



ch&i associates

**Investigation into a complaint against
Councillor Jerry Hyman,
Waverley Borough Council**

A report for the Monitoring Officer of
Waverley Borough Council

3 May 2018

Contents

1	Executive Summary	3
	<i>Statement of complaint and outline of investigator recommendations as to whether the member was acting in member capacity and, if so, whether he breached the Code.</i>	
2	Official details of Councillor Jerry Hyman	5
	<i>An outline of the member's position and history in the Council.</i>	
3	The relevant legislation & protocols	5
	<i>Relevant parts of the Localism Act 2011 and the Council's Code of Conduct for members.</i>	
4	The investigation	6
	<i>An outline of the sources of evidence obtained and the conduct of the investigation.</i>	
5	The evidence	7
	<i>Factual reasoning on key disputed areas and findings of fact.</i>	
6	Have there been failures to comply with the Code of Conduct?	18
	<i>Investigator's suggestions as to whether Councillor Hyman broke the Code.</i>	
7	Recommendations	22
	<i>Investigator's suggestions as to recommendations.</i>	

1 Executive Summary

- 1.1 ch&i associates was appointed by the Monitoring Officer at Waverley Borough Council (the Council) to investigate two complaints about the conduct of Councillor Jerry Hyman, a member of the Council.

Scope and focus of the investigation

- 1.2 Mr Daniel Bainbridge, the Council's Borough Solicitor, alleged that Councillor Jerry Hyman publicly accused officers from the Council's Legal Services team of providing incorrect professional advice, despite not being a lawyer and not being employed by the Council to provide such advice. Mr Bainbridge contended that while members of his team expect to have their advice occasionally questioned or challenged, Councillor Hyman did so repeatedly and in a manner that was undermining and disrespectful. Mr Bainbridge indicated that Councillor Hyman's poor conduct was demonstrated at a meeting of the Council's Joint Planning Committee on **16 November 2016** and a meeting of the Council's Western Area Planning Committee on **29 March 2017**.
- 1.3 Councillor Peter Isherwood, Chair of the Council's Western Area Planning Committee, also submitted a complaint about Councillor Hyman's conduct at the Committee meeting on **29 March 2017**. Councillor Isherwood alleged that Councillor Hyman openly criticised the Legal officer present and attempted to provide his own 'legal advice' after claiming that the advice provided by the officer was incorrect.

Recommendation

- 1.4 My approach in this case has been to equip the Council to determine the allegations through any of the routes open to it, namely:
- a. The member *was not* acting in councillor capacity therefore the code was not engaged, and the member did not breach it;
 - b. The member *was* acting in member capacity, but did not through their conduct breach any Code paragraph;
 - c. The member *was* acting in member capacity and breached the Code.
- 1.5 It is my view that Councillor Hyman was acting in his official capacity when attending meetings on 16 November 2016 and 29 March 2017 and as such the Code was engaged. Having considered the evidence provided, including watching webcasts of the relevant meetings, I have concluded that Councillor Hyman did fail to treat two legal officers with respect and therefore failed to comply with the Code.

- 1.6 In considering what action the Monitoring Officer should consider taking, I am not sure that further examination of the concerns highlighted or formal determination of these allegations through a public hearing is the best use of public resources. While I think that Councillor Hyman's conduct did on this occasion cross the line, it is a finely balanced decision. Given how important it is that councillors must be free to scrutinise and criticise the actions of their own authority, Councillor Hyman's conduct should be viewed at the lesser end of seriousness.
- 1.7 I am mindful that Councillor Hyman has already rejected the offer of resolving this matter informally and that during his interview he made several remarks that I think will make doing so now quite challenging. Having said that, I do not think that Councillor Hyman intended to disrespect the respective legal officers at the two meetings and that he would want to ensure that there are good working relations moving forward.
- 1.8 In light of the conclusions set out in this report, I would invite Councillor Hyman to reconsider his response to this complaint and instead engage with the Council's Monitoring Officer in seeking an informal resolution. I would also suggest he reflect on whether the concerns he raises at meetings are actually being well served by his approach and style of presentation. I would caution his tendency to stray from political debate into personal accusations, as this is hardly conducive to encouraging constructive communication and proper advice. I would also suggest that the Council's desire to address his concerns about aspects of the legal advice offered 'behind closed doors' is an eminently sensible approach and not, as suggested by Councillor Hyman, the Council wanting to wash their dirty laundry in private.
- 1.9 Should Councillor Hyman choose to engage directly with the Monitoring Officer in a constructive manner, my recommendation is that the Monitoring Officer seek a local resolution to the matters raised; the flexibility of being able to take other action has built-in advantages and fits in with a locally owned process. I consider that the local resolution should involve Councillor Hyman attending a meeting with the Council's Monitoring Officer and Independent Person so that they can be satisfied that Councillor Hyman understands that conduct such as that described in this report is unbecoming for a member of the Council and has an impact on the effective running of the Council. If Councillor Hyman does not engage with the process in a manner that the Monitoring Officer considers sufficient, I believe that there is no option but for the matter to be referred for a formal hearing.
- 1.10 I would further recommend that the type of workshop event referred to in 5.37 of this report be arranged as soon as is possible. In my view it would assist all members of the Planning Committee to have their understanding of the

Habitats Directive and associated matters improved so that they can be confident when reaching the decisions on relevant planning applications.

2 Official details of Councillor Jerry Hyman

2.1 Councillor Hyman has served as a member of Waverley Borough Council since 8 August 2016. Councillor Hyman is a member of the Farnham Residents Group.

