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Supplementary Agenda

Melton Borough Council

Rural Capital of Food

Meeting name	**Meeting of the Melton Economic & Environmental Affairs Committee (previously Rural, Economic & Environmental Affairs)**
Date	**Wednesday, 24 January 2018**
Start time	**6.00 pm**
Venue	**Parkside Approach, Burton Street, Melton Mowbray, LE13 1GH**
Other information	**This meeting is open to the public**

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Town and Country Planning Act 1990

Neighbourhood Planning (General) Regulations 2012

WALTHAM ON THE WOLDS AND THORPE ARNOLD NEIGHBOURHOOD DEVELOPMENT PLAN 2017 - 2036

INDEPENDENT EXAMINATION

Report to Melton Borough Council

by Edward Cousins BA, LLM

December 2017

SUMMARY OF CONCLUSIONS

1. I am satisfied that the consultation exercise conducted by the Parish Council fulfils the Regulation 14 requirements, and the "*Sedley Criteria*".

2. As my conclusions in the Interim Draft Report were at variance with some of my initial views as recorded in my Draft Conclusions and Note, the statutory provisions particularly relating to the Strategic Environmental Assessment and the Habitats Directive, were the subject of detailed consideration and legal analysis. In this Final Report I have retained this legal analysis for the purposes of background information to the Neighbourhood Development Plan.

3. From the evidence made available since the Draft Conclusions and the Note were produced, I came to the conclusion that the Borough Council had complied with its obligations to provide a formal reasoned Regulation 9 determination, and that a full Strategic Environmental Assessment was unnecessary. However, as originally it appeared that the Parish Council as a "*responsible authority*" had apparently not provided such a determination, I considered that this should be addressed. Accordingly, on 7th December 2017 the Parish Council did so provide such a determination, which, in my judgment, satisfies the legal requirements.

4. It was also apparent that Natural England and Historic England had been consulted, but (as stated in the Interim Draft Report) it was not immediately apparent that the other Agencies had been so consulted. I therefore stated such evidence should be provided that the other Agencies have also been the subject of consultation. This has now been rectified in that the Parish Council has now forwarded to me as Attachments A, B and C the relevant consultation responses from the Environment Agency, Historic England, and Natural England. This again, in my judgment, satisfies the legal requirements.

5. Thus, subject to certain suggested modifications and amendments, I was satisfied that, in principle, that the draft Policies enumerated in Sections 3 to 8 of the Neighbourhood Development Plan were in compliance with the provisions of Section 38A in that the Policies do relate to the use and development of land within the Neighbourhood Plan Area, and not to extraneous matters.

6. Further, the draft Policies appeared to be in general conformity with the strategic policies in the draft Neighbourhood Development Plan. The "village envelopes" had been updated, but the general principle of settlement boundaries to prevent coalescence of settlements had been retained. I considered that the overall spatial strategy of concentrating growth in Melton Mowbray and the new village was not undermined by the draft Neighbourhood Development Plan. I was satisfied that the general principles of protecting heritage assets, areas of important open space, and sites of importance for biodiversity were carried through, and that there was support for community facilities within the villages.

7. However, at the earlier stage of the Examination I did consider that the draft Neighbourhood Development Plan did not fully comply with the various statutory requirements. Accordingly, I was unable at that stage of the Examination to recommend that the draft Neighbourhood Development Plan be submitted to a Referendum. In the Interim Draft Report, I stated that there were several specific points to be addressed, and I suggested possible modifications that could overcome those deficiencies. In particular, I recommended that attention should be directed to the modification or amendment of a number of Policies by the Parish Council. I considered that the wording of certain Policies was not appropriate as they are inconsistent with national policy and guidance.

8. However, I was, in principle, satisfied that the Neighbourhood Development Plan, with necessary modifications and modifications, could make a contribution towards sustainable development by supporting appropriate economic development whilst protecting the local environment.

9. I also considered whether the Referendum should extend beyond the Neighbourhood Plan Area. In this instance, I could see no particular reason to hold a wider Referendum.

10. Finally, I was satisfied that the Neighbourhood Development Plan had regard to the fundamental rights and freedoms guaranteed under the European Convention of Human Rights ("the European Convention of Human Rights") and did not interfere disproportionately with them. It therefore complied with the Human Rights Act 1998.

11. Having now received the response from the Parish Council in its letter dated 6th December 2017, together with a number of documents attached thereto, I have now considered the various comments made. I have modified the Interim Draft Report to incorporate these as textual amendments and modifications to the original text.

12. I am now satisfied that all the requisite legal requirements have been addressed. Accordingly. Subject to the text of the Neighbourhood Development Plan being modified to take account of the various proposed alterations, I can now recommend that the Neighbourhood Development Plan proceed to a Referendum.

CHAPTER 1

INTRODUCTION

Appointment of the Examiner[1]

1. I have been appointed by Melton Borough Council ("the Borough Council") to conduct an independent examination ("the Examination") of the draft Waltham on the Wolds and Thorpe Arnold Neighbourhood Development Plan 2017-2036 ("the Neighbourhood Development Plan") produced by the Waltham on the Wolds and Thorpe Arnold Parish Council ("the Parish Council"), and to provide a Report.

2. I am independent of the Parish Council and the Borough Council. I have no interest in any land affected by the Neighbourhood Development Plan - nor do I have any professional conflicts of interest.

3. I was called to the Bar of England and Wales in 1971 and practised as a Chancery Barrister in Lincoln's Inn for over 30 years with expertise in property and land law, and associated Chancery litigation. From 2002 to 2011, I served as Chief Commons Commissioner appointed under section 17 of the Commons Registration Act 1965. This was a part-time judicial post. In September 2003 I was appointed to the salaried full-time judicial role of the Adjudicator to HM Land Registry, established under the provisions of the Land Registration Act 2002. When in June 2013 this jurisdiction was transferred into the tribunal system, I then became Principal Judge of the First-tier Tribunal (Property Chamber – Land Registration Division). This meant that I was able to sit as a Deputy Upper Tribunal Judge in the Lands Chamber, and the Tax and Chancery Chamber.

4. In October 2014 I ceased to be salaried judge. I then joined Francis Taylor Building as an Associate Member specialising in planning law, and related land and property law issues. In that capacity I am engaged in the role of Legal Adviser, Mediator and Arbitrator. I have been appointed to the Panel of Examiners established by NPIERS. I am also qualified to sit as a non-statutory Inspector, and have been retained in that

[1] For the role of the Examiner, see Chapter 2, paras 33 *ff.*

role to conduct a number of town and village green inquiries. I still continue to sit as a fee-paid judge in the High Court.

Qualifying Body

5. The Parish Council is a qualifying body as defined. It is therefore entitled to initiate the process whereby it can require the local planning authority to "*make*" the Neighbourhood Plan. For these purposes the Borough Council is the local planning authority.[2]

Referendum

6. Following the Examination, in the Report the Examiner can make a recommendation that the Neighbourhood Plan should go forward to a Referendum.[3] If the Neighbourhood Plan achieves more than 50% of votes in favour of a Referendum, then the Borough Council would be under a statutory duty to make the plan. However, for the reasons stated below, In the Draft Interim Report considered that it was premature for the draft Neighbourhood Plan to proceed to a Referendum at that stage. However, having now received the response dated 6th December 2017 from the Parish Council as to a number of queries raised by me at the earlier stage of the Examination, I have now revised my views, and in my judgment, for all the reasons stated below, I recommend that the Neighbourhood Development Plan should proceed to a Referendum.

Consultations

7. There have been several Consultations conducted by the Parish Council. There was an initial public consultation which took place between 19th and 20th April 2016. This was followed by a second public consultation between 16th and 17th November 2016. Between 12th April and 23rd May 2017 the statutory consultation then took place in accordance with Regulation 14 of the Neighbourhood Planning (General) Regulations 2012 (as amended) ("the 2012 Regulations").

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2 See s. 38A(12) of the 2004 Act, and Chapter 2, paras 21 *ff*.

