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Dear Harvey

Monitoring Officer Advice

I refer to our telephone conversation this morning regarding the situation you have with your Council meeting this evening and a Notice of Motion in relation to night time flying at Manston airport which has been received from Councillors Hart and Poole. You have kindly sent me a copy of the agenda item and I note that the motion on notice reads as follows:

"The Council adopts a policy of not allowing scheduled, pre-planned or otherwise timetabled flights between the hours of 2300 and 0700 hours. That a period of 1 hour at the end of the flying day be allowed for late/early arriving flights only. That a penalty be applied to any flights arriving during the 1 hour periods. No take-offs will be allowed between 2300 and 0700 hours and a schedule of exceptions to the above be prepared to include "mercy flights" and flights for medical emergencies, coastguard movements etc."

You have also sent me a copy of the relevant part of the Council's Constitution, which provides in paragraph 16.4 that

"(a) motions must:

- (i) be about matters for which the Council has a responsibility or which affect the District.
- (ii) be expressed in such a form that it shall confirm with the requirements of the Council Procedure Rules and be competent for the Council if it so desires to pass it as a lawful and valid resolution. If it is not so expressed the Chairman shall rule it out of order."

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Whilst the motion does not, on the face of it, specifically refer to Manston airport I doubt that it could reasonably be said that this is not about matters for which the Council has a responsibility or which affect the District, and so the motion is valid so far as that is concerned. You have advised that it is expressed in such a form that it conforms with the requirements of the Council Procedure Rules but the third criteria, which is that it is "*competent for the Council if it so desires to pass it as a lawful and valid resolution*" is the point in question.

I understand that some members of the Council were elected in May partly on the basis of their opposition to night time flying. I also understand that Thanet District Council is in discussion with the company, Infratil, who are the owners and operators of KIA, about the expansion of the airport, and that the Core Strategy Preferred Options consultation which took place towards the end of 2009, includes certain options around Manston, and propose the continued development of the airport to meet growth objectives. I also understand that a lengthy further consultation is planned around this which will include the issue of night flying and which consultation will go outside the boundaries of Thanet District Council to ensure that those who may be affected outside the District Council's boundaries have an opportunity to give their views, and that this consultation process has been partly funded by contributions from other Authorities in the area and from Kent County Council. I am also aware that the owners of the airport have published a proposed night time flying policy, in which they commit themselves to developing and agreeing a scheme with the District Council.

Certainly, it is quite legitimate for Councillors to agree a policy and furthermore, for that policy to be based upon the manifesto or part of the manifesto upon which they were elected. Councillors are entitled to have regard to and apply policies in which they believe, particularly if those policies have been part of their manifestos. However, the danger comes if decisions then have to be made by the Council where the decision-making body (i.e. the Council) has, predetermined the decision. In the words of Ouseley J in Bovis Homes Limited v New Forest Plc:

"A Council acts unlawfully where its decision-making body has pre-determined the outcome of the consideration which it is obliged to give to a matter, ... by the adoption of an inflexible policy ... because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed."

Accordingly, it seems to me that the wording of the Notice of Motion is sufficient for it to be said that the Council had, by approving the policy set out there, fallen foul of the distinction between a predisposition towards a decision, which is a legitimate position for an Authority to be in, and a predetermination of the position, which is not. Again, the Courts have applied their minds to this and I would refer you to the decision of the Court of Appeal in Condron v National Assembly for Wales where Richards LJ said as follows:

"... the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example,

because of a decision already reached or a determination to reach a particular decision). The former is consistent with the preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors."

It seems to me that the policy which is implicit in the Notice of Motion carries a significant risk of falling foul of this test, which would then open the Council up to a successful challenge for a judicial review.

Furthermore, the Council is bound to exercise its decision-making and its policies reasonably. A progressive policy making approach towards the question of night flying at the airport, with the route of consideration through Scrutiny and referral to Cabinet, with all the proper considerations around financial, legal and procedural matters considered, and the results of consultation and all the relevant facts and material considerations before them, may mean that members come up with a similar policy, but one which falls within the boundaries of predisposition and not predetermination. This is however very different from a sudden and, on the face of it unreasoned change to the position by the immediate adoption of the policy, without the Councillors having in front of them, the factors referred to above.

Again, it is likely that such a decision could be unreasonable to a level where it would be likely to expose the Council to a finding that the decision was unlawful by way of unreasonableness and irrationality.

For these reasons, I would advise that there is a significant risk to the Council of the purported policy within the Notice of Motion, as currently drafted, being legally challengeable, which would bring it outside the criteria in the Constitution.

I trust that this advice is helpful and if I can assist further please do not hesitate to let me know.

Yours sincerely

Olwen Dutton
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