2.2 Councillor Hyman is currently appointed to the following Committees.

- Area Planning Committee (Western)
- Audit Committee
- Council (Acting as Trustee of the Ewart Bequest Trust)
- Council (Acting as Trustee of the Shottermill Recreation Ground Trust)
- Joint Planning Committee
- Overview & Scrutiny Committee - Community Wellbeing (Substitute)
- Overview & Scrutiny Committee - Environment (Chairman)
- Overview & Scrutiny Committee - Housing (Substitute)
- Overview & Scrutiny Committee - Value for Money & Customer Service (Substitute)

3 The relevant legislation & protocols

Localism Act 2011

- 3.1 By section 27(1) of the Localism Act 2011 (the Act) a “relevant authority” is placed under a statutory duty to “promote and maintain high standards of conduct by members and co-opted members of the authority”.
- 3.2 By section 27(2) of the Act a relevant authority “must in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity”.
- 3.3 Under section 28(1) of the Act a relevant authority must secure that a code adopted by it is, when viewed as a whole, consistent with prescribed principles of standards in public life – the so called “Nolan principles”.
- 3.4 The intention of the legislation is to ensure that the conduct of public life in local government does not fall below a minimum level which engenders public confidence in democracy, as was recognised by Beatson J, as he then was, in *R (Calver) v The Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) when he held that there was a clear public interest in maintaining confidence in local government while at the same time bearing in mind the importance of freedom of political expression or speech in the political sphere.

- 3.5 Under 28(6) of the Act, Local Authorities must have in place (a) arrangements under which allegations can be investigated and (b) arrangements under which decisions on allegations can be made. By section 27(7), arrangements put in place under subsection (6)(b) must include provision by the appointment of the authority of at least one “independent person” whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate.
- 3.6 Section 28(11) of the Act provides that if a relevant authority finds that a member or a co-opted member of the authority has failed to comply with its code of conduct it may have regard to the failure in deciding (a) whether to take action in relation to the member or co-opted member and (b) what action to take.

Waverley Borough Council Code of Conduct for members.

- 3.7 Under Section 27(2) of the Localism Act the Council established a Code of Conduct for members (the Code).
- 3.8 The Code adopted by the Council includes the following paragraphs:

Introduction and Interpretation

1. (1) This Code applies to you as a Member of Waverley Borough Council (“the Council”) when you act in your role as a Member.

General Obligations

2. (1) You must always treat member colleagues, officers, other organisations and members of the public with respect.

4 The investigation

- 4.1 This investigation was conducted by Alex Oram on behalf of the Council’s Monitoring Officer. Alex¹ is a director of ch&i associates, a company with a successful track record of conducting complex investigations, assessments and case reviews within the regulatory, charity, NHS and local government sectors. Alex has been conducting member conduct investigations since 2003. He was previously employed by Standards for England as a principal investigator

¹ Alex is not a lawyer and any recommendations provided in this report should not be construed as legal advice; all reasoning is based on his extensive experience of having conducted over 300 standards investigations.

responsible for conducting many of their most complex, politically sensitive and high-profile investigations into member conduct.

- 4.2 During the course of this investigation we have considered documents provided by the Council and obtained from their website; documents provided by Councillor Hyman; and oral evidence provided by Councillor Hyman, Mr Bainbridge and Councillor Isherwood. We have also watched the webcasts of the relevant meetings.

5 The evidence

Meeting of 16 November 2016

- 5.1 On 16 November 2016 the Council's Joint Planning Committee considered an application in respect of the 'Baker Oates' site (application WA/2016/1234). The Committee was advised that the principle of development and the means of access had been approved and established along with all the technical matters unrelated to the reserved matters required to assess whether the site would be suitable for the development of 43 dwellings; these included issues relating to air quality, archaeology and effect on the Special Protection Area² (SPA). Members were made aware that these were not for consideration under this application, but they could discuss appearance, landscaping, layout and scale. With reference to the report circulated with the agenda, Officers presented a summary of the proposed development, including site plans, indicative layout and street scene.
- 5.2 During the Committee's debate of the application Councillor Hyman indicated his concern at the lack of appropriate 'Environmental Impact Assessments', stating that an 'appropriate assessment'³ in respect of the application's impact on the nearby SPA was required by law. Councillor Hyman told members that the Committee could not lawfully grant consent to the development unless an appropriate assessment, which included bird population and trends, mitigation

² Special Protection Areas (SPAs) are strictly protected sites classified in accordance with Article 4 of the [EC Birds Directive](#), which came into force in April 1979. These areas are protected for the conservation of birds and habitats under the Habitats Regulations, which aim to protect the habitats and species living in these areas from disturbances such as dog walkers or rambles.

³ Article 6(3) of the Habitats Directive requires that: "*Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of Paragraph 4 of the Directive, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*"

and risks, had been conducted. Therefore, legally they had to in effect withdraw the consent already given.