3 In accordance with paragraph 14 of Schedule 4B to the 1990 Act.

Neighbourhood Development Plan

8. The draft Neighbourhood Development Plan was then submitted for Examination to the Examiner by the Borough Council in September 2017.

9. Following the analysis of the material submitted for the purposes of the Examination, I produced Draft Conclusions dated 3rd November 2017, in which a number of concerns with the Neighbourhood Development Plan were set out. Helpful comments were then received from the Parish Council. These addressed some of the points raised, and I was provided with a number of further documents.[4] However, on an initial assessment I considered that the Strategic Environment Assessment and the Habitats Regulations Assessment Screening Report were deficient in a number of respects. I then produced a Note outlining these perceived deficiencies.[5] However, for the reasons stated below, I have now revised my initial assessment.[6]

10. As stated, I then produced the Interim Draft Report in early December 2017 for the consideration of the Parish Council. This Interim Draft Report addressed matters relevant to the Examination and made a number of suggestions as to the way forward, and made draft recommendations for certain modifications to the Neighbourhood Development Plan. In a letter dated 6th December 2016 from the Parish Council have now received responses to the various queries raised. I am now satisfied that all the matters raised in the Interim Draft Report have been addressed, and the points resolved. I therefore will recommend that the Neighbourhood Development Plan should go forward to a Referendum, subject to the necessary modifications being made to its text.

Neighbourhood Development Plan Period

11. Section 38B(1)(a) of the Planning and Compulsory Purchase Act 2004, as amended ("the 2004 Act")[7] requires that a neighbourhood plan specify the period

4 The Draft Conclusions, and the subsequent comments from the Parish Council are annexed to this Interim Draft Report as Annex 1.

5 The Note is contained in Annex 2.

6 See Chapter 4, para 100*ff,* and footnote 42.

7 Amended by the Localism Act 2011, Sch 9.

for which it is to have effect. In Chapter 4 I express concerns as to the manner in which the Plan Period has been expressed.[8]

Neighbourhood Development Plan Area

12. A plan showing the boundary of the Waltham on the Wolds and Thorpe Arnold Neighbourhood Area is included as Figure 1 on page 5 of the Neighbourhood Development Plan. The area to be covered by the Neighbourhood Development Plan is defined by the Parish boundary i.e. the whole Parish is included. The Borough Council approved the designation of Waltham on the Wolds and Thorpe Arnold as a Neighbourhood Area in February 2014. This satisfies the relevant requirement under section 61G(1) of the Town and Country Planning Act 1990 ("the 1990 Act").

Site View

13. In the Interim Draft Report it was stated that in due course it might become necessary to conduct an escorted Site View. However, I have now re-addressed the position, and I no longer consider that a Site View is necessary.

[8] Para 102*ff*. In paragraph 5(c) of my Draft Conclusions this point was raised, and it has now been stated that the termination date for the Neighbourhood Development Plan is 31st December 2036.

CHAPTER 2

NEIGHBOURHOOD PLANNING

The Background

14. Neighbourhood planning is the process introduced by Parliament as enacted by the Localism Act 2011 ("the 2011 Act"). The intellectual purpose of neighbourhood planning is to seek to enfranchise those persons living and working in a community by providing the basis through which they can play a more active role in the process of deciding the future of their neighbourhood. It has been described as the ability:-

> "*to give to communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need*"

15. Thus, the 2011 Act gave powers to parish councils to involve their communities in the creation of neighbourhood development plans, in order to provide them with a greater say in planning matters. Parish councils are therefore able to play a role in the establishment of general planning policies for the development and use of land in their neighbourhoods. Examples of such involvement are directed to the siting, design and construction of new homes and offices, and the designation of local green space. The neighbourhood plan sets a vision for the future for the area concerned. It can be detailed, or general, depending on what local people want.[9]

16. In order to ensure that the new process is workable and effective the 2011 Act introduced the requisite amendments to the 1990 Act, and the 2004 Act.[10] These amendments came into force on 6th April 2012 and were supplemented by detailed procedures provided for in the 2012 Regulations.

17. The first step towards producing a neighbourhood plan is for a parish council, or other qualifying body, to define a "*neighbourhood area*" for which it considers that a plan should be prepared and presented. [11] This is part of the process which that body is entitled to initiate for the purpose of requiring the local planning authority in England

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9 https://www.gov.uk/publications/neighbourhood-planning

10 The 1990 Act, ss. 61E to 61P, Sch 4B (neighbourhood development orders); the 2004 Act, ss. 38A to 38C (neighbourhood plans), as amended by the 2011 Act.

11 See s 38A(1).

to make a neighbourhood development plan for the whole or any part of its area specified in the plan.[12] "A "*neighbourhood development plan*" is a plan

> *".....which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area*".[13]

The local planning authority will provide assistance in this process, where appropriate. The draft plan must meet what are referred to in the legislation as the basic conditions ("*the Basic Conditions*"). This means that the draft plan must in general conformity with national and other local planning policies. It must also conform to other provisions.[14]

18. Once a draft plan has been prepared and made available for inspection within the area in question, and members of the community have had the opportunity to comment upon it, an independent Examiner is appointed by the planning authority, with the consent of the qualifying body that produced the draft plan. The examiner must be someone who is independent of the qualifying body and the planning authority, has appropriate qualifications and experience, and has no interest in any land affected by the plan.[15] The Examiner then produces the Report which contains one of three possible recommendations.[16] One of these recommendations is that the draft plan should be submitted to a referendum.[17]

19. The purpose of the referendum is to decide whether the draft plan should be "*made*", subject to any changes recommended by the examiner and accepted by the planning authority. If more than 50% of those voting vote in favour of the plan, the planning authority must then make the plan.

20. Once it comes into force, the neighbourhood plan forms part of the development plan for the area to which it relates, together with the strategic policies in the adopted local plan, the "*saved*" policies of the relevant local plan, any plans for minerals and waste disposal, and any saved policies of the relevant regional strategy. Thereafter it forms

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12 The 1990 Act, s. 61F(1), (2), applied by the 2004 Act, s. 38C(2)(a).

13 By virtue of 38A(2).

14 The 1990 Act, Sch 4B, para 8, applied by the 2004 Act, s 38A(3). For a detailed examination of the Basic Conditions and other statutory requirements, see Chapter 3, below.

15 The 1990 Act, Sch 4B, para 7(6), applied by the 2004 Act, s. 38A(3).

16 See para 29, below.

17 The 1990 Act, Sch 4B, para 10(2)), applied by the 2004 Act, s 38A(3). For the appointment and role of the examiner, and the possible recommendations see para 33, below.

an integral part of the policy framework that guides the planning authority and the planning inspectorate, in making all planning decisions in the area.

The statutory framework - the detail

Compliance with provision made by or under sections 38A and 38B of the 2004 Act

Section 38A – Meaning of "neighbourhood developments plan"

21. Section 38A of the 2004 Act provides that any "*qualifying body*" is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan. The Parish Council is a "*qualifying body*" by virtue of the provisions of 38A(12), and the Borough Council is a "*local planning authority*", for the purpose of the 2004 Act.

22. As stated above,[18] an application was made by the Parish Council for the whole Parish to be designated Neighbourhood Plan Area for the purpose of the 2004 Act. This was approved and authorised by the Borough Council in February 2014.

23. A *'neighbourhood development plan'* is defined by Section 38A(2) as "*a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan*".

24. Section 38A(2) requires the neighbourhood development plan to only contain policies relating to the development and use of land lying in the neighbourhood area. The policies are set out in Sections 3-8 of the Neighbourhood Development Plan. I am satisfied that the Policies do relate to the use and development of land within the neighbourhood area, and not to extraneous matters.

25. By section 38(3)(c) of the 2004 Act, a neighbourhood development plan that has been made in relation to an area forms part of the statutory development plan, for the purpose of guiding town and country planning decisions. Under section 38(6) there is a presumption in favour of determining planning applications in accordance with the neighbourhood development plan, unless material considerations indicate otherwise.

[18] Para 12, above.

