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CHIEF EXECUTIVE

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Email: chief.executive@tmbc.gov.uk

Our ref: JB/DLKT

24 October 2014

Mrs H M Damiral
Clerk to Borough Green Parish Council
Lullingstone
Paddock Close
St Mary's Platt
Kent TN15 8NN

Dear Hazel

Formal complaint

I write further to the email of Adrian Stanfield, Director of Central Services and Monitoring Officer dated 13 October 2014.

In view of the serious nature of the allegations made in your letter dated 7 October 2014, and given that the matters raised in the complaint have already been considered by either the Director of Planning, Housing and Environmental Health or the Director of Central Services, I have treated this as a Stage 3 complaint under our Complaints Procedure.

Compliance with planning conditions TM/11/01191 and TM/13/02358

I note that your complaint is comprised of 2 parts – firstly, it is alleged that the Borough Council failed to ensure that Crest adhered to the planning conditions for contamination remediation contained within TM/11/01191 and TM/14/02358 (I am assuming the second reference is a typo and you mean to refer to TM/13/02358/RD although there are no conditions attached to this approval). The second part of your complaint alleges that the Borough Council failed to respond adequately to allegations that the planning conditions in question were being breached.

In respect of the first part of your complaint, I should begin by saying that this complaint appears to be predicated on the following – (1) that Crest have failed to adhere to the planning conditions and (2) the Borough Council is in some way at fault for this failure. Whilst I am aware that Cllr Taylor has for some time held the belief that there have been 'violations' of condition 25 of TM/11/01191, I am not aware of any extant breaches of this condition. Furthermore, there has been for some considerable time a fundamental

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difference of opinion between the Borough Council and Cllr Taylor as to the Borough Council's role in monitoring compliance with that condition.

It is appropriate to set out in full the condition in question. Condition 25 of TM/11/01191 provides as follows

"25. No development shall commence until :

- (a) Further investigations into the existence of soil and groundwater contamination on and beneath the site have been carried out, in accordance with a scheme first submitted to and approved in writing by the local planning authority, to supplement the information contained in the Scott Wilson Report Geo-environmental and Geotechnical Ground Conditions Report 2010 dated April 2010; and*
- (b) A scheme of proposed remedial and engineering measures to render the site suitable for permitted end use and to prevent contamination of groundwater and air and water pollution of adjoining land has been drawn up and approved by an appropriately qualified environmental specialist and submitted to and approved in writing by the local planning authority. The scheme shall include a detailed risk assessment for identified components and sensitive receptors, plus suggested remedial targets. It shall also include details of arrangements for responding to any discovery of unforeseen contamination during the undertaking of the development (including arrangements for notifying the local planning authority of the presence of any such unforeseen contamination) and also validating imported soils as being fit for purpose.*

Thereafter:

- (c) The approved scheme of remedial and engineering measures shall be implemented and completed fully in accordance with the approved details, unless otherwise agreed in writing by the local planning authority. On completion of the works, a completion report and certificate shall be provided to the local planning authority, certifying that the land is suitable for its permitted end use. The certificate shall be issued by the person responsible for the development and shall be endorsed by the environmental specialist who designed and specified the scheme of remedial works or another appropriately qualified environmental specialist. No dwelling shall be occupied unless and until the completion report has been submitted to and approved in writing by the local planning authority and the certificate has been provided insofar as it relates to that part of the development which will be occupied.*
- (d) No works shall take place within the site such as to prejudice the effectiveness of the approved scheme of remediation."*

Details of the site investigation and proposed remediation scheme were submitted to the Council under application number TM/13/02358/RD and approved on 20 November 2013. There are no further conditions attached to this approval.

Throughout the period commencing November 2013 to date, there have been extensive communications between the Borough Council, Crest Nicholson and Cllr Taylor relating to the investigation and decontamination of the site. These are too extensive to replicate in this letter, but I have set out below some of the key dates and reports dealing with this issue.

On 5 March 2014 an urgent item of business was considered by the Area 2 Planning Committee on the implementation and monitoring of the development at Isles Quarry. That report, together with a supplementary report, considered in detail 3 particular areas of concern that had been raised by Cllr Taylor – land contamination, surface/ foul water drainage and alterations to land adjoining the Hornet Access Road. I attach for your information copies of the reports. You will note the conclusion that there was no reason for more formal intervention at that stage. After careful consideration and serious discussion of the concerns raised, as set out in the main and supplementary reports, Members recognised that there had been a constructive response to locally expressed concerns and that officers had been active in investigating those concerns. In addition, Members were satisfied that appropriate measures were in place to address any perceived concerns and had every confidence in officers and other experts.