- 5.3 Councillor Hyman was reminded by Councillor Frost that consent for the application had already been agreed; the Committee was only being asked for its thoughts on design. Councillor Hyman maintained that the Habitats Directive and requirements of Environmental law overrode the permission granted and therefore was wholly relevant; if a mistake had been made in unlawfully granting outline permission then, by law, it had to be rectified. Councillor Hyman specifically requested that Barry Devlin, (then-Locum) Planning Lawyer, “confirm that the catch-all principle does apply [in respect of this application] and that we do not have an appropriate assessment”.
- 5.4 Elizabeth Sims, Head of Planning, was invited by the Chair to speak first in response. She advised members that due to the location of the application site, the application was considered ‘not likely’ to have a significant impact on the SPA and therefore an appropriate assessment was not necessary. Ms Sims concluded that Councillor Hyman’s approach “*simply isn’t right.*” Ms Sims made the point that the Planning Inspector had endorsed their approach.
- 5.5 Barry Devlin then confirmed Elizabeth Sims’s advice. Mr Devlin quoted from case law in respect of Environmental Impact Assessments and advised the Committee as to why Councillor Hyman’s argument was not relevant with regards this application.
- 5.6 Councillor Hyman then sought to repeat his point and was asked to move on by the Chairman (Councillor Peter Isherwood). The following exchange then took place:

Cllr Hyman: We’ve had the denial and I think I should be allowed to quote from the law as opposed to simply assumptions.

Chairman: We’ve just had the law quoted. Please. Can we move on.”

Cllr Hyman: Misquoted, Chairman.

Chairman: I beg your pardon. I think that deserves an apology. I really do. That is out of order.

Cllr Hyman: Mr Chairman. The Habitats Directive is applied differently to the Environment Impact Assessment Regulations, from which Mr Devlin quoted. It has a very strong presumption...

Councillor Hyman is interrupted by Councillor Cockburn, who said that she would not sit by and let officers be insulted. She demanded that Councillor Hyman be made to either offer an apology or leave the chamber. The Chairman

requested an apology from Councillor Hyman in respect of that comment, stating that it was “*out of order.*”

Cllr Hyman: Do we have to apologise when we are in the right, Chairman? All development was stopped because this is so serious a few years ago, you will recall. It is a very serious matter and it has not been applied properly for many years.

Chairman: I totally disagree with that comment and I would like you to move on please. Have you any other comments to make?

Cllr Hyman: I will certainly apologise if I am wrong, but I would very much like to establish this at some point and be able to discuss it properly, rather than be told “we’ve got an answer and you’re wrong” and we’re not allowed to speak about it anymore, which is what we’ve had for the past eighteen months, Chairman.

The Chairman then concluded the exchange by stating that he took Councillor Hyman’s point and asked that he take it outside of the meeting and discuss it with the Council’s lawyers. Councillor Hyman and Mr Bainbridge both told me that this discussion never took place; Mr Bainbridge told me that this was because Councillor Hyman did not request one at the time.

- 5.7 Mr Daniel Bainbridge, the Council’s Borough Solicitor, told me that in his view Councillor Hyman’s comments directly undermined the integrity of those tasked with providing legal advice to the Committee. Mr Bainbridge said that all his officers are prepared to respond to questions and challenge; on this occasion both Elizabeth Sims and Barry Devlin listened to Councillor Hyman’s concerns and then provided properly-considered professional advice. In response, Councillor Hyman publicly accused them of mis-quoting the law.
- 5.8 Mr Bainbridge also drew attention in his complaint to the behaviour of Mr Devlin: “*Mr Devlin presented that advice calmly, clearly and professionally. At no stage did Mr Devlin fail, in my view, to uphold his part in the Member/Officer relationship. Despite the very clear criticism that he faced, Mr Devlin never sought to interject in order to respond in kind to that criticism.*”
- 5.9 In response Councillor Hyman told me that his concern, which is ongoing, is that the advice provided by officers with regards the application of the Habitats Directive is consistently incorrect. Councillor Hyman told me that the Directive operates on a precautionary principle; the developer must demonstrate that a proposed development will not have a detrimental impact on the SPA. This is contrary to the way in which most UK laws work, which routinely requires the harm to be proven.

- 5.10 Councillor Hyman acknowledged that he was not a lawyer but stressed that he was intelligent and an engineer by trade; he told me that he had a good understanding of these directives because they are principle based. Councillor Hyman said that maybe because he was not a lawyer he did not rely on being able to simply say '*this is the law*'; he actually quoted from relevant legal decisions to demonstrate his own position.
- 5.11 At interview Councillor Hyman referred to the guidance produced by the Planning Advisory Service, which states that the process should leave no grounds for a decision to be considered unlawful or procedurally improper. Councillor Hyman described himself as a whistle blower, saying: "*I do believe it is my responsibility as a councillor and representative of the whole of the borough to ensure the law is being upheld where I believe there are concerns.*" Councillor Hyman told me that it was never his intention to undermine or question the integrity of officers; he was clear though that in his view the importance of ensuring that the Council did not make unlawful decisions superseded any responsibilities he might have to treat officers with respect.

Meeting of 29 March 2017

- 5.12 On **28 March 2017** the Joint Planning Committee considered an application in respect of the former Weyburn Works site (Application WA/2016/1261). The proposed development involved the erection of 61 new dwellings including 9 affordable and a 60 bed Care Home; provision of a Suitable Alternative Natural Greenspace (SANG)⁴, alterations to accesses and associated works following demolition of existing buildings. Mr Devlin was again the legal advisor to the Committee at that meeting.
- 5.13 The Committee was advised that since the agenda had been published, an appeal had been allowed on the site for a slightly larger scheme. The Inspector had concluded that the Council could not demonstrate a 5-year housing land supply and that the proposal would conserve the AONB⁵ and AGLV⁶ and in some limited respects would offer modest visual improvements over that which currently existed. Furthermore, the Inspector concluded that, having regard to all of the evidence, there was no reasonable prospect of the site being used for employment purposes and therefore no need for the site to be retained for such purposes. The Inspector also concluded that the cumulative benefits of the scheme outweighed the harm, such that very special circumstances existed. Officers advised the Committee that the conclusions of the appeal were a

⁴ SANG is the name given to green space that is of a quality and type suitable to be used as mitigation for residential and where necessary tourism development likely to affect a SPA. The aim of a SANG is to provide alternative green space to accommodate additional levels of recreation and divert visitors away from a SPA. For a site to function as an effective SANG it must look to be a more attractive to use as a recreational resource than the SPA to ensure that it diverts users.

