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Secretary to the Aarhus Convention Compliance Committee
Economic Commission for Europe
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Dear Ms Smagadi

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom: Questions to the Party Concerned with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60

Thank you for your letter of 5 July 2012, inviting us to answer two further questions from the Committee in relation to compliance cases ACCC/C/2010/45 and ACCC/C/2011/60. Please find our response below.

(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. In England & Wales all applications for planning permission are made in the first instance to local planning authorities. These are directly elected local authorities.

2. Applications for planning permission of the type that might fall within the scope of the Aarhus Convention are invariably determined through a procedure whereby a planning officer considers the application, supporting material and any representations made in respect of the application by objectors and supporters. He then writes an officer report that makes a recommendation to a committee of councillors (see the examples provided to the Committee at the hearing in respect of the KECN case). Councillors are directly elected members of the local authority. Members do not have to accept the

officer's recommendation. As discussed at the hearing the report is required to be made available to the public in advance of any meeting. Planning officers are employees of the local planning authority, they are professional planners that is to say they have a relevant planning (or similar) qualification.

3. If a local planning authority refuses to grant planning permission, refuses to grant a consent required by a planning condition, grants a conditional planning permission or fails to reach a decision in the time laid down in the statute for such a decision, the applicant may appeal.
   (i) The appeal is made to the Secretary of State for Communities & Local Government. As explained the Secretary of State is a Member of Parliament, and a member of the Cabinet. He is a directly elected politician. The appeal is full *de novo* reconsideration of the planning merits.
   (ii) Most appeals are not determined by the Secretary of State himself but rather are delegated for a decision by a planning inspector ("transferred appeals"). All appeals (including the few that are determined by the Secretary of State) are administered by the Planning Inspectorate (referred to as PINS). PINS is an executive agency of the Department of Communities & Local Government. Planning Inspectors have professional planning (or related) qualifications.
   (iii) In respect of a small number of appeals – those considered of national importance – the Secretary of State is himself the decision maker. These are called "recovered appeals". In such cases a planning inspector is still appointed, but rather than actually make the decision he writes a report setting out a summary of the evidence along with a recommendation whether to accept, to accept with conditions or reject the application. The decision is taken by the Secretary of State, who can reject the recommendation but must set out his decision and reasons in writing.
   (iv) There are three possible procedures that can be applied on appeals:
      a) A written representations procedure, with no oral hearings – the majority of appeals are determined in this way;
      b) A hearing procedure – this involves an oral hearing in the form of a round-table discussion led by the Inspector;
      c) An inquiry procedure – this involves a formal public inquiry with rules of evidence, cross-examination of witnesses, closing speeches etc.
   (v) Which procedure is used is a matter for PINS, acting on behalf of the Secretary of State, to determine although regard will be had to the views of the appellant and other parties in making that decision. All these procedures provide for very full public participation by third party objectors, see:
      - http://www.planningportal.gov.uk/uploads/pins/taking-part_planning-written.pdf;
      - http://www.planningportal.gov.uk/uploads/pins/taking-part_planning-hearing.pdf; and
      - http://www.planningportal.gov.uk/uploads/pins/taking-part_planning-inquiry.pdf.
   (vi) The Secretary of State has the power under section 77 of the Town and Country Planning Act 1990 to "call in" an application for his own determination, rather than allow determination by the local planning authority. The powers are used sparingly where matters of significant national interest and policy are concerned. An application may be considered for call in following representations made by third parties or from a local planning authority. An inspector is appointed to make a recommendation (as for a

recovered appeal) and the procedure used by the Inspector on the appeal (written representations, hearing or inquiry) is determined as under (v) above.

(vii) Decisions on a call in application and all planning appeals have to be notified in writing to the parties. Decisions on planning applications and appeals must be contained in a planning register, which under the TCPA 1990, must be kept open for public inspection at all reasonable times

(viii) See further:

- http://www.planningportal.gov.uk/uploads/pins/procedural_guidance_planning_appeals.pdf

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

4. In England & Wales where it is alleged that there has been a breach of a condition imposed on the grant of planning permission it is for the local planning authority to take enforcement action.