Section 38B

26. Section 38B of the 2004 Act provides as follows:

> ***"38B Provision that may be made by neighbourhood development plans***
>
> *(1) A neighbourhood development plan—*
> *(a) must specify the period for which it is to have effect,*
> *(b) may not include provision about development that is excluded development, and*
> *(c) may not relate to more than one neighbourhood area.*
>
> *(2) Only one neighbourhood development plan may be made for each neighbourhood area.*
>
> *(3) If to any extent a policy set out in a neighbourhood development plan conflicts with any other statement or information in the plan, the conflict must be resolved in favour of the policy.*
>
> *(4) Regulations made by the Secretary of State may make provision—*
> *(a) restricting the provision that may be included in neighbourhood development plans about the use of land,*
> *(b) requiring neighbourhood development plans to include such matters as are prescribed in the regulations, and*
> *(c) prescribing the form of neighbourhood development plans.*
>
> *(5) A local planning authority must publish each neighbourhood development plan that they make in such manner as may be prescribed by regulations made by the Secretary of State.*
>
> *(6) Section 61K of the principal Act (meaning of "excluded development") is to apply for the purposes of subsection (1)(b)."*

27. Section 61K provides, so far as is material, as follows:-

> *"**61K Meaning of "excluded development"***
> *The following development is excluded development for the purposes of section 61J—*
> *(a) development that consists of a county matter within paragraph 1(1)(a) to (h) of Schedule 1,*
> *(b) development that consists of the carrying out of any operation, or class of operation, prescribed under paragraph 1(j) of that Schedule (waste development) but that does not consist of development of a prescribed description,*

> *(c) development that falls within Annex 1 to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended from time to time),*[19]
> *(d) development that consists (whether wholly or partly) of a nationally significant infrastructure project (within the meaning of the Planning Act 2008).”*

28. The 2012 Regulations were made under section 38B of the 2004 Act. These prescribe some detailed requirements for neighbourhood development plan proposals and how they are to be consulted upon, publicised and submitted.

29. Further, the 2012 Regulations, at Regulation 32, and Schedule 2 thereof, prescribe a condition for the purpose of paragraph 8(2)(g) of Schedule 4B to the 1990 Act. Paragraph 1 of Schedule 2 to the 2012 Regulations stipulates that:

> *“[the] making of the neighbourhood development plan is not likely to have a significant effect on a European site (as defined in the Conservation of Habitats and Species Regulations 2012) or a European offshore marine site (as defined in the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007) (either alone or in combination with other plans or projects).”*

30. The procedure for examining draft neighbourhood development plans is provided for in Schedule 4B of the 1990 Act, which is applied by section 38A(3) of the 2004 Act. This provides at paragraph 7 for the local planning authority to submit the draft plan for independent examination by a person who is independent of the qualifying body and of the authority, does not have an interest in any land that may be affected by the draft plan, and has appropriate qualifications and experience.

31. The Examiner must make a report on the draft plan pursuant to paragraph 10 of Schedule 4B, which must recommend either that the draft plan is submitted to a referendum; or that modifications be made to correct errors or secure compliance with legal requirements, and the draft plan as modified be put to a referendum; or that the

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[19] This must now be taken to refer to codifying Directive 2011/92/EU, which repealed and re-enacted Directive 85/337/EEC and its amending instruments and states at Article 14 that references to the repealed directive are to be construed as references to the new directive, as a matter of consistent interpretation and under the principle of construction codified in relation to domestic law by s.17(2)(a) of the Interpretation Act 1978.

proposal for the plan be refused.[20] The examiner's report must contain a summary of its main findings and give reasons for each of its recommendations.

32. The local planning authority is then required to publish the examiner's report, and to consider the recommendations made. If the local planning authority considers that the statutory requirements are complied with, the draft plan must then be put to a referendum and, if approved by the referendum, adopted as part of the neighbourhood development plan.

Role of the Examiner – the detail

33. The role of the Examiner is to conduct an independent examination of the draft plan. Paragraph 8(2) of Schedule 4B to the 1990 Act, as modified by section 38C(5)(d) of the 2004 Act, requires the Examiner to consider the following:

- whether the draft plan "*meets the basic conditions*" (defined at sub-paragraph (2)),[21] and is in general conformity with "*EU obligations*" (Basic Condition (f)). [22]
- whether it complies with the provision made by or under sections 38A and 38B of the 2004 Act; and
- whether the area for any referendum should extend beyond the neighbourhood area to which the draft plan relates; and
- whether the draft plan is compatible with "the Convention rights", as defined by the Human Rights Act 1998;[23]

34. In carrying out the examination of a draft plan, the Examiner is also required to consider specifically whether the draft plan is likely to have a significant effect on:

(1) a European site (as defined in the Conservation of Habitats and Species Regulations, 2010) ("*the Habitats Directive*"), or

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20 See below, para 33 *ff*.

21 For a detailed analysis of the Basic Conditions see Chapter 3, para 45 *ff*.

22 See paragraph 46, above

23 Section 1 of the 1998 Act defines these as the rights and fundamental freedoms set out in—Articles 2 to 12 and 14 of the European Convention on Human Rights, Articles 1 to 3 of the First Protocol to the Convention, and Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention.

(2) a European offshore marine site (as defined in the Offshore Marine Conservation (Natural Habitats, &c) Regulations, 2007),

either alone, or in combination with other plans or projects (additional Basic Condition (g)).[24]

35. It is important to note that the examination process is not intended to put the Examiner into the shoes of the "*qualifying body*" so as to usurp its function and re-make its decisions. The statutory remit of the Examiner is limited.

36. Thus, the examination process is less intrusive than that required in respect of a local development plan document. For instance:

> *"the remit of an examiner dealing with a neighbourhood plan does not include the requirement to consider whether that plan is 'sound' (as in section 20(5)(b) of the 2004 Act), so the requirements of 'soundness' contained in paragraph 182 of the NPPF do not apply to a neighbourhood plan. The Examiner of a neighbourhood plan does not consider whether that plan is 'justified' in the sense used in paragraph 182 of the NPPF. In other words, the Examiner does not have to consider whether a draft policy is the 'most appropriate strategy' compared against alternatives, nor is it for him to judge whether it is supported by a 'proportionate evidence base'.*
>
> - *Whereas under paragraph 182 of the NPPF a local plan needs to be "consistent with national policy" an examiner of a neighbourhood plan has a discretion to determine whether it is appropriate that the plan should proceed having regard to national policy.*
>
> - *The basic condition only requires the examiner to consider whether the draft neighbourhood plan as a whole is in general conformity with the strategic policies in the adopted Development Plan taken together. I am not charged with determining in respect of each particular policy or element whether there is a tension between the local and neighbourhood plans, and if there is such tension in places, that may not be determinative of the overall question of general conformity."*[25]

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24 2012 Regulations, Reg 32; Sch 2, para 1.

25 See *R(Maynard) v Chiltern District Council* [2015] EWHC 3817 (Admin) at [13] per Holgate J.

37. Although the Examiner has a general discretion whether to recommend modification to bring the neighbourhood plan into line with national policy if he finds points of departure, it is necessary to bear in mind that it would normally be expected that appeal decisions would follow current national policy where it conflicts with a local or neighbourhood development plan. A neighbourhood plan that is at odds with national policy is in danger of becoming otiose. Unless the Examiner considers that there is evidence demonstrating good reason to depart from national policy in the neighbourhood, he would be expected to recommend that it be followed.

38. In essence, therefore, the role of the Examiner is to assess whether the draft plan is compliant. If in the event that the draft plan does not comply with the various statutory requirements, the Examiner then is obliged to consider whether it can be modified so that it does so comply.

The Report

39. The Examiner then produces a report, which contains one of three possible recommendations, namely, whether:

> *"(a) the draft plan is to be submitted to a referendum;*
> *(b) the modifications specified in the report are to be made to the draft plan, and that the draft plan as modified is submitted to a referendum; or*
> *(c) the proposal for a plan is to be refused."*[26]

40. The recommended modifications can only be those that the Examiner feels are necessary to ensure that the draft plan complies with the Basic Conditions and the other relevant statutory requirements, or are needed for the purpose of correcting errors. If the changes are substantial, then they may have to be the subject of a further round of consultation.

