and this was recognised in a report published by the Government in 2008. http://www.communities.gov.uk/documents/localgovernment/pdf/1100993.pdf '*However the accountability of such partnerships remains problematic with local stakeholders and the public often feeling uncertain about what partnerships are accountable for, who they are accountable to, and how they can be held to account*'.

13. Furthermore, according to the same report and as evidenced by the LSP in East Kent, the membership of the LSPs often did not properly reflect the community and voluntary sectors. '*There remain concerns about whether new initiatives will engage marginalised and excluded social groups, whether they will do so in a meaningful way, and how representative of the community the individuals who do engage are*' (page 10) and it was also reported at page 15 that '*There continue to be difficulties in engaging representatives from the business sector and securing the sustained involvement of the voluntary and community sectors, particularly in strategic level partnerships. Policy makers need to consider how to provide appropriate support for representative bodies to participate if they wish local partnerships to be more widely representative of the local public, private, voluntary and community interests.*'

14. The role envisaged by the Government for LSPs also changed. The first plan the LSPs created was the Community Strategy required under the Local Government Act 2000. Later the name was changed to Sustainable Community Strategy (SCS) under the Sustainable Communities Act 2007. The SCS is supposed to feed into the statutory core strategy (key planning document) of the planning authority concerned. See page 14 of the Government Guidance entitled Planning Together: http://www.communities.gov.uk/documents/localgovernment/pdf/154326.pdf As can be seen from the diagram on page 14, public participation is supposed to inform the whole process. It is thus telling to note that despite the fact that the East Kent SCS was adopted in 2009 by the relevant authorities in East Kent, this document cannot be located on any of their websites and the formulation of this document clearly did not encompass the necessary components of public participation because of the constitutional nature of the LSP.

15. In around 2009/2010, the LSPs took on the role of creating LIPs. Many of the LIPs were adopted by the local authorities by April 2011. It is clear from the guidance from the Homes and Communities Agency that the LIPs are supposed to play an important role in securing investment for the priorities for development indicated in the LIPs and that the LIPs would need to be changed to reflect the geographical boundaries of the new partnerships called Local

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Enterprise Partnerships (LEPs) under the new Coalition Government. See http://www.homesandcommunities.co.uk/hca-local-investment-planning. LSPs have apparently not been abolished but many of them have disbanded because it has been made clear by the Government that LEPs are now considered the partnerships required to drive forward this Government's priorities of more localised market-driven economic growth by a partnership consisting of a majority of people from the private sector-(gone are the voluntary and community sectors). See http://www.communities.gov.uk/documents/localgovernment/pdf/1626854.pdf .There are now 39 LEPs and they cover all of England.

16. The LEPs cover much larger areas then their forbears. They consist of mostly business men with chief executives from local authorities. They are self-appointed, self-regulated, their meetings are not open to the public and there is no conceivable way for the ordinary public to get involved with them or properly hold them to account. LEPs will be devising policy, strategy and development proposals that will shape the statutory plans and will as the Government indicates, be the key bodies for obtaining money from Government, European and other sources to push forward LEP policies, strategies and specific development proposals.

17. Therefore, it is no surprise that KECN members and many other community and residential groups are unaware of the existence of the LSPs, LIPs and LEPs. It is a new hidden sort of planning, behind closed doors with powerful influence. It is likely that with money attached and with support from key council officers, LEP plans and policies will prevail irrespective of any later statutory, rubber-stamping exercise.

18. The LIP referred to by KECN in its submission to the Committee did not undergo the Strategic Environmental Impact (SEA) process nor could the Government be persuaded that it should. Importantly for our purposes, there was no public participation in the formulation of the LIP. The self-appointed body that formulated the plan had no environmental residential members or input, it has since been closed down and its meetings were not open to the public in any event.

19. The LIP contains new strategic development proposals in East Kent such as the proposed expansion of South Canterbury with thousands of homes. This allocation for houses had not appeared in any previous adopted statutory plan and is likely being used by unknown bodies (most likely to be the LEP) to support funding applications to the Regional Growth and other funds. It must be remembered that many local authorities like Canterbury, Shepway and Dover did not and some still do not have core strategies in place. When the LIPs were being developed, the old style plans dictated where and on what site developments would occur. It is clear to KECN that purpose of LIPs is not just to inform funding decisions. They are also are

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about strategic plan making. The Committee will appreciate this by going through the LIP already provided in full to the Committee. The problem is as with regard to Article 7, is that it is likely that many planning proposals and policies emanating from the LIPs and the LEPs, irrespective of any later inclusion in a statutory plan will not receive public participation at the vital stages when the options are open. Secondly, once a development proposal has money attached to it and a contract has been signed with the funding parties, it will be near impossible to influence a policy or related development consent decisions in a meaningful way as envisaged by the Convention especially when local authorities are cash-strapped. In England, we now have two planning systems. The new shadowy non-statutory planning system undermines the whole Convention.