5. The TCPA 1990 (as amended) provides local authorities with a wide range of powers to take enforcement action:

(i) It may serve an enforcement notice under s. 172 of the TCPA 1990. Such a notice can be served where it appears to the local authority that there may be a breach of planning control. That would include a case where conditions were being breached. If such a notice is not complied with it is a criminal offence. In the Magistrates Court the developer can be fined up to £20,000. In the Crown Court the fines that can be imposed are unlimited. There is a right of appeal against an enforcement notice, and to allow the opportunity for such an appeal such notices do not take effect for at least 28 days. The appeal is to the Secretary of State (the procedures are similar to those described above for planning appeals). On any such appeal there are full rights of public participation in the appeal procedure for third parties, see:

- http://www.planningportal.gov.uk/uploads/pins/taking-part_enforcement-written.pdf;
- http://www.planningportal.gov.uk/uploads/pins/taking-part_enforcement-hearing.pdf; and
- http://www.planningportal.gov.uk/uploads/pins/taking-part_enforcement-inquiry.pdf.

(ii) Where an enforcement notice is not complied with a local planning authority has statutory power under s. 178 of the TCPA 1990 to itself enter the land concerned in order to take the steps need to remedy the breach and then seek to recover the costs of so doing from the developer.

(iii) It may serve a stop notice under s. 183 of the TCPA 1990. These allow a local authority almost immediately to ban activities it considers are in breach of planning control. There is no right of appeal against such a notice, although the issue of a stop notice can be the subject of judicial review proceedings in the High Court. It is a criminal offence to breach the notice. In the Magistrates

Court the developer can be fined up to £20,000. In the Crown Court the fines that can be imposed are unlimited.

(iv) It may seek an injunction from the High Court under s. 187B to restrain a breach of planning control including a breach of condition. Failure to comply with the terms of the injunction is a contempt of court and can result in imprisonment and/or a fine.

(v) It may issue a breach of condition notice under s. 187A. These provide a summary procedure where the breach of planning control is a breach of condition. The local planning authority can specify the steps that are required to comply with the conditions specified in the notice and specify the steps that the authority consider ought to be taken, or the activities that ought to cease, to secure compliance. There is no right of appeal against such a notice, although the issue of a notice can be the subject of judicial review proceedings in the High Court. It is a criminal offence to breach the notice.

6. A member of the public concerned that a condition attached to a planning permission may have been breached can complain to the local planning authority. Local planning authorities employ planning enforcement officers whose job it is to "police" whether there has been a breach of planning control and to take action (see above) where there has been such a breach and where it is considered "expedient" to use the powers available.

7. The Government issues guidance on enforcement. Up until recently the guidance was contained in PPG18 Enforcing Planning Control which said at para. 5:

> "LPAs have a general discretion to take enforcement action, when they regard it as expedient. They should be guided by the following considerations: -
>
> (1) Parliament has given LPAs the primary responsibility for taking whatever enforcement action may be necessary, in the public interest, in their administrative area (the private citizen cannot initiate planning enforcement action);
>
> (2) the Commissioner for Local Administration (the local ombudsman) has held, in a number of investigated cases, that there is "maladministration" if the authority fail to take effective enforcement action which was plainly necessary and has occasionally recommended a compensatory payment to the complainant for the consequent injustice;
>
> (3) in considering any enforcement action, the decisive issue for the LPA should be whether the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest;
>
> (4) enforcement action should always be commensurate with the breach of planning control to which it relates (for example, it is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site); and
>
> (5) where the LPA's initial attempt to persuade the owner or occupier of the site voluntarily to remedy the harmful effects of unauthorised development fails, negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop..."

8. As from 27 March 2012 this was replaced by the National Planning Policy Framework ("the NPPF") which says, see para. 207:

"Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control. Local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively, in a way that is appropriate to their area. This should set out how they will monitor the implementation of planning permissions, investigate alleged cases of unauthorised development and take action where it is appropriate to do so."

9. If a member of the public complains to a local planning authority that a condition has been breached but it fails to take any action the following remedies are open to the member of the public:

   (i) He may judicially review in the High Court the failure to take enforcement action. There are cases where the High Court in such proceedings have made a mandatory order requiring a local planning authority to issue an enforcement notice in respect of a breach of planning control: see e.g. ***Ardagh Glass Ltd v Chester City Council*** [2009] Env. L.R. 34.

   (ii) He may complain to the Local Government Ombudsman. As the guidance in PPG18 (quoted above) notes "the Commissioner for Local Administration (the local ombudsman) has held, in a number of investigated cases, that there is "maladministration" if the authority fail to take effective enforcement action which was plainly necessary and has occasionally recommended a compensatory payment to the complainant for the consequent injustice".

   (iii) If the breach of a condition attached to a planning permission is causing harm to a neighbouring property (e.g. via noise, vibration, smells etc.) then the person whose land was so affected could bring a claim in nuisance. The essence of a nuisance claim is activity which unduly interferes with the use or enjoyment of land. This is an ordinary civil claim brought in the courts (the County Court or the High Court). It can be brought by private persons. Remedies available to the Courts where it finds there is a nuisance include an injunction and/or damages. The fact that a condition on a planning permission is not being complied with is not a necessary precondition of a nuisance action but it would be a relevant consideration in assessing whether the claim was made out.