41. The further requirements of the Examiner, as defined in the 2012 Regulations, include considering whether the draft plan complies with the definition of a neighbourhood development plan, and the provisions that can be made by a neighbourhood development plan; and whether the draft plan is compatible with the European

[26] 1990 Act, Sch 4B, para 10(2), applied by the 2004 Act, s 38A(3).

Convention on Human Rights. The Examiner may also make recommendations on whether the neighbourhood plan area for referendum should extend beyond the neighbourhood plan boundaries.

42. In this Report, I shall first consider the Basic Conditions, and then formal compliance with the provisions contained within sections 38A and 38B of the 2004 Act. I shall then address the European dimension and the question of human rights. Finally I shall make recommendations as to the modification or amendment of the draft Policies.

Public Consultation

43. The consultation requirements for a draft neighbourhood plan are set out in Regulation 14 of the 2012 Regulations. In essence, the Parish Council are required to have publicised the details of the proposed neighbourhood development plan, where and when it may be inspected and how and when to make representations in a manner likely to bring it to the attention of people who live work and carry on business in the neighbourhood area. In addition, certain bodies must be consulted whose interests may be affected by the proposals in the draft neighbourhood development plan.

44. **I am satisfied that the consultation conducted by the Parish Council satisfied the Regulation 14 requirements and the "*Sedley Criteria*" for consultation endorsed by the Supreme Court as a "prescription for fairness" in *R (Moseley) v LB Haringey.*[27]**

[27] [2014] UKSC 56.

CHAPTER 3

THE BASIC CONDITIONS

Overview

45. In this Chapter the Basic Conditions are analysed. The requirement made is for the Examiner to consider whether the Neighbourhood Plan meets the Basic Conditions.[28] Thereafter in this Report consideration is then directed as to whether the Neighbourhood Plan meets the Basic Conditions.

46. Paragraph 8(2) of Schedule 4B to the 1990 Act[29] provides that a neighbourhood development plan meets the Basic Conditions if:

> *"(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make [the plan],*
>
> *(b)…….*
>
> *(c)…….*
>
> *(d) the making of [the plan] contributes to the achievement of sustainable development,*[30]
>
> *(e) the making of [the plan] is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),*
>
> *(f) the making of [the plan] does not breach, and is otherwise compatible with, EU obligations,*[31] *and*
>
> *(g) prescribed conditions are met in relation to [the plan] and prescribed matters have been complied with in connection with the proposal for [the plan]."*[32]

47. Basic Conditions (b) and (c), relating to the built heritage, apply to the examination of proposed neighbourhood development orders, but not to that of neighbourhood plans.

48. Only one further Basic Condition has been prescribed under paragraph 8(2)(g), as follows:

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28 The 1990 Act, Sch 4B, para 8(1)(a), applied by the 2004 Act, ss 38A(3), 38C(5)(b).

29 As modified by section 38C(5)(d) of the 2004 Act.

30 For the definition of "sustainable development", see paragraphs 56*ff*, below.

31 I.e. the European Convention of Human Rights, the Strategic Environmental Assessment Directive 2001/42/EC, and the Habitats Directive 92/43/EEC.

32 1990 Act, Sch 4B, para 8(2), applied by the 2004 Act, ss 38A(3), 38C(5)(d).

> *"The making of the neighbourhood development plan is not likely to have a significant effect on a European site … or a European offshore marine site … (either alone or in combination with other plans or projects)."*[33]

49. The 2012 Regulations provide that the submission of a proposed neighbourhood plan by a qualifying body to a planning authority must be accompanied by a statement explaining how the plan meets the Basic Conditions, together with other statutory requirements.[34] In the case of the Neighbourhood Development Plan, a document entitled the "Statement of *Basic Conditions*" dated June 2017 has been produced to accompany it. It provides summary of the measures that have been taken in this case to ensure that the Neighbourhood Development Plan does meet the Basic Conditions.

50. Further, a draft plan must meet all of the Basic Conditions specified in paragraph 8(2), if it is to be submitted to a Referendum, not just some of them.

National policies and advice: National Planning Policy Framework

51. In carrying out the Examination of a draft plan, and deciding whether to recommend that it should be submitted to a Referendum, the Examiner is required to have regard to national policies and advice contained in guidance issued by the Secretary of State (see Basic Condition (a)).

52. The most significant national policies relevant to planning matters in England are set out in the document entitled the "*National Planning Policy Framework*" ("*the NPPF*"). This was published on 27th March 2012. It replaced almost all of the Planning Policy Guidance notes and Planning Policy Statements (PPGs and PPSs) that were extant at that time.

53. In the "*Ministerial Forward*" of the NPPF the declaration was made by the then Minister for Planning that *"[t]he purpose of planning is to help to achieve sustainable development.*" "Sustainable … *means ensuring better lives for ourselves don't mean worse lives for future generations".* "*Development means growth … We must house a*

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33 2012 Regulations, Sch 2, para 1.
34 The 2012 Regulations, Reg 15(1)(d).

rising population, which is living longer and wants to make new choices…. Sustainable development is about change for the better, and not only in our built environment….Development that is sustainable should go ahead, without delay – a presumption in favour of sustainable development that is the basis for every plan, and every decision …". The expressed aim of the NPPF is by replacing *"…. over a thousand pages of national policy with around fifty, written simply and clearly, we are allowing people and communities back into planning*."[35]

54. The NPPF comprises a clear demonstration of the Government's commitment to a "*plan-led*" planning system, as is apparent throughout the document. In paragraph 2 of the "*Introduction*" there is an acknowledgment of the statutory presumption in favour of the neighbourhood development plan[36], and the status of the NPPF as another material consideration. There are a number of references to the "*plan-led*" system contained in the document.

55. Paragraph 12 acknowledges that the NPPF *"… does not change the statutory basis of the development plan as the starting point for decision-making*". It states that the *"[p]roposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise.*" It is added that *"[i]t is highly desirable that Local Planning Authorities should have an up-to-date plan in place."* Paragraph 13 confirms that the NPPF *"… constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications."*

"Achieving sustainable development"

56. In paragraph 6 of the NPPF it is stated that the purpose of the planning system is to contribute to the achievement of sustainable development. Reference is then made to

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35 In the conjoined appeal *Suffolk Coastal District Council v Hopkins Homes Ltd and Secretary of State for Communities and Local Government; Richborough Estates Partnership LLP v Cheshire East Borough Council and Secretary of State for Communities and Local Government* Lindblom LJ referred to authorities where it is stated that this attempt for simplicity and clarity and process of simplification had not necessarily achieved what was intended.

36 See s. 38(6) of the 2004 Act.

paragraphs 18 to 219 as constituting the Government's view of what sustainable development in England means for the planning system. Paragraph 7 of the NPPF provides as follows:

> *"7. There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:*
>
> - ***an economic role*** *– contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;*
> - ***a social role*** *– supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and*
> - ***an environmental role*** *– contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy. "*

"The Presumption in favour of sustainable development"

57. A key component of the NPPF is the concept of *"... the presumption in favour of sustainable development"*. In carrying out an examination of a draft plan, the Examiner is required to consider whether the making of it would contribute to the achievement of sustainable development (Basic Condition (d)). Paragraph 14 of the NPPF explains how this presumption is to be applied:-

> *"At the heart of the National Planning Policy Framework is* ***a presumption in favour of sustainable development****, which should be seen as a golden thread running through both plan-making and decision-taking.*
>
> *For* ***plan-making*** *this means that:*

- *local planning authorities should positively seek opportunities to meet the development needs of their area;*
- *Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:*

  any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

  specific policies in this Framework indicate development should be restricted."[37]

*For **decision-taking** this means*[38]*:*

- *approving development proposals that accord with the development plan without delay; and*
- *where the development plan is absent, silent or relevant policies are out of date, granting permission unless:*
  - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole; or*
  - *specific policies in [the NPPF] indicate development should be restricted."*[39]

58. The Government's understanding of neighbourhood plan-making is summarised at paragraphs 15 and 16 of the NPPF where specific reference is made to neighbourhood plans, as follows:

"15. … All plans should be based upon and reflect the presumption in favour of sustainable development, with clear policies that will guide how the presumption should be applied locally.