⁵ Area of Outstanding Natural Beauty

⁶ Area of Great Landscape Value

highly material consideration in favour of the development and recommended members to support the proposal.

- 5.14 During the Committee's debate of the application Councillor Hyman referred to an email that he had circulated to the Committee earlier that same day in which he had referred to "specific points of law". Referring again to the so-called 'catch-all principle' of environmental law, Councillor Hyman expressed his view to the Committee that it was able to refuse the application. Councillor Hyman recognised that there appeared to be strong support for the application and therefore he would be willing to support it but that to do so the legal requirements had to be met: *"I am sure that Mr Devlin will confirm that we do have a way of consenting development even where we don't have convincing objective evidence. We don't have an appropriate assessment with us here in front of us. We don't have convincing objective evidence that we need, and we know that. I'd like you to confirm that we do have a way through Article 6(4)⁷" ... "If Mr Devlin could confirm we do have the Article 6(4) route available... we could use that."*
- 5.15 The Chairman invited Mr Devlin to advise the Committee. Mr Devlin told members that the Officer report in front of them stated that there had been an assessment overall that indicated the need for an 'appropriate assessment' had not been triggered; he maintained that this had been supported by the Planning Inspector. On that basis he advised that the Committee could proceed and deal with the application, confident that the necessary assessments had been carried out. Mr Devlin stated: *"Councillor Hyman seeks to drag the Committee into technicalities and technical detail in terms of the Habitat regulations which simply aren't engaged here"*. Mr Devlin further advised that while the legal opinion in Councillor Hyman's email was indeed correct, it was not actually relevant to the application under consideration.
- 5.16 Later in the meeting Councillor Hyman spoke again briefly, stating that he was slightly surprised to hear that the Committee had an assessment to consider and that he would like to know where it was *"but I can take that outside of the meeting with Mr Devlin"*. There is no evidence that Councillor Hyman followed this up.
- 5.17 In his complaint Mr Bainbridge stated that while he did not consider that Councillor Hyman's conduct at the meeting amounted to a failure to comply with the Code, it is relevant to comments he made the following day.

⁷ Article 6(4) of the Habitats Directive provides: *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.'* "

- 5.18 On **29 March 2017**, the Western Area Planning Committee considered an application in respect of the former Lobster Pot site (Application WA/2016/1960). The applicant sought outline planning permission for the erection of 5 dwellings; 1 would be detached and 4 would comprise a terrace of dwellings.
- 5.19 During the debate Councillor Hyman applauded the developer for doing much to improve the design; he said though that he could not support the application because it did not satisfy certain legal constraints in respect of the SPA. Councillor Hyman criticised the Council's continued use of Farnham Park as a SANG, referring to it as a '*tax on development*' and an '*imaginary SPA tax*⁸'; Councillor Hyman expressed the view that the Park provided no real mitigation to the potential harm the development might cause the SPA. Councillor Hyman said that the Committee should not turn a blind eye to the law and therefore they must refuse the application.
- 5.20 Councillor Hyman was followed by Councillor Cockburn and then Councillor MacLeod. Councillor MacLeod raised his points about the application before asking to hear from "the lawyer" regarding the legal position in respect of what Councillor Hyman had said earlier in the meeting. At this point Mr Lucas was invited by the Chairman (Councillor Isherwood) to advise the Committee.
- 5.21 Mr Lucas explained that the law allowed outline applications to come forward and that the Council had an avoidance strategy⁹ in respect of the SPA, most recently updated in 2016. Mr Lucas pointed out that it had been councillors who had decided to adopt the strategy in order to mitigate harm to the SPA; as such the Committee could not criticise a developer for following that strategy and reflecting it in their application.¹⁰
- 5.22 Following Mr Lucas's advice, Councillors Frost, Lear and Pritchard all spoke in the debate. In addition to commenting on the application, Councillor Frost asked that in the future, if Councillor Hyman wished to enter into legalistic debate with the Council's lawyers he do so prior to the start of any meeting.

⁸ The Council's SPA avoidance strategy review dated 19 July 2017 stated that up to that date the Council had received contributions from developers totalling £980,000.00.

⁹ The original Thames Basin Heaths Special Protection Area (SPA) Avoidance Strategy was adopted by the Council in December 2009. Its purpose is to provide guidance to developers when making planning applications for new housing which may have an effect on the conservation interests of the SPA. The Strategy sets out the Council's approach in seeking to avoid the effect of a net increase in population within 5 km of the SPA, and how it proposes to discharge its legal obligations under the Habitats Regulations. The key strategies involve the use of Farnham Park as a SANG and the collection of 'Section 106' payments from developers to develop and support a Strategic Access Management and Monitoring (SAMM) strategy. The Council's Avoidance Strategy must be taken into account for development control purposes as a material planning consideration.

¹⁰ In terms of providing SANG, developers have three options: buy into 'strategic' SANG through S106 agreements; contribute to the upgrading of an existing SANG site; or provide new (bespoke) SANG themselves.

5.23 Councillor Hyman was allowed to speak again in relation to the application; the following exchange then took place:

Cllr Hyman: Only to clarify for Councillor Frost. I am rather surprised that after 10/11 years there are people in this room on a planning committee who don't know the basics of the main constraints...