   (iv) If a developer wants to apply for a planning condition that has been imposed on a planning permission to be lifted he must apply for what is in effect a new planning permission under s. 73 of the TCPA 1990. That application is subject to the full range of rights for public participation for third parties applicable to any other application for planning permission.

10. The current system of enforcement of planning control was introduced via amendments to the TCPA 1990 made by the Planning & Compensation Act 1991. This followed a report *Enforcing Planning Control* (February 1989) by Robert Carnwath (now Lord Carnwath, a Supreme Court Justice) a specialist in planning and environmental matters. He considered whether parties other than the local planning authority should be given the right to institute enforcement proceedings. The report noted:

"5.3 In this case it seems to me that the issues are largely ones of policy ... the suggestion might be seen as a means of "privatising" part of planning enforcement ... More importantly, it would tend to change the balance of the system, by increasing the emphasis on private property interests ...

5.4 The overwhelming majority of the responses from local authorities and expert bodies were opposed to the extension of third party rights in enforcement proceedings. Particular importance was attached to retaining the discretion of the local planning authority to determine which cases justify action on planning grounds, and to distinguish between public and planning considerations. It was also considered that the Commissioner for Local Administration provides a suitable forum for complaints of inaction by authorities. (In theory the Secretary of State also has the power to intervene in cases of default by authorities, although I understand that this power is rarely, if ever, exercises).

5.5 In the light of this strong consensus, I see no reason to recommend any change. I note that the suggestion was also considered and rejected in the Dobry report. Furthermore, any move to greater third-party involvement would tend to divert attention from the crucial role of the local authorities as enforcers of the law, and remove some of the incentives for improving their performance ..."

11. The Committee is urged in its decision not to disturb the "strong consensus" on these matters. Since this report and the introduction of the 1991 reforms the Government is unaware of any clamour by NGOs or the public for further third party rights to take enforcement action. As the Carnwath report notes these are largely matters of policy for Governments to decide.

(1) <u>LIPs</u>

12. **The issue:** We understood at the Committee meeting that further explanation in writing of our position on LIPS would be helpful. The issue here is whether there is a breach of Article 7 of the Convention. We believe that both parties accept that in respect of "development plan documents" (see below), part of the statutory "development plan" for planning purposes (see below) there is full compliance with Article 7 in terms of public participation etc. The complaint made is only that Local Investment Plans are adopted without public participation and it is alleged that these in effect dictate the content of "development plan documents" in breach of Article 7 and/or are determinative of applications for planning permission in breach of Article 6.

13. **The planning system in England & Wales:** in the planning law of England & Wales the important plans are those forming part of the statutory "development plan". In relation to this there are a number of points:

(i) Plans in England & Wales do not themselves authorise works. So even if a statutory development plan allocates a site for a particular form of development, planning permission must still be sought (and can still be refused) before any such development can begin.

(ii) The position is set out in more detail in the extracts from the judgment of Mr Justice Lindblom in ***Cala*** handed to the Committee at the hearing. These are the key points:

a) when determining an application for planning permission, a local planning authority (and on appeal or call-in an Inspector and/or the

Secretary of State) is required to have regard to two kinds of consideration: (i) the statutory "development plan" so far as is relevant, and (ii) "other considerations" that are "material" (see section 70(2) of the Town and Country Planning Act 1990).

b) S. 38(3) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), provides that the "development plan" consists of, inter alia, "the development plan documents (taken as a whole) which have been adopted or approved in relation to that area".

c) In England & Wales the planning system is "plan-led". In statutory—as opposed to policy—terms, the priority to be given to the development plan in development control decision-making is encapsulated in s.38(6) of the 2004 Act, which provides "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

d) There is thus by statute a presumption in determining a planning application in favour of the development plan. If the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker.

e) Other plans and policies not defined as being part of the statutory "development plan" are at most "other material considerations" to which regard can be had but which do not benefit from a statutory presumption in their favour.

14. "Development plan documents" come in a number of forms. In relation to all of these there are statutory requirements for public participation: see p. 2 of DEFRA's letter of 11 April 2011; para. 7(2) of the UK's note of oral presentation and the first bullet point of the update annex to that note. Mr Hockman QC at the hearing confirmed that KECN accepted that these regulations provided for public participation compliant with Article 7 in respect of "Development plan documents".