16. The application of the presumption will have implications for how communities engage in neighbourhood planning. Critically, it will mean that neighbourhoods should:

- *develop plans that support the strategic development needs set out in Local Plans, including policies for housing and economic development;*

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37 e.g. *"...those policies relating to sites protected under the Birds and Habitats Directives ... and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion*."

38 "*Unless material considerations indicate otherwise*."

39 *Ibid.*

- *plan positively to support local development, shaping and directing development in their area that is outside the strategic elements of the Local Plan; and*
- *....”*

59. None of those who submitted written representations has referred to any other definition of sustainable development, or any other documents relating to it, that should be taken into account in this Examination of the Neighbourhood Plan.

The core planning principles

60. The “*core planning principles*” that should underpin all planning are then summarised at paragraph 17, and elaborated in relation to specific topics in the remainder of the NPPF. That paragraph provides as follows:

> *“17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:*
>
> - *be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency; ...”*

61. Contained in section 8 of the NPPF under the heading “Promoting healthy communities” two paragraphs are of relevance to the present Examination, namely paragraphs 76 and 77.

> *“76. Local communities through local and neighbourhood plans should be able to identify for special protection green areas of particular importance to them. By designating land as Local Green Space local communities will be able to rule out new development other than in very special circumstances. Identifying land as Local Green Space should therefore be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be*

designated when a plan is prepared or reviewed, and be capable of enduring beyond the end of the plan period.

77. The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used:

- *Where the green space is in reasonably close proximity to the community it serves;*
- *Where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and*
- *Where the green area concerned is local in character and is not an extensive tract of land."*

62. It will be noted in particular in paragraph 77 that the designation of "*Local Green Space*" should only be used in the circumstances set out in the three bullet points. In particular, it should not be an "*extensive tract of land*". There is no apparent definition of that phrase, although it is usually used in connection with land to be designated as National Parks and not in relation to a relatively small acreage of fields.

Neighbourhood planning

63. The principal policies of the NPPF specifically relating to neighbourhood planning are as follows:

"*183. Neighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need. Parishes and neighbourhood forums can use neighbourhood planning to:*

- *set planning policies through neighbourhood plans to determine decisions on planning applications; and*
- *grant planning permission through Neighbourhood Development Orders and Community Right to Build Orders for specific development which complies with the order.*

184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area

and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.

185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. …"

64. More general policies relating to "*plan making*" are found throughout the NPPF, but they generally refer to the making of local plans. For example, paragraphs 47 and 158-159 contain important policies regarding the need to ensure an adequate supply of housing; but these specifically refer to action by local planning authorities. Nevertheless, since neighbourhood plans are to be in general conformity with strategic policies in local plans, those policies in the NPPF relating to local plans will still be indirectly relevant.

65. Other policies directly relating to the making of neighbourhood plans are in paragraphs 28, 56 - 58, 69 - 70, 76 - 77, 97, 109 - 111, and 117 of the NPPF.

66. More generally, the NPPF sets out a number of policies relating to a wide range of issues, including in particular transport, housing, design, climate change, the natural environment, and the historic environment. It is necessary for the Examiner to have regard to these where appropriate in carrying out the Examination.

Planning Practice Guidance

67. More detailed guidance and advice, expanding on the general policies in the NPPF, has been available since March 2014 on the Planning Portal website, as *Planning Practice Guidance* ("*PPG*").[40] This guidance relates to a whole range of planning issues.

[40] http://planningguidance.communities.gov.uk

68. In particular, the PPG contains the following guidance:

> **How should the policies in a neighbourhood plan be drafted?**
>
> *A policy in a neighbourhood plan should be clear and unambiguous. It should be drafted with sufficient clarity that a decision maker can apply it consistently and with confidence when determining planning applications. It should be concise, precise and supported by appropriate evidence. It should be distinct to reflect and respond to the unique characteristics and planning context of the specific neighbourhood area for which it has been prepared."*[41]

69. A policy that is not "*clear and unambiguous*" is thus not in accordance with the Basic Conditions.

70. The requirement that a policy should be distinct, reflecting local circumstances, is less straightforward. Many policies in proposed neighbourhood plans are to a greater or lesser extent generic policies that could apply to many if not all locations. However, the fact that a particular community has chosen to include a particular generalised policy in its plan reflects its awareness that the issue in question is of special relevance in its circumstances. The inclusion of such general policies thus does not of itself mean that those policies, or the plan as a whole, is not in accordance with the Basic Conditions.

Other national policies and advice

71. The reference in the first basic condition to national policies and advice is not limited to the guidance in the NPPF and the PPG. Historically, a plethora of Circulars, practice guidance notes and other such documents were in existence at an earlier stage. Fortunately, most of these were revoked when the NPPF was produced in 2012. Those that survived, and in particular the 2007 practice guidance on "*Strategic Housing Market Assessments and Strategic Housing Land Availability Assessments*", were cancelled in March 2014.

72. For the purposes of this Examination the assumption has been that the relevant national policies and advice are those that are now exclusively contained in the NPPF and the PPG.

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41 PPG, ref ID: 41-041-20140306.

EU obligations

Strategic environmental assessment [42]

Requirements of the Directive and Regulations

73. Paragraph 10(4) of Schedule 4B to the 1990 Act (as modified by s.38C(5) of the 2004 Act) states that the Examiner is not permitted to recommend submission of the Neighbourhood Development Plan to Referendum if it is consider that the plan does not:

    (a) meet the Basic Conditions mentioned in paragraph 8(2), or
    (b) comply with the provision made by or under' sections 38A or 38B of the 2004 Act.

74. The Examiner is required to check that the making of the plan does not breach EU obligations. This means that there must be consideration whether there has been compliance with the Strategic Environmental Assessment Directive ("*the SEA Directive*"),[43] and the Environmental Assessment of Plans and Programmes Regulations 2004 ("*the 2004 Regulations*") which incorporates the Articled of the SEA Directive.

75. Adoption without a Regulation 9(1) determination by the Parish Council would be a breach of EU law obligations as imposed through the 2004 Regulations. It would therefore fail to comply with the provisions contained in paragraph 8(2)(f) of Schedule 4B to the 1990 Act, as well as failing to comply with provision made under s.38A.

76. The SEA Directive is concerned with the assessment of the effects of certain plans and programmes on the environment. It is provided by Article 3(2) that an environmental assessment is to be carried out for plans prepared for town and country planning or land use, which set a framework for development consent of certain projects, or which in view of the likely effect on protected sites, have been determined to require assessment under the Habitats Directive. Where a plan determines the use

42 As my conclusions in this Report are now at variance with some of my initial views as recorded in my Note, I consider that it is necessary to have detailed regard to the statutory provisions governing the position.

43 Directive 2001/42/EC.

of small areas at local level and makes minor modifications to other town and country planning or land use plans, they require such assessment only where Member States determine that they are likely to have significant environmental effects (by virtue of Article 3(3)).

77. Where an environmental report is required under Article 3 of the SEA Directive, Article 5 provides that:-

> "*an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated."*

Further, the report must contain:-

> *"the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment*"

These include the matters set out in Annex I.

Paragraph (h) of Annex I states"-

> "*an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken.*"

It is proper to use information derived from other levels of decision-making or other assessment procedures, to avoid duplication.