Chairman: Excuse me. We have a protocol Councillor Hyman. Do not criticise me or other councillors. Thank you.

Cllr Hyman: Would you just ask that Mr Lucas confirms that the constraint, regardless of what you might call avoidance strategies, or whatever, that the legal constraint here isn't actually as is written on page 31, where it says it has to satisfy the Local Plan.

Chairman: You have had the legal answer. He is a specialist. We must accept his instructions."

Cllr Hyman: I thought we were here as Councillors because there are occasions when the advice we receive is wrong, otherwise we wouldn't need any Councillors."

Chairman: Excuse me. That is strictly against the rules. Strictly against our Code of Conduct. You cannot criticise an officer. Please withdraw that.

Cllr Hyman: It wasn't a criticism of an officer Chairman.

Chairman: Yes you were.

Cllr Hyman: If it was taken as a personal criticism of any individual then I will withdraw but it wasn't. It was a simply statement Chairman that not everybody is right all the time.

Chairman: I would like you to withdraw the comment please Councillor Hyman

Cllr Hyman: I can't remember exactly what I said but if it'll keep you happy then I'll withdraw the comment, but we're not perfect people none of us are and isn't that why we are here. We should be able to debate these matters and find out not who's right but what's right, Chairman.

Chairman: Thank you, we'll move on.

Councillor Frost then spoke in support of the Committee and its officers, pointing out that they had debated often very complex matters for many years and that she trusted the advice provided by the professionals. Councillor Frost said that she was a little tired of Councillor Hyman telling the Committee that they are acting illegally or that they don't understand. She suggested that Councillor Hyman put his case to Officers before the meeting and not criticise the Officers, who were not allowed to answer back.

- 5.24 In his complaint Mr Bainbridge alleged that the statements made by Councillor Hyman during this exchange represented a clear example of his undermining Mr Lucas' integrity and professionalism. Mr Bainbridge said that this was compounded by a failure to accept at the time that he had criticised an Officer and then a comment to the effect that he could not recall what he had said, before only reluctantly apologising on the basis that doing so would satisfy the Chairman (rather than the Officer whose advice Councillor Hyman had stated had been wrong).
- 5.25 Councillor Isherwood shared Mr Bainbridge's concerns, stating that Councillor Hyman's conduct was a clear breach of protocol that should not be taken lightly. Councillor Isherwood said that he had approached Councillor Hyman twice after Committee meetings, when he was a new member, to suggest that if he wished to raise any questions on any Legal matter or to seek background information he should consult the relevant Officer prior to a meeting to ensure that his concerns are addressed; this information could then be relayed to all members by the update sheet. Councillor Isherwood told me that he advises all members on site visits that any queries should be put to the relevant officer in advance of the meeting to ensure that there are no surprises; he added that in his experience the Legal department have always taken great care to ensure that any uncertainties he might have are fully addressed.
- 5.26 Councillor Hyman told me at interview that he never unfairly criticised Mr Lucas; he was just making the point that we are all fallible and therefore capable of making a mistake. Councillor Hyman expressed the view that Mr Lucas was in fact very good and that they had subsequently discussed his concerns with regards the Council's legal responsibility under the Habitats Directive; Councillor Hyman told me that in a subsequent meeting Mr Lucas confirmed that the issues he was raising were relevant; where doubt about a project exists, consent cannot be granted unless an appropriate assessment has been carried out which provides convincing objective evidence that harm will not be done.¹¹
- 5.27 Councillor Hyman did also tell me though that in his view the Council's avoidance strategy was not fit for purpose and having the opposite effect to that intended; it was causing harm to local wildlife. Councillor Hyman said that he

¹¹ I have not interviewed Mr Lucas and therefore cannot comment on the veracity of this evidence.

was concerned that similar strategies were now being adopted nationwide by numerous authorities, with the Council leading the way. He told me that the law on the matter is quite simple and therefore he has no doubt that those running the Council *'are knowingly flouting the law'*¹². Councillor Hyman said that his concerns are falling on deaf ears though because the imperative for both the Council and the Government is to build houses and *'concrete over the South East'*.

- 5.28 Later, during the same meeting, the Committee considered an application in respect of Overwood House (Application WA/2017/0090) for the erection of a detached 5-bedroom dwelling and detached garage. Mr Daniel Lucas (rather than Mr Devlin) was sitting as legal advisor during the meeting.
- 5.29 Despite an Officer recommendation for approval, members were generally very critical of the application. It was noted that a previous application for the site, which had been rejected by the Committee, had subsequently been considered by the Planning Inspector. While the Inspector had also dismissed it, his more limited objections had been addressed as part of the new application. The Inspector had concluded that it was an acceptable site for development.
- 5.30 During the debate Councillor Hyman said that in his view the application could easily be rejected, referring to the Habitats Directive, appropriate assessments and sections from the National Planning Policy Framework. Councillor Hyman then stated: *"Unless someone is going to argue, as someone might have tried last night I think, that an inappropriate assessment equals an appropriate assessment, which obviously it isn't. Because we were told last night, and we have to be consistent, that we required SANG for development."*
- 5.31 Mr Bainbridge told me that in his view Councillor Hyman was again undermining Mr Devlin's integrity and improperly dismissing his properly-considered professional advice. Mr Bainbridge said that his conduct demonstrated a lack of respect and courtesy to Mr Devlin. Mr Bainbridge said: *"Councillor Hyman clearly knew Mr Devlin was not present and therefore Mr Devlin would have no opportunity to respond in any way or to advise the Committee further."*
- 5.32 Councillor Hyman reiterated the view that his priority is ensuring the probity of the planning process and that challenging officers is part of his role. Councillor Hyman acknowledged that he had not sought to discuss his concerns privately with Mr Devlin, but argued that it was important to have such discussions in the