20. Judicial review of the adoption of the LIP was not possible because the Government made it clear that the LIP did not require a SEA and there were no other legal procedural errors. The fact that they are not mentioned in Sweet & Maxwell, DCP online, COMPASS Online and the fact that Mr Maurici has never come across them before should indicate instead the mere fact that they are a recent departure from the old way of doing things, that LIPs are inaccessible to the public, non-statutory so people assume they are not important and difficult to challenge legally. Even when they have been challenged i.e. by KECN, it has not been possible to do so in the traditional sense- so far.

Response to specific points made by Defra

21. Defra argues at paragraph 20 in its recent submission re LIPs that LIPs are merely reflections on proposals already contained in existing statutory development plans. As KECN argues at paragraph 14 above, this is not always the case. The plans referred to at page 5 of the East Kent LIP are mostly non-statutory. The local statutory plans referred to were for the most part, the old style local plans (page 14 of the East Kent LIP). In Canterbury, the Canterbury District Local Plan is still the statutory plan for Canterbury and the statutory consultation process for the new style was shelved in 2011 (without the results from the consultation being published). There has never been any reference in any adopted statutory plan to the significant housing development proposals for Canterbury South that are indicated in the LIP at page 27. See http://www.cartogold.co.uk/canterbury/ It does it say at page 12 of the East Kent LIP that all the projects identified in the East Kent LIP come from adopted statutory plans. It is apparent that some of the projects identified might indeed have come from non-statutory plans such as the Local Economic Development Strategy referred to on page 14 of the East Kent LIP or as KECN submits from the East Kent LIP itself. What is clear is that the LIP is not merely a reflection on proposals already contained in the adopted statutory plans.

22. KECN has already argued above at paragraphs 12, 13, 14 and 17 and in previous submissions to the Committee that public participation in the preparation of LIPs was and ought to be

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considered wholly inadequate under the Convention. KECN does not therefore accept the assertions made by Defra in paragraphs 20. iii and 20.iv of their LIP submission and paragraph 20.v is not relevant to our case. Our argument is simply that when planning proposals are indicated in an adopted non-statutory planning document like a LIP without adequate public participation and then used to access funds to further those proposals, those development proposals if included in a statutory plan at a later stage, will likely be found sound by the Inspector and be more likely get planning consent by the cash-strapped local authorities. This does not satisfy Article 7 (6.4) that provides a right to public participation in the ***preparation of*** plans when all the options are open.

23. KECN does not have the requisite knowledge to comment on the precise nature of the Oxfordshire, Mole Valley District and Harlow LIPs and how they relate to their own adopted statutory plans. However, it is clear that the East Kent LIP is not merely a reflective document and it is probable that other LIPs share similar characteristics. Take the Dover district for example. The adopted local plan (2002) and Core Strategy (2010) do not allocate 1800 homes for Betteshanger, 500 homes for Sholden and 406 homes for Buckland Mill whereas the East Kent LIP does. Indeed some of these sites were rejected in the Core Strategy Inquiry process (Sholden, 500 homes). Nonetheless, despite the fact that the LIP was adopted after the adoption of the Core Strategy, the above sites have been included in the East Kent LIP. This indicates that the LIP is much more than a reflective document and rather more important in the planning process than Defra would have the Committee believe.

24. Defra argues again at paragraph 22 of their LIP submission that the guidance issued by the Homes and Communities Agency illustrates the reflective nature of LIPs to adopted statutory plans. In fact the guidance does nothing of the sort. It merely says that the LIPs may reflect development plan documents and that a statutory plan may make it necessary to revise specific aspects of the plan http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf. There is no obligation either way.

25. KECN disagrees that LIPs are not subject to Article 7 public participation requirements alleged by Defra in their LIP submission at paragraph 25, for the reasons set out above at paragraphs 9, 10 and 11. LIPs are not just about securing funding. LIPs are related to the implied definition of environmental information explained fully in the AIG at pages 35-39 and 115.

26. Defra considers that LIPs are not subject to the Strategic Environmental Assessment Directive (SEA) (paragraph 26 of the Defra LIP submission).KECN disputes this and has complained to the European Commission regarding this matter. What is made clear from the AIG is that plans and programmes related to the environment have a broader scope than understood by Defra. The LIP concerns land-use development proposal priorities that are related to the environment. The fact that these land-use plans (once adopted by the local

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authorities) will be used by a partnership body to secure funding for those land-use proposals contained in it, should not take a LIP outside the scope of Article 7 or the SEA.

27. We refute paragraphs 27, 28 and 29 of Defra's LIP submission for the reasons already made out above and specifically in paragraphs 9-20. Additionally, the Statement of Community Involvement is of no assistance because it does not apply to non-statutory plans such as the LIP. See http://www.canterbury.gov.uk/assets/localplan/SCIFinalPublishedVersion2.pdf The Sustainable Community Strategy may have been consulted upon but the plan did not comply with Article 7 for the reasons stated above at paragraph 14.

Yours sincerely

Geoff Meaden
Director