On 8 April 2014 Cllr Taylor raised the following question at full Council

"In view of the clear violation of the planning approval TM/11/01191 and TM/13/02358 by the developer at Isles Quarry West, Borough Green, and the failure of the Planning Department to adequately monitor the contamination remediation, and their failure to provide proof of remediation under the BGPC FOI request of 7th March within the specified 28 day period, what action will be taken by this Council to ensure safety of future residents, and the safety of the drinking water aquifer over the wider area.

The response is set out in full below for the benefit of other members of the Parish Council.

'Detailed written answers have been provided to Cllr Taylor in relation to queries made both in response to Freedom of Information/Environmental Information (FOI/EIR) requests and other points raised on the subject of potential contamination and how it is addressed. When responding to a FOI/EIR request the Council is, of course, only able to provide information it actually holds and not information that the enquirer feels ought to be held.

Officers have also set out for Cllr. Taylor, the principle of the processes by which the Council, acting in its role as Local Planning Authority, should deal with potential contamination. The procedures have been of general national applicability for some years now and involve a number of stages which are reflected in the condition that has been placed on the planning permission for the development of Isles Quarry West (the condition itself reflects guidance issued by Government).

The planning process as expressed in the latest National Planning Policy Framework and Guidance, clearly places the onus on the applicant/developer to use suitably qualified professional advisors to ensure that the following procedures and practices are put in place:

- Site characterisation assessment – a desk study appraisal and site walkover;*
- Submission of a remediation scheme – which should include matters arising as a result of a risk assessment;*
- Implementation of the approved remediation scheme – notification to the local planning authority of when the works will start, validation by the developer and specialist advisors that the works have been carried out and reporting of any unexpected contamination found; and*
- Monitoring and maintenance – a description of what is required and for how long.*

As with all planning conditions the obligation for compliance rests entirely with the developer. In accordance with the condition of the planning permission the Council requires the developer to confirm that he has executed the works, as designed by the technical advisors, once the method has been approved by the Council. It is neither normal practice nor a requirement with this type of condition, or indeed the application of any planning condition, for Council staff to carry-out continuous monitoring. The guidance from Government does not envisage such an approach.

In the case of Isles Quarry West the development is proceeding in a satisfactory manner according to the stages set out in the planning condition. Due to the nature of the site and the existence of buildings and hard-standings, the stages are necessarily phased but this has not prevented the works proceeding appropriately. This was addressed in a report made to the Area 2 Planning Committee on 5th March.

Notwithstanding the particular role of the Council as Planning Authority, officers will continue liaison with the developers' technical advisors (and where and when appropriate, the Environment Agency) to obtain interim details while awaiting the revised remediation report relating to the area of the site where demolition of buildings and the lifting of hard surfaces is taking place.'

In April 2014 the Borough Council took the step of seeking Counsel's advice on the specific arrangements within the planning permission issued under TM/11/00191 relating to the investigation and decontamination of the site, and the actions of officers in investigating and determining whether there had been a breach of those conditions. A summary of that advice was sent to you on 13 June 2014, and copies of the Instructions to Counsel and the full advice were supplied to Cllr Taylor on 18 June 2014. For ease of reference, I have repeated a summary of the advice below –

(1) Counsel is satisfied that the conditions on the planning consent relating to contamination are comprehensive in the way in which they seek to control the remediation plan for the land. In the absence of any breach of those conditions being identified there is no need for continuous monitoring other than the monitoring which is set out in the planning conditions themselves.

(2) Counsel is further satisfied that the actions of officers in investigating and determining whether there is a breach is commensurate and in accordance with the Borough Council's powers and duties as a planning authority.

(3) Counsel concludes that the advised regime implemented through the appropriate use of planning conditions, does not require continuous monitoring of the site which would potentially be wasteful of Borough Council resources.

(4) Counsel is concerned that as a public authority the Borough Council must act reasonably, rationally and proportionally. He observes that a valid planning permission has been secured and as the national guidance points out, monitoring is principally the responsibility of the developer. That is made clear by through the imposition of the appropriate planning condition. Constant and continuous on site monitoring in the circumstances can be oppressive.

I am aware that Cllr Taylor holds a differing view as to the role of the Borough Council in monitoring compliance with condition 25. That is of course his prerogative, but I can see no reason to question the view expressed by Counsel, nor the approach taken by the Planning Department to monitor the compliance by Crest with this condition.