¹² Councillor Hyman told me that the Council has acknowledged this fact on a number of occasions. He told me that in 2006 the Council admitted that if they strictly applied the Habitats Directive then Farnham would be disadvantaged because there would be no new development. Councillor Hyman said though that instead of looking to article 6(4) of the Habitats Directive, the Council pursued its 'dodgy' avoidance strategy.

open. Councillor Hyman expressed the view that the Council have knowingly been breaking the law for over ten years and have largely been unaccountable: “*maybe someone coming in and calling them out on it is upsetting*”.

- 5.33 Councillor Hymen acknowledged that his manner might sometimes come across as if he is ‘*taking the mickey*’. He told me that prior to becoming a councillor he spent over ten years attending meetings as a member of the public; the difficulty in getting his voice heard meant that ‘*he only survived by finding the humour*’.

Councillor Hyman’s additional comments

- 5.34 During the course of our interview Councillor Hyman made a number of comments that he considers relevant to my considerations:
- i. As Chair of the Council’s Environment Overview & Scrutiny Committee he has a specific responsibility to ensure that the Council is meeting its legal responsibilities with regards environmental matters;
 - ii. He understands that the Council’s failure to insist that appropriate assessments are carried out is a matter best dealt with by Judicial Review; developers are hardly likely to do so however as it is against their interests.
 - iii. He does not want to put officers in a difficult position but is not sure what else he can do when they fail to apply the appropriate legislation. He understands that officers are in a difficult position, because adherence to the law would mean they could not do what the Council wants them to do; however, if he is not allowed to challenge them during a meeting where should he do so – in the press?
 - iv. He has made limited efforts to discuss his concerns privately with members of the legal team, however the individual officers (like Mr Devlin and Mr Lucas) keep switching roles.
 - v. Councillor Isherwood and Cockburn have both made approaches to him to discuss whether he would support them in objecting (against officer advice) to certain applications and the possible implementation of a new SANG at Tongham. Councillor Hyman pointed out that despite his complaint, Councillor Isherwood

appears happy to seek his assistance and support his approach when it suits him¹³.

Matters relevant to considering whether Informal resolution might be appropriate

- 5.35 Prior to referring these complaints for investigation, the Council's Monitoring Officer considered that they might best be resolved by informal resolution. The complaints were received in April 2017; after initial separate conversations with the complainants, Councillor Hyman was contacted on 13 April 2017 and invited informally to discuss these matters. That initial meeting happened on 25 April 2017, where it was agreed that due to the level of detail contained within the complaints it would be fair and appropriate to allow Councillor Hyman time to consider the relevant documents and meet again to hear his perspective. Councillor Hyman was asked to carefully reflect upon the complaints made and share his view on his actions within the context of the member code of conduct and the member/officer protocol and whether or not he would like to propose any action in order to informally resolve the matter. The following week (4 May) was the County Election at which Cllr Hyman was a candidate so I agreed it was reasonable for him to give his attention to this matter after that had finished.
- 5.36 [REDACTED]. After Councillor Hyman returned to his council duties and after not hearing back, the Monitoring Officer attempted to arrange a meeting with him without success. Councillor Hyman did agree to submit his thoughts in writing by 10 July 2017, however failed to do so.
- 5.37 In the meanwhile, Councillor Macleod, also a member of the Farnham Residents Group, asked Mr Lucas if a meeting could be arranged to discuss Councillor Hyman's understanding of the Habitats Directive and associated matters. Elizabeth Sims and Daniel Bainbridge indicated their support for the proposal, with Elizabeth Sims suggesting that all members of the Planning Committee be invited to a workshop style event, with members being invited to submit any areas of concern for discussion beforehand.
- 5.38 Mr Bainbridge told me that it was accepted that any such meeting could not be actioned immediately due to the amount of Planning and Legal resource dedicated to ongoing Local Plan hearings and a three-week public inquiry. It was hoped that the workshop might take place after the summer 2017; to date though no such event has taken place.

¹³ Councillor Isherwood expressed concern that Councillor Hyman's comments makes it appear as if he had pre-determined the matter; he stressed that he never reaches a final decision until he has properly listened to the relevant debate.

- 5.39 Councillor Isherwood and Mr Bainbridge both told me that they would be willing to have this matter resolved informally. Both understood that it would be in the Council's interest to have Councillor Hyman's repeated concerns addressed; both were clear though that any resolution must also involve an acknowledgement from Councillor Hyman that his treatment of officers at the meetings referred to above was unacceptable.
- 5.40 Councillor Hyman told me that while the elections [REDACTED] had impacted on his ability to engage with the suggested informal resolution, he eventually took the decision that he did not want to meet with the Monitoring Officer because of the 'heavy-handed' way in which an earlier complaint had been dealt with.¹⁴
- 5.41 Councillor Hyman did appear to indicate during our interview that he was open to having the issues described above being resolved by way of a private meeting to openly discuss the concerns raised, however his focus appeared to be on the Council's failures rather than his own conduct. During our conversation Councillor Hyman also made a number of comments which left me concerned as to the likely success of an informal resolution involving solely him and members of the Council's Legal department. These included:
- i. His assertion that the strong response to his conduct, both in the Chamber and the subsequent complaints, was partly motivated by the fact that those involved knew that the Council was breaking the law;
 - ii. his suggestion that the Council's limited budget meant that members could never be wholly confident that they were getting the best quality of legal expertise on offer¹⁵;
 - iii. his assertion that as Chair of the Environment Overview and Scrutiny Committee, he has been stopped from scrutinising certain matters so that the Council can cover things up;
 - iv. concerns he expressed about both the competence and integrity of the Council's Legal department (in relation to the matters discussed in this report)

¹⁴ Councillor Hyman told me that a complaint had been made about his conduct just weeks after his election and related to conduct that pre-dated him becoming a councillor. Councillor Hyman said that despite the matter clearly being outside the jurisdiction of the Code, the Monitoring Officer made him attend a private meeting at the Council so that he could receive a warning.