15. **Local Investment Plans ("LIPs")**: LIPs have no statutory basis. They are entirely non-statutory documents. They are not referred to in any planning (or other) legislation.

16. LIPs are drawn up by local authorities in collaboration with the Homes and Communities Agency ("HCA") and other key partners. The HCA is an agency of the Government, responsible for housing and regeneration investment in England. LIPs are formed through the process of what is called the 'single conversation' between the HCA, local authorities and other local organisations, which also gives rise to Local Investment Agreements ("LIAs"). Guidance from the HCA makes clear that community engagement "should be integrated throughout the process": see: http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf

17. The purpose of LIPs is to inform funding discussions, in particular bids for funding from the HCA. The HCA comments that the content, focus and length of these documents vary greatly between localities. See further : http://www.homesandcommunities.co.uk/hca-local-investment-planning.

18. The communicant has sought to suggest that these documents are in some way decisive or of great influence in planning decision-making. This is simply not so. The Committee might want to note the following in assessing the position:

    (i) The Sweet & Maxwell Encyclopaedia of Planning Law & Practice which runs to 9 volumes – and several thousand pages - contains not one single mention of LIPs;
    (ii) DCP Online – an online resource providing guidance for local authorities, planning consultants and developers alike also does not contain even a single mention of LIPs;
    (iii) A search of COMPASS Online which has a database of 166,600 planning appeal decisions online appears to reveal no appeals where there has been a reference to a LIP let alone an appeal which was determined by the content of a LIP.
    (iv) Counsel for the UK Government (Mr James Maurici) has practised in planning and environmental law in England & Wales since 1997 and had never even heard of LIPs before they were raised in this case by KECN.

19. What then is the relationship between LIPs and development plan documents?

20. First, what one normally sees with LIPs is that these are merely a reflection of proposals already contained in statutory development plan documents which have themselves been the subject of extensive public participation procedures. This is reflected in the East Kent Local Investment Plan 2011 – 2026 referred to at the meeting. A full copy is at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-45/Correspondence%20with%20the%20communicant/12%20June%202011/Appendix_1_Local%20Investment%20Plan%20East%20Kent.pdf. Thus (page references are to the page numbers in the top middle of the page, pages 1 – 78):

    (i) Page 5: this lists documents that support the LIP and includes "Local Development Frameworks/Local Plans" that is to say the development plan documents which form the statutory development plan;
    (ii) Page 12: this explains that the assessment process in terms of prioritising investment took as its starting point "projects identified in current policies and programmes such as each local authority's Local Development Framework". A Local Development Framework is the name given the suite of development plan documents adopted in an area. This shows the LIP taking its lead from the development plan documents and not vice versa. The prioritisation of funding decisions – the subject of the LIP – thus took as its starting point the planning policies in the adopted development plan documents;
    (iii) Page 13: in relation to stakeholder engagement the LIP notes that prior to the LIP there was "significant stakeholder engagement through local development framework processes which helped to identify the initial selection of priority projects". What is being said is that LIPs are reflective of, and follow on from,

local development documents which have themselves been the subject of very full statutorily required public participation procedures (see p. 2 of DEFRA's letter of 11 April 2011; para. 7(2) of the UK's note of oral presentation and the first bullet point of the update annex to that note);

(iv) Page 17: this makes the position even clearer: in respect of each local authority in the area of the LIP its existing local plans and local development framework is set out. Again it is clear from this that the LIP is taking its lead from the statutory development plan documents and not vice versa (as the communicant claims). It is of some importance that what is said is that the table on page 17 "outlines the current position of the East Kent Local Development Frameworks which the LIP process will help to deliver". This is crucial. What is being said is that the purpose of the LIP is to try and help deliver – by identifying funding – projects and policies already included in local development documents. And, of course, before the policies and projects were included in those local development documents they were the subject of full public participation procedures.

(v) Page 35: under the heading "Planning Status" the text recognises that while some projects considered by the LIP have planning permission others do not. It recognises that the LIP needs to be flexible as projects it considers funding for might not actually obtain consent. If KECN were correct that LIPs were decisive for planning it would hardly say this.