78. Member States are required by Article 6(3) to designate which authorities are to be consulted on the draft plan and report. They are also required by Article 6(4) to identify "*the public affected or likely to be affected by, or having an interest in, the decision-making*" and the consultation procedures *"shall be determined by the Member States*" (Article 6(5)). Article 6(2) states:

"*the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan.*"[44]

79. Regulation 2(1) defines "*responsible authority*" as follows:

> *'"responsible authority", in relation to a plan or programme, means–*
> *(a) the authority by which or on whose behalf it is prepared; and*
> *(b) where, at any particular time, that authority ceases to be responsible, or solely responsible, for taking steps in relation to the plan or programme, the person who, at that time, is responsible (solely or jointly with the authority) for taking those steps'.*

In this case, the Parish Council is a "*responsible authority*", because it proposes and has prepared the plan. The Borough Council is probably also a *responsible authority*, at least by the present time (because it is the Borough Council who have sent the documents on to the Examiner for Examination, and will "*make*" the neighbourhood development plan).[45]

80. Regulation 5(6) of the 2004 Regulations provides:

> *"(6) An environmental assessment need not be carried out–*
> *(a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level…*
> *[…]*
> *unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, or it is the subject of a direction under regulation 10(3)."*

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[44] This is a justiciable question: Case C-474/10, *Department of the Environment for Northern Ireland v Seaport (NI) Ltd* at [46]-[50]; *Cogent Land LLP v Rochford DC* [2012] EWHC 2542 (Admin) at [119] per Singh J; *Kendall v Richford DC* [2014] EWHC 3866 (Admin) at [84] per Lindblom J.

[45] It would seem to follow from the definition that the local planning authority is not initially a "*responsible authority*" until the plan has come into existence and the authority has become "*responsible*" as a matter of law for taking steps in relation to it.

81. Regulation 8 (***Restriction on adoption or submission of plans, programmes and modifications)*** provides as follows:

> *"(1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted…*
> *(a) where an environmental assessment is required in consequence of the determination… before the requirements of paragraph (3) below have been met;*
> *(b) in any other case, before the determination has been made under regulation 9(1).'*

82. Regulation 9 provides that :

> *'9. Determinations of the responsible authority*
> *(1) The responsible authority shall determine whether or not a plan, programme or modification of a description referred to in–*
> *(a) paragraph (4)(a) and (b) of regulation 5;*
> *(b) paragraph (6)(a) of that regulation; or*
> *(c) paragraph (6)(b) of that regulation,*
> *is likely to have significant environmental effects.*
> *(2) Before making a determination under paragraph (1) the responsible authority shall–*
> *(a) take into account the criteria specified in Schedule 1 to these Regulations; and*
> *(b) consult the consultation bodies.*
> *(3) Where the responsible authority determines that the plan, programme or modification is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination.*"

83. The effect of Regulation 9 is that that a formal, reasoned determination *whether or not* an environmental report is required must be made by the Parish Council which is actually responsible for preparing and formulating the plan. Although Regulation 5(6) states that no assessment need be carried out unless it has been determined under Regulation 9 that this is required, the responsible authority cannot avoid assessing the plan by the expedient of failing to consider whether one is required, because Regulation 8 (together with Section 38A(6) of the 2004 Act) prevents adoption unless a determination under Regulation 9(1) has been made. The fact that there is now more than one responsible authority, and that the Borough Council was of the view that a full SEA is not required, does not release the Parish Council from its

obligation, as the authority responsible for preparing the plan, to make a Regulation 9 determination.

84. Regulations 4 and 9(2)(b) require the responsible authority to consult "*consultation bodies*", namely: (a) the Countryside Agency; (b) the Historic Buildings and Monuments Commission for England (Historic England); (c) Natural England; and (d) the Environment Agency. The Countryside Agency was absorbed into Natural England and the Regulations do not reflect this. In domestic law, the basic requirements of a fair consultation are that:

(a) consultation must be at a time when proposals are still at a formative stage,
(b) sufficient reasons must be given for any proposal to enable intelligent consideration and response,
(c) adequate time must be given for such consideration and response, and
(d) the product of consultation must be conscientiously taken into account in finalising any proposals.[46]

These requirements apply to any consultation under the 2004 Regulations.

85. Natural England and Historic England have been consulted, but it is not immediately apparent that the other Agencies have been so consulted.

Recommendation

86. **I originally made a recommendation in the Interim Draft Report that, although that the Borough Council had complied with its obligations to provide a formal reasoned Regulation 9 determination, and that a full SEA was unnecessary, the Parish Council as a "*responsible authority*" had apparently not done so. The Parish Council have now addressed this aspect in its letter dated 7th December 2017. Evidence has also now provided that the other Agencies referred to above have also been the subject of consultation.**

[46] *R (Assisted Reproduction and Gynaecology Centre) v HFEA* [2017] EWHC 659 (Admin) at [87] per O'Farrell J.

Habitats Regulations Assessment

87. Article 6(3) of the Habitats Directive[47] requires that any plan which is not directly connected with or necessary to the management of a protected site, but is likely to have a significant effect thereon (meaning that such an effect cannot be excluded beyond reasonable scientific doubt on the basis of objective information) must not be agreed to unless it has been subject to an "*appropriate assessment of the implications for the site*", and that it has been ascertained that it will "*not adversely affect the integrity of the site concerned*". If a neighbourhood plan is assessed and found to cause harm to the integrity of a protected site, Article 6(4) enumerates some conditions under which a plan may exceptionally be approved where the plan must nevertheless be carried out for imperative reasons of overriding public interest.

88. Those obligations have been incorporated into national law by regulations 102, 102A and 103 of the Conservation of Habitats and Species Regulations 2010 ("*Habitats Regulations*"). Regulation 102 states:

> *"(1) Where a land use plan—*
> *(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and*
> *(b) is not directly connected with or necessary to the management of the site,*
> *the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives.'*
> *(4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority…*
> *must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site…"*

Regulation 102A states:

[47] Council Directive 92/43/EEC of 21 May 1992.

> *"A qualifying body which submits a proposal for a neighbourhood development plan must provide such information as the competent authority may reasonably require for the purposes of the assessment under regulation 102 or to enable them to determine whether that assessment is required."*

89. Regulation 107(1) of the Habitats Regulations then sets out a number of definitions. ''*Land-use plan*" is defined to include a neighbourhood development plan. "*Plan-making authority*" is defined to mean "*the local planning authority when exercising powers under Schedule 4B to the [the 1990 Act](as applied by section 38A(3) of the 2004 Planning Act)*". The term "*competent authority*" is not defined by regulation 107 but by regulation 7 to include (but not be limited to) a "*public body of any description or person holding a public office*". It includes local authorities and parish councils.

90. Case law has established that neighbourhood plans cannot be approved in reliance upon the duty to assess the planned projects as and when they come forward, and only approve them at that stage if found not to harm any protected site.[48] For instance, the fact that there may be restrictive language in the statutory development plan stating that projects cannot be approved if they would harm a protected site, cannot of itself be sufficient to enable the plan to be approved without assessment, where it allocates or encourages particular development that is liable to harm a protected site.

91. There is no requirement for any formal decision to be made under the Habitats Regulations whether or not an "*appropriate assessment*" has been required. However, the Borough Council will be in breach of Regulation 102 of the Habitats Regulations if in fact the plan is likely to have a significant effect on a European site and has not been assessed.

92. Nevertheless, I am required as part of my examination to consider for myself whether Basic Conditions the are met, including checking that making the plan would not breach and would be compatible with, EU obligations. This requires to be done with

[48] Case C-6/04, *Commission v UK* [2006] Env. L.R. 29 at [51]-[56].

an adequate evidence base.[49] Paragraph 040 of the NPPG states: "*Proportionate, robust evidence should support the choices made and the approach taken.*"[50] Pursuant to regulation 102A, *"[a] qualifying body which submits a proposal for a neighbourhood development plan must provide such information as the competent authority may reasonably require for the purposes of the assessment under regulation 102 or to enable them to determine whether that assessment is required*".