¹⁵ Councillor Hyman told me that before he became a councillor he became involved in a dispute of air quality and wrote to the Council setting out what he believed to be their legal responsibilities. Councillor Hyman said that the Borough Solicitor at the time (not Mr Bainbridge congratulated 'his legal team' on their work, saying that it was better than that managed by the Borough Council's legal team.

While I do not consider that this takes the possibility of local resolution off the table, it will no doubt make it challenging.

6 Have there been failures to comply with the Code?

Official Capacity

- 6.1 Before I make a recommendation as to whether Councillor Hyman's conduct amounts to a failure to comply with the Code of Conduct, I need to decide if he was acting as a councillor (i.e. acting in his official capacity). Section 27(2) of the Localism Act 2011 requires all relevant authorities to adopt a code of conduct "*dealing with the conduct that is expected of members ... when they are acting in that capacity.*"
- 6.2 There can be no question that Councillor Hyman was acting in his capacity as a Councillor when the Planning Committee meetings on **16 November 2016** and **29 March 2017**. As such I am confident that his conduct at the Member Briefing fell within the jurisdiction of the standards framework.

Did Councillor Hyman fail to comply with the Code?

- 6.3 The intention of the Code is to ensure that the conduct of public life at the local government level does not fall below a minimum level which engenders public confidence in democracy. In adhering to the principles set out in the Code there is an expectation that members will treat their fellow councillors and Council officers with respect. This is not to say that councillors should not be encouraged to engage in vigorous public debate on matters pertaining to the Council; however, the impact of such debate is diminished, rather than accentuated, when it is cast in abusive or offensive terms.
- 6.4 Failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred are relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect.
- 6.5 The planning process can be a difficult area for elected members. Local authorities' planning decisions and local plan preparations are constrained by the need to operate within the law and to give considerable weight to policy, both local and national. The need to make planning related decisions on an authority-wide basis, often putting the desires of local people second to the

need to work within the authority's overall policy framework, can create real tensions.

- 6.6 In considering whether Councillor Hyman has failed to comply with the Code, a line must be drawn between the requirement for members to treat others with respect and the freedom members have to disagree with the views, opinions and actions of others. It is my view that members should be able to express in forceful terms concerns that they have about any aspect of the running of the council or the advice being provided to them by officers. As Lord Laming stated in the Victoria Climbié Inquiry; councillors "*must not accept at face value what they are told*".
- 6.7 It is not within the remit of this investigation to ascertain the veracity of Councillor Hyman's comments about the legal advice offered; indeed, I do not have the necessary expertise to assess the matter. Having met with Councillor Hyman though, I am confident that he has carried out a substantial amount of research into the relevant issues and that his assertions are made in good faith. He is clearly passionate about protecting his local environment and appears to fervently believe himself in the right. Councillor Hyman is entitled to question the advice provided by officers and disagree with it if he sees fit. Robust language can sometimes be appropriate to ensure that matters are dealt with properly. The Code is not intended to stifle the expressions of passion and frustration that often accompany discussion about the efficient running of a council.
- 6.8 Having said that, while ideas, policies, recommendations and advice may be challenged and criticised, individuals should not be subject to unreasonable or excessive personal attack. The investigation has established that Councillor Hyman went slightly further than challenging the advice offered, in that he publicly accused Mr Devlin and Mr Lucas of providing incorrect legal advice; and Mr Devlin of misquoting the law and of trying to portray an 'inappropriate assessment' as an 'appropriate assessment'. In my view, it was at this point that Councillor Hyman's conduct became unacceptable.
- 6.9 Councillor Hyman has acknowledged that he has become frustrated at '*being ignored*' and that this may have affected his manner in the Chamber. Councillor Hyman is clearly a very hard-working councillor who is passionate about the work that he does. It is important that members with Councillor Hyman's undoubted intellectual abilities and desire to represent their community are able to fulfil a legitimate 'scrutiny' role, drawing attention in a reasonable manner to issues of genuine public concern. Given Councillor Hyman's concerns, it is understandable that he should want to get his point across strongly. My concern though is that in doing so Councillor Hyman has paid little regard to the impact his comments might have on the legal officers advising the Council. I note that Councillor Hyman has not met the relevant officers to discuss the matter privately, where the specific concerns he has about the interpretation of

the environmental law could be discussed in detail. I would suggest that their desire to address his concerns about aspects of the legal advice offered 'behind closed doors' is an eminently sensible approach and not, as suggested by Councillor Hyman, the Council wanting to wash their dirty laundry in private.