Requests for information

Your letter is unspecific as to the particular requests for information that you believe have not been dealt with by the Borough Council, either under the Freedom of Information Act/ Environmental Information Regulations or otherwise requested/ supplied to Cllr Taylor in his role as Borough Councillor. For the purposes of this response I have assumed you are referring to the request for information made by Cllr Taylor on 6 March 2014, together with the subsequent correspondence between Cllr Taylor and Council Officers. Given the volume of emails relating to Isles Quarry since 6 March 2014, it is necessary to examine the key correspondence in detail.

I should also preface my response to your complaint by explaining the process for responding to requests for information. I am aware that the Director of Central Services & Monitoring Officer has previously set this out in an email to Cllr Taylor, but for the benefit of the other Members of the Parish Council I shall repeat it here.

There are 2 separate pieces of legislation dealing with access to information held by public authorities; the Freedom of Information Act 2000 (FOI) gives rights of public access to information held by public authorities. The Environmental Information Regulations 2005 (EIR) give rights of public access to environmental information held by public authorities. There are similarities between the two, but there are also important differences. Information requested relating to contamination would fall to be dealt with under EIR rather than FOI.

Under FOI, the information to be communicated to an applicant is the information held at the time of the request is received, except that account may be taken of any amendment or deletion made between that time and the time the information is communicated. The position with EIR is different, in that Regulation 5(1) requires a public authority to make information that it holds available on request, and regulation 12(4)(a) provides an exception for information not held at the time the request is received. In either case, it is not possible to seek information that may or may not be held by a public authority at some unspecified point in the future.

In respect of requests under FOI, a public authority holding the requested information has a duty to communicate that information to the requester promptly and in any event no later than 20 working days after the date of receipt of the request. A 20 working day timescale also applies to EIR requests. Extensions to this timeframe are permitted in limited circumstances.

On 6 March 2014 Cllr Taylor made a request via email to the Borough Council under the Freedom of Information Act 2000. In that email Cllr Taylor sought disclosure of the 'contamination audit trail' at Isles Quarry West. He listed various matters that should be included within that audit trail, adding 'In short, any documentation that will evidence the correct and safe disposition of the contamination'. Cllr Taylor sought disclosure of the historical data 'as soon as practical' with 'ongoing data supplied on a real time day to day basis'.

In respect of that part of the request requesting 'ongoing data on a real time day to day basis', I am aware that the Director of Central Services & Monitoring Officer has previously explained to Cllr Taylor (email dated 18 June 2014) that neither the Freedom of Information Act 2000 or the Environmental Information Regulations 2004 oblige a public authority to disclose information that doesn't exist at the time of the request and may or may not be held at some unspecified point in the future. The same point was also made to Cllr Taylor by Lindsay Pearson in an email dated 21 May 2014, and by Steve Humphrey in an email dated 10 June 2014. Whilst the Borough Council is not obliged to provide such information to Cllr Taylor under either FOI/ EIR, we have in any event endeavoured to provide the same to him in his position as a Borough Councillor.

On 20 March 2014 Lindsay Pearson (Chief Planning Officer) emailed Cllr Taylor to inform him that a bundle of papers had been sent to him in response to this request. Lindsay also dealt in detail with the component parts of Cllr Taylor's request. I do not propose to repeat that email and supporting note here – a copy is attached for your information. Lindsay's response to the request dated 6 March was well within the 20 working day statutory timeframe.

On 22 March 2014 Cllr Taylor emailed Lindsay Pearson to confirm receipt of the bundle of papers. He also raised what he described as 'a few questions/ issues outstanding'. For the purposes of FOI/ EIR, supplemental questions represent a new request, with the 20 working day timescale for responding commencing from the date of receipt of the questions. However, I note that virtually all of the points made by Cllr Taylor were either expressions of opinion on the information supplied to him or complaints about why information hadn't been supplied earlier, rather than requests for further information.

On 17 April 2014 further information was supplied to Cllr Taylor by Lindsay Pearson. This related to particular matters raised by Cllr Taylor i.e. tarmac, tyres and clean soil. Cllr Taylor responded to this email the same day; whilst that email challenged the points made by Lindsay Pearson, I can see no new requests for information within this email.

On 21 April 2014 Councillor Taylor emailed Lindsay Pearson, following his visit to IQW that day. The email itself was a commentary on matters Cllr Taylor had observed during his visit. It is not clear to me that Cllr Taylor was seeking any further information in this email.