93. The evidence that the examiner requires to assess compliance with the Habitats Directive will have to include the following:

(1) Information as to the proximity to any European protected sites;

(2) the citation/description and conservation objectives of any relevant protected sites (including the species or habitats for which they have been designated, any other relevant species that are important to the integrity of that ecosystem and, where relevant, maps or plans showing where those habitats or species are found within the protected sites);

(3) where relevant, the most recent condition assessments describing the state of the protected sites and their vulnerabilities;

(4) information as to the potential pathways or mechanisms by which the proposed neighbourhood plan might adversely affect the protected sites (such as for instance: waste water discharges; surface water runoff; visitor disturbance via roads or footpaths; air pollution; noise/traffic; diversion of activity from one area to another, perhaps arising as a result of restrictions on development channelling growth to different areas; interference with nesting, resting, rearing or feeding areas of relevant birds or other species; interference with migration routes or flightpaths); and

(5) sufficient evidence to make a reasoned evaluation as to why harms from those pathways or mechanisms are, or are not, likely to eventuate. This is likely to include information as to the nature and scale of the development or activity generated or affected by the draft plan, and the accessibility of the protected

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49 A planning decision-maker is required to acquaint himself "*with all the information relevant to the decision in order to be able to arrive at the correct decision, albeit that the content of the duty will vary according to the context*": *Wealden DC v SSCLG* [2017] EWHC 351 (Admin) [2017] Env. L.R. 31 at [47] per Jay J.

50 Paragraph 040 (Reference ID: 41-040-20160211).

sites, as well as information about the population status, distribution, physiology and behaviour of any relevant species.

The proposed Neighbourhood Development Plan has to be considered in combination with other plans and projects which are relevant to the protected sites (including the existing levels of development and activity affecting any protected sites, as well as approved plans and granted but as-yet-unimplemented planning permissions). Such plans and projects may not be limited to the Borough Council's administrative area. If relevant, sufficient information must be provided about such other plans and projects to enable an evaluation to be made.

General Conformity with the strategic policies in the Neighbourhood Development Plan

94. The current Local Plan contains extracts from the Melton Local Plan 1999, namely policies from which have been saved by Direction of the Secretary of State.

95. The current Local Plan is out of date and a new emerging Local Plan has been submitted for examination in public pursuant to the 2004 Act. Nevertheless, for the purpose of paragraph 8(2)(e) of Schedule 4B to the 2004 Act, the examiner is required to assess conformity with the strategic policies (if any) in the current neighbourhood development plan. Representations have been made by stakeholders that adoption of the Neighbourhood Development Plan would be premature before the new Local Plan is examined, but I consider those under the heading of "appropriateness" below.

96. In my judgment, the strategic saved policies are those which articulate the overall spatial strategy in the Local Development Plan, and control the general pattern of development. Thus,

(1) **Policies OS1 and OS2** are clearly "*strategic*" because they set out the overall pattern of development that is desired (particularly in terms of focusing growth on Melton Mowbray and a new village, restricting rural development outside of "village envelopes" and avoiding coalescence of settlements), and some of the important criteria for acceptability of development within and outside such envelopes.

(2) Saved **Policies H6, H7 and H8** also set out important principles in connection with the 'village envelopes', and for that reason are properly to be regarded as relevant strategic policies.

(3) **Policies H10 and H11** are properly to be considered strategic policies insofar as they set standards for provision of outdoor space for new housing development, and accordingly influence housing distribution.

(4) **Policy H21** is of strategic importance in supporting gypsy and travellers' sites subject to considerations of access, services and amenity.

(5) **Policies EM9 and EM10** are the relevant strategic policies that direct and constrain employment-generating land uses.

(6) Saved **Policies T1 and T5** protect strategic transport routes, and **Policies T3 and T6** with their support for major development provided it includes suitable transport infrastructure, are also of strategic significance in directing the overall pattern of growth.

(7) **Policy C1** is of strategic importance in safeguarding the areas of best and most versatile agricultural land. **Policies C6 and C7** are also of potential strategic importance insofar as they set guidelines for conversion of agricultural buildings to other uses.

(8) **Policies C13 to C16** are of strategic importance because they protect designated and important sites for nature conservation, including areas of ancient woodland.

(9) **Policies BE9, BE11 and BE12** protect specified sites of heritage importance and protected open space, in a strategic and coherent manner. Some of the retail policies relating to Melton Mowbray fall to be described as strategic but are not directly relevant to the Neighbourhood Plan.

(10) **Policies CF1, CF2 and CF4** are to be regarded as strategic in that they safeguard sites used for community facilities.

(11) **Policy R1** is strategic in protecting particular sites for leisure use, whilst **Policies R8, R9 and R10** safeguard proposed foot and cycle routes. **R11** safeguards the Grantham Canal.

97. **The policies in the Neighbourhood Development Plan do appear to be in general conformity with the strategic policies in the Local Plan described above. The "village envelopes" have been updated, but the general principle of settlement**

boundaries to prevent coalescence of settlements has been retained. The overall spatial strategy of concentrating growth in Melton Mowbray and the new village is not undermined by the Neighbourhood Development Plan. The general principles of protecting heritage assets, areas of important open space, and sites of importance for biodiversity are carried through. There is support for community facilities within the villages.

Appropriateness of making the Neighbourhood Development Plan

98. The consultation responses tend to focus on the following general questions of principle:

(1) whether it would be premature to adopt the Neighbourhood Development Plan when the emerging Local Plan is at its current stage (particularly when it is alleged that housing need is higher than the emerging plan will accommodate and that Melton Mowbray North Sustainable Urban Extension should be extended into the neighbourhood area);

(2) whether making the Neighbourhood Development Plan would be inappropriate having regard to the consultation by Leicestershire County Council on the route for the Melton Mowbray Distributor Road.

(3) whether the approach to have 'village envelopes' and an 'area of separation' is inappropriate having regard to national policies and to the emerging Local Plan;

(4) the specific route of the proposed settlement boundaries (Mrs Annabelle Meek objects to her garden being bisected; others object to inclusion of land to the east and south of a house known as Cedar Wood; an objection is made to encroachment on farmland);

(5) whether the Neighbourhood Development Plan is too restrictive of new residential development and should specify a 'requirement figure' or allocate sites or reserve sites;

(6) whether the percentage figure for affordable housing is properly evidenced and sensible;

(7) whether the policies concerning flooding and protecting ridge-and-furrow landforms are lacking in evidence and unduly restrictive.

European Convention of Human Rights

99. I am also satisfied that the Neighbourhood Development Plan has regard to the fundamental rights and freedoms guaranteed under the European Convention of Human Rights ("the European Convention of Human Rights") and does not interfere disproportionately with them. It therefore complies with the Human Rights Act 1998. No substantive evidence to the contrary has been provided.

CHAPTER 4

POLICIES AND REQUIREMENTS

GENERAL CONSIDERATIONS

100. My conclusions in the Interim Draft Report were at variance with some of my initial views as recorded in my Draft Conclusions and Note. In this final version of the Report I have now updated the Interim Draft Report to take into account the responses made by the Parish Council in its letter dated 6th December 2017.

101. There were a number of drafting points that arise as to specific policies in the draft Neighbourhood Development Plan. I shall address the recommended modifications to be made following this response of the Parish Council in the following paragraphs.

Section 38A – neighbourhood development plan

102. Subject to specified modification and amendments, as set out below, I consider that there will be compliance with this statutory provision.

Section 38B – the plan period

103. There is no requirement for a neighbourhood development plan's period precisely to mirror or coincide with a local plan period. Further, it is not my role to dictate what the Neighbourhood Development Plan period should be. However, the Neighbourhood Development Plan must specify the period for which it has effect. This is required by section 38B(1)(a) of the 2004 Act.

104. As mentioned in the Note,[51] I expressed concern as to the termination date for the Plan Period and the text needed to be modified, and/or the title to the Neighbourhood Development Plan. This is to clarify the intended end date of the Neighbourhood Development Plan and whether it is intended to still be in effect in the year 2036. It was stated in the response from the Parish Council to the Draft Conclusions that the termination date of the Neighbourhood Development Plan is 31st December 2036, but this must be made clear throughout the text. It has now been clarified that the

[51] See Annex 1.

proposed Neighbourhood Development Plan period is specified as being through to 31st December 2036. This must be made clear throughout the document.