- 6.10 Councillor Hyman said that in his opinion the importance of ensuring that the Council did not make unlawful decisions superseded any responsibilities he might have to treat officers with respect. While stressing that I have not considered the veracity of Councillor Hyman's concerns (and it should be noted that the decisions referred to above have not been judicially challenged), I would argue that that the two are not mutually exclusive. I would further remind Councillor Hyman that it is the legal officers who tasked with and qualified to ensure that Committee decisions are made lawfully. While Councillor Hyman was entitled to express his concerns in good faith, he was not allowed to publicly challenge the personal integrity and professionalism of the two officers referred to above. I am of the view that by accusing them officers in the manner he did fail to treat them with respect.

Freedom of Expression

- 6.11 In my consideration as to whether Councillor Hyman has failed to comply with the Code, I must also take into account his right to free speech, in particularly the higher level of protection offered to political speech.¹⁶
- 6.12 In *Heesom v Public Service Ombudsman for Wales*, Mr Justice Hickinbottom considered a councillor's right to free speech.¹⁷ His considerations drew attention to a number of earlier cases in which the following propositions could be derived:
- a. While freedom of expression is important for everyone, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests.
 - b. The enhanced protection applies to all levels of politics, including local.
 - c. Article 10 of the European Convention on Human Rights protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated.

¹⁶ Please refer to paragraphs 3.10-3.13 for the relevant considerations.

¹⁷ Full judgement <http://www.landmarkchambers.co.uk/userfiles/Heesom.pdf>

- d. Whilst, in a political context, Article 10 protects the right to make incorrect but honestly made statements, it does not protect statements which the publisher knows to be false.
- e. The protection goes to “political expression”; but that is a broad concept in this context. It is not limited to expressions of or critiques of political views, but rather extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others.
- f. Past cases draw a distinction between fact on the one hand, and comment on matters of public interest involving value judgment on the other. As the latter is unsusceptible of proof, comments in the political context amounting to value judgments are tolerated even if untrue, so long as they have some – any – factual basis. What amounts to a value judgment as opposed to fact will be generously construed in favour of the former; and, even where something expressed is not a value judgment but a statement of fact (e.g. that a council has not consulted on a project), that will be tolerated if what is expressed is said in good faith and there is some reasonable (even if incorrect) factual basis for saying it, “reasonableness” here taking account of the political context in which the thing was said
- g. As article 10(2) expressly recognises, the right to freedom of speech brings with it duties and responsibilities. However, any restriction must respond a “pressing social need”.
- h. Politicians are required to have a thick skin and be tolerant of criticism and other adverse comment. Civil servants are, like politicians, subject to the wider limits of acceptable criticism. However, unlike politicians they are involved in assisting with and implementing policies, not making them. As such they must enjoy public confidence in conditions free from perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive attacks when on duty.

6.13 In considering whether a breach finding would amount to a disproportionate restriction on Councillor Hyman’s right to freedom of expression I am firstly mindful that under the Localism Act the range of sanctions is very limited; as such any interference is likely to be minimal. In addition, I consider that the circumstances of this case warrant intervention; while much of Councillor Hyman’s conduct would receive the higher level of protection afforded political debate, I would draw his attention to paragraph 6.12(h). I therefore suggest that the proposed finding at paragraph 6.10, that Councillor Hyman breached the Code, would not represent a disproportionate restriction on his freedom of expression.

7 Recommendation

- 7.1 It is my view that Councillor Hyman was acting in his official capacity when attending meetings on **16 November 2016** and **29 March 2017** and as such the Code was engaged. Having considered the evidence provided, including watching webcasts of the relevant meetings, I have concluded that Councillor Hyman did fail to treat two legal officers with respect and therefore failed to comply with the Code.
- 7.2 In considering what action the Monitoring Officer should consider taking, I am not sure that further examination of the concerns highlighted or formal determination of these allegations through a public hearing the best use of public money. While I think that Councillor Hyman's conduct did on this occasion cross the line, it is a finely balanced decision. Given how important it is that councillors must be free to scrutinise and criticise the actions of their own authority, Councillor Hyman's conduct should be viewed at the lesser end of seriousness.
- 7.3 I am mindful that Councillor Hyman has already rejected the offer of resolving this matter informally and that during his interview he made several remarks that I think will make doing so now quite challenging. Having said that, I do not think that Councillor Hyman intended to disrespect the respective legal officers at the two meetings and that he would want to ensure that there are good working relations moving forward.
- 7.4 In light of the conclusions set out in this report, I would invite Councillor Hyman to reconsider his response to this complaint and instead choose to engage with the Council's Monitoring Officer in seeking an informal resolution. I would also suggest he reflect on whether the concerns he raises at meetings are actually being well served by his approach and style of presentation. I would caution his tendency to stray from political debate into personal accusations, as this is hardly conducive to encouraging constructive communication and proper advice.
- 7.5 Should Councillor Hyman choose to engage directly with the Monitoring Officer in a constructive manner, my recommendation is that the Monitoring Officer seek a local resolution to the matters raised; the flexibility of being able to take other action has built-in advantages and fits in with a locally owned process. I consider that the local resolution should involve Councillor Hyman attending a meeting with the Council's Monitoring Officer and Independent Person so that they can be satisfied that Councillor Hyman understands that conduct such as that described in this report is unbecoming for a member of the Council and has an impact on the effective running of the Council. If Councillor Hyman does not

engage with the process in a manner that the Monitoring Officer considers sufficient, I believe that there is no option but for the matter to be referred for a formal hearing.

- 7.6 I would further recommend that the type of workshop event referred to in 5.37 of this report be arranged as soon as is possible. In my view it would assist all members of the Planning Committee to have their understanding of the Habitats Directive and associated matters improved so that they can be confident when reaching the decisions on relevant planning applications.