21. This is not just true for East Kent. LIPs generally are reflective in nature, when it comes to planning policies (all the LIPs referred to below can be found online):

(i) For instance, the Oxfordshire LIP states "This LIP outlines and integrates the plans of Cherwell, Oxford..." etc (p7). It similarly states "The LIP is a living document. The SPIP will review it every 18 months to ensure it reflects the evolution of the five Local Development Frameworks and other local strategies as well as national and regional strategies." (p9) http://www.oxford.gov.uk/Direct/OxfordshireLocalInvestmentPlan.pdf;

(ii) Surrey provides another example: the Mole Valley District Council website, describes the Surrey Interim LIP, saying "The Surrey Interim Local Investment Plan September 2010 brings together the plans of the districts and boroughs, county council and key infrastructure providers. The Homes and Communities Agency will use the Plan to decide how much money is needed to provide affordable housing and necessary infrastructure" http://www.molevalley.gov.uk/index.cfm?Articleid=11421;

(iii) Similarly, the Harlow LIP states "This Local Investment Plan (LIP) describes a clear vision for West Essex, and sets out priorities for housing, infrastructure, and regeneration activity to deliver the vision over the next 15 years. It draws on the priorities for each local area as set out in key local plans and is an ongoing, evolving and dynamic process. It has at its core, shared visions and objectives for places. A key function of this LIP is to provide a framework for future partnership working with the Homes and Communities Agency (HCA). It will articulate the shared priorities of each local authority and other partner agencies and will be the starting point for partners to consider resource allocation to local areas." (p 5): http://www.harlow.gov.uk/about_the_council/council_services/growth_and_regeneration/regeneration_team/local_investment_plan.aspx.

22. This position is reflected in the HCA's own guidance on the preparation of LIPs, which says (p 1) that the LIP should explain "how it supports local priorities for housing, economic growth and regeneration". The reflective nature of LIPs is then further emphasised by the guidance stating that "Significant changes in policy [such as in the content of Development Plan Documents] may make it necessary to review specific aspects of the plan" [i.e. the LIP]. See: http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf

23. Second, after a LIP is adopted, what happens where a local authority is engaged in the statutory process of revising, amending or adding to its development plan documents? Development plans are not adopted once and for all. They are subject to revision and amendment so that they are kept up to date. Sometimes a new development plan document is produced to add to existing ones. Development plans before they are revised, amended, added to or adopted are (see above) subject to consultation and the right for objectors to appear at an independent examination in front of an inspector. At most a LIP would be a small part of the evidence base for a statutory plan the subject of examination. This appears, from Dr Le-Las' submissions to the meeting, to have been the case in East Kent, but there is no evidence to suggest it played any greater role than that.

24. What is important in terms of plans and policies in respect of a planning application are development plan documents and other planning policies. That is because of the plan-led system, see above. The Committee has an illustration of how matters work in practice in the Sainsbury's officer reports presented to the Committee at the hearing, in the one marked "rep 1" at pp. 64 – 65 is a section headed "Planning Policy". The policies considered are national planning policy, the South East Plan (a regional planning policy and part of the statutory development plan as defined by s. 38(3) of the 2004 Act – see above) and the relevant development plan document. No LIP or other form of investment strategy or plan is even mentioned.

25. **LIPs not Article 7 plans.** LIPs are not Article 7 plans. The Implementation Guide at p. 115 says 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., at all levels of government. They may also include government initiatives to achieve particular policy goals relating to the environment, such as incentive programmes to meet certain pollution reduction targets or voluntary recycling programmes, and complex strategies such as national and local environmental action plans and environmental health action plans. Often such strategies are the first step in action to reach environmental protection goals, followed by the development of plans based on the strategies. Integrated planning based on river basins or other geographical features is another example". What is clearly outside Article 7 are investment strategies whether in the form of LIPs or otherwise.

26. Moreover, the implementation guide makes the link (see p. 114) to the SEA Directive (Directive 2001/42/EC). LIPS are not subject to SEA. This is because they are not "plans and programmes, ...which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the

framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC".

27. Finally, even if despite all the above, the Committee were to conclude that Article 7 did apply to LIPs, the requirements of Article 7 are met in any event. The Committee is referred to p. 13 of the East Kent LIP (the one produced by KECN, see above). This records the various ways that public participation fed into the LIP including:

    (i) The very full public participation in respect of development plan documents (see above) and which documents "helped to identify the initial selection of priority projects"; and
    (ii) Community involvement in the Sustainable Community Strategy – this strategy provides the overall strategic direction for the LIP and is consulted upon.

28. Moreover, if the Committee looks at p. 2 of that document it will be seen that the East Kent LIP was adopted by the local authority's Executive following a meeting at which (see para. 1) members of the pubic were allowed to speak.

29. Again, the HCA's own best practice guidance on the production of LIPs emphasises the central role that community involvement should play in the process – that it should be "integrated throughout", "through engaging with people who represent the communities of different sorts, whether residents, businesses or other interest groups". See: http://www.homesandcommunities.co.uk/sites/default/files/aboutus/plan-good-practice.pdf (p 2)

David Hamson DAVID HAMSON

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