On 20 May 2014 Cllr Taylor emailed Lindsay Pearson and others to make a further request for information under FOI, and to note that he was still awaiting answers to 9 questions asked formally, or under FOI rules. From the correspondence I have seen I cannot see that these questions had been put to Lindsay Pearson previously. The ninth question did in any event query why further information had not been supplied pursuant to the request for information dated 6 March 2014, the clear inference being that information should be supplied on a continuous basis. As has been explained elsewhere, there is no continuing obligation under either FOI or EIR to provide information not held at the date of the request. The new request for information related to (1) 'copies, plans, meeting notes and all other correspondence used by the LPA to arrive at the decision to produce [consent to condition 3 of the EA, and condition 24 of the planning consent] and (2) any instructions to, or correspondence with, outside agencies concerning the monitoring of the River Bourne and the extraction boreholes.

On 21 May 2014 Lindsay Pearson emailed Cllr Taylor to explain the formal process for submission of details pursuant to the planning condition, and to confirm that Cllr Taylor had been provided with some detail that had been provided to the Borough Council thus far, outside of the formal process for compliance with the condition. In addition to reiterating that there is no continuing obligation under FOI/ EIR to provide information received after the date of the request, Lindsay nevertheless confirmed that we would share with Cllr Taylor any information provided prior to formal compliance with the condition.

On 30 May 2014 Cllr Taylor emailed Nicolas Heslop and various officers. Within that email he complained that there was still material outstanding on his FOI, which he said Lindsay had responded to on 18 March. He noted in particular that 'at least records of meetings on 11 and 13 March' were still outstanding, and 'There may well be other documents that are being withheld, but I don't know what they are'.

On 10 June 2014 Steve Humphrey emailed Cllr Taylor to reiterate the points made by Lindsay Pearson in his email dated 21 May relating to the obligation of the Borough Council to disclose information that isn't held at the time of the request for information. Steve nevertheless confirmed (in response to Cllr Taylor's email dated 30 May) that there were no notes of the officer meetings on 11 and 13 March. Cllr Taylor responded to that email the same day, indicating that he was not seeking information 'after the FOI', rather he was asking 'for the rest of the as yet unreleased information within Lindsay's self-imposed time frame up to the 13th March'. Cllr Taylor was not specific as to the information he believed had not been supplied to him in response to his initial request dated 6 March.

On 12 June 2014 Cllr Taylor emailed Lindsay Pearson and others to acknowledge receipt of 'the posted FOI material' which he said contained the Ground Obstruction Report and the email confirming the construction of the T19 storage tank. His email was headed '2nd tranche FOI material'. In that email Cllr Taylor made a specific complaint about the supply to him of a Ground Obstruction report, which he contended had been wilfully omitted from documents supplied to him pursuant to his request for information dated 6 March 2014. The Director of Central Services and Monitoring Officer has previously looked into this complaint, and attach for your reference a copy of his email

to Cllr Taylor dated 18 June 2014. I do not propose to comment further on this specific allegation, as there is nothing I can add to that previous email. However, I should say that the supply to Cllr Taylor of the Obstruction Report in June 2014 was not pursuant to the FOI request dated 6 March, as the Borough Council did not receive a copy from Barton Willmore until 19 May 2014.

In conclusion, I can see no evidence that the Borough Council has failed to meet its obligations under the Freedom of Information Act or the Environmental Information Regulations, or indeed that we have more generally failed to supply information to Cllr Taylor. I am aware that Cllr Taylor believes information has been withheld from him, but I can see no evidence to support this assertion.

The Director of Central Services and Monitoring Officer has previously advised Cllr Taylor (email dated 18 June) that he is entitled to make a complaint to the Office of the Information Commissioner (ICO) if he believes that the Borough Council has failed to meet its responsibilities under either FOI or EIR, although to date I am not aware of any such complaint having been made. Further information can be found on the Information Commissioner's website – www.ico.gov.uk. For the avoidance of doubt, should Borough Green Parish Council remain dissatisfied with that part of this response relating to the supply of information to Cllr Taylor, your next step would be to make a complaint to the ICO.

If you are not satisfied with our response to the other issues raised in this letter i.e. in respect of your complaint relating to compliance with the conditions attached to the planning consent, you may wish to take the matter to the Local Government Ombudsman who can be contacted at PO Box 4771 Coventry CV4 0EH, telephone 0300 061 0614 or at www.lgo.org.uk

Yours sincerely



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