Minerals and Waste

105. The Neighbourhood Plan does not include provision about minerals and waste development, development specified in Annex I of Directive 2011/92/EU, or nationally significant infrastructure projects. I am satisfied that it does not make provision for "*excluded development*".

106. I am also satisfied that the Neighbourhood Development Plan does not relate to more than one neighbourhood area.

Historic England

107. Historic England have stated that it will be important that the Neighbourhood Plan safeguards the Waltham on the Wolds Conservation Area, and elements contributing to the importance of Listed Buildings within the neighbourhood area. In my judgment. The Parish Council is entitled to choose only to include a policy in relation to non-designated heritage assets, particularly when designated heritage assets will be protected by national policies and statutory duties.

Issues of prematurity and setting settlement boundary "envelopes" and "area of separation"

Prematurity

108. With regard to prematurity, the NPPG addresses this issue in terms. It is made clear that neighbourhood plans may be promoted before, or at the same time as, local plans. The guidance states,

> '*It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging Local Plan, including housing supply policies. This is because section 38(5) of the Planning and Compulsory Purchase Act 2004 requires that the conflict must be resolved by the decision maker favouring the policy which is contained in the last document to become part of the development plan. Neighbourhood plans should consider providing indicative delivery timetables, and allocating reserve sites to ensure that emerging evidence of housing need is addressed. This can help minimise potential conflicts and ensure*

that policies in the neighbourhood plan are not overridden by a new Local Plan.'[52]

109. There are two potential reasons to suggest that in certain circumstances it is premature to approve the Neighbourhood Development Plan at this stage. The first is the concern not to pre-empt the outcome of an emerging Local Plan examination process in which much remains open to change, and in which many stakeholders may have an interest in changing the submitted draft. The second is the concern not to prejudice delivery of the subsequent Local Plan. These concerns can be mitigated by the operation of section 38(5) of the 2004 Act, and by appropriate drafting. For instance, if the Local Plan examiner were to see fit to require extension of the land area of the Melton Mowbray North urban extension after the Neighbourhood Plan were adopted, that would take precedence over any conflicting policy in the Neighbourhood Plan.

110. I am conscious that the emerging Local Plan could be subject to change, and that I am not required to assess conformity with strategic policies in the emerging Local Plan. However, it is necessary to consider that question as a matter of discretion under the heading of "*appropriateness*", and in order to consider the Neighbourhood Development Plan against the above national guidance.

111. The supporting text to the emerging Local Plan states that sections 1 to 8 of the Plan are intended to contain the "*strategic*" policies. Whilst this assessment cannot be determinative as a matter of law, I agree with this characterisation of the policies contained in sections 1 to 8.

112. In terms of overall spatial strategy, the emerging Local Plan proposes to focus new employment and retail uses in Melton Mowbray, and to focus about 65% of housing development in Melton Mowbray. There is support for rural development and farm diversification in draft **Policy EC2** and for the Masterfoods site at **EC3**. The "*Vision*" informing the emerging plan is for the strong historic and landscape character of the Borough to be as apparent and cherished as ever. Paragraph **'en1'** of **draft Policy SS5** aspires to create a defined "*town edge*" for the proposed Melton Mowbray North Sustainable Neighbourhood urban extension, and to protect the separate character of

[52] Paragraph: 009 Reference ID: 41-009-20160211.

Thorpe Arnold. **Policy EN1** does not provide for Areas of Separation to be landscape designations protected from all development, but it does provide for landscape and countryside to be protected and enhanced, having regard to the guidance in the settlement fringes and "*Areas of Separation*" study, as well as protection of views. Paragraph 7.4.3 explains that Areas of Separation are areas of vulnerability where development should not lead to coalescence of settlements or harm to their character.

113. **Policy EN4** provides specific policy requirements to avoid coalescence of settlements, to retain highly tranquil parts of the landscape between settlements, and to safeguard the individual character of settlements. The overall strategy (as described by **Policy SS2**) is to allocate new housing by settlements (Thorpe Arnold being a "*rural hub*" and Waltham a "*service centre*" for this purpose), and that

> "*Outside the settlements identified as Service Centres, and those villages identified Rural Hubs and Rural Settlements, new development will be restricted to that which is necessary and appropriate in the open countryside.*"

Draft **Policy C7** provides strong support for retention of existing community facilities.

114. The consultation response from the Borough Council dated 6th September 2017 stated:

> "*The Borough Council is content that Limits to Developments can be introduced via Neighbourhood Plans and such policies are not intrinsically at odds with the requirements of the NPPF*".

Whilst the Borough Council stated that such boundaries "*could be seen to conflict*" with **Policy SS3**, I do not consider that it does. The text **of SS3** refers to allocations "in" different types of settlements, albeit outside of the allocated sites.

115. Having regard to the above, I am satisfied that the principle of drawing settlement boundaries in the Neighbourhood Plan is in general conformity with the strategic policies in the emerging draft Neighbourhood Plan.

116. I am also satisfied that Neighbourhood Plan **Policy ENV5** on the Area of Separation is in conformity with the emerging Local Plan, particularly draft Local Plan **Policies ENV1 and ENV4**.

117. Further, I have had regard to the fact that the Pre-Submission Draft expressly allocated four sites (i.e. **WAL1, WAL2 and WAL3 and THOR1**). Between them, the proposed allocated sites were intended to be suitable to provide up to 152 new homes, comfortably exceeding the apportioned share of Borough Council requirements i.e. (111). The Pre-Submission Draft also allocated one reserve site in Waltham (within **WAL3)**, and one reserve site at Thorpe Arnold (**THOR2**) for a total of up to 168 and 48 homes respectively, should use of those sites for housing be required. This appears to me to have built in a comfortable "*buffer*", or margin of security, that the housing delivery targets for these settlements would be met so long as the anticipated development took place within the allocated sites. However, the "*Focused Changes*" made to the pre-submission draft removed **WAL3** from the list of allocated sites and brought the total anticipated housing to be delivered on **WAL1 and WAL2** to 114 units, with a further 24 units to be provided on **THOR1 and THOR2**, to give a grand total of 138 units. This is a somewhat smaller "*buffer*". The submission version also included **WAL3** as a "*reserve site*" for 168 units if required (**Policy C1(B)**).[53]

118. I also bear in mind that the Neighbourhood Development Plan relates to a relatively small rural area comprising a single parish, which is earmarked as being required to provide just 111 of the 6125 new homes identified in the Pre-Submission Draft of the emerging Local Plan, This is less than 2% of the total requirement. Even if those numbers for the Parish changed significantly by one or two hundred homes, this would remain a small fraction of total housing delivery, such that the Neighbourhood Plan does not seem likely to materially affect the overall spatial strategy or scale of housing delivery at Borough level.

119. However, notwithstanding the relatively small numbers at stake in the overall scheme of the emerging Local Plan, there is a conflict between the "*limits to development*"

[53] Focused changes **FC4**: https://docs.wixstatic.com/ugd/d246bd_c562f6334e584edd9db50642c5e63a85.pdf

shown in the Neighbourhood Plan and the emerging Local Plan, insofar as **WAL3** is outside the proposed "limits to development" of Waltham. **WAL3** is now intended as a reserve site for up to 168 dwellings. Although the neighbourhood plan would be in general conformity with the strategic policies taken as a whole, there is an inconsistency in that respect and **WAL3** is contemplated as potentially accommodating a sizeable proportion of new homes within the Parish in the emerging Local Plan.

120. Paragraph 184 of the NPPF states, "*Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies*". The NPPG states that neighbourhood plans should not "*be used to constrain the delivery of a strategic site allocated for development in the Local Plan*."[54] I can see no explicit reasoning other than reliance on an outdated housing requirement from an earlier draft of the emerging Local Plan for not including **WAL3**. I note though that part of this site is referred to as being "*of local significance for wildlife (biodiversity) and/or history*" in **Policy ENV4** and **Figure 10**, although **ENV4** is worded positively and supports protection of these sites and enhancement rather than strictly prohibiting their development.

121. Whilst it is understandable that the southern settlement boundary for Waltham in the Neighbourhood Plan has been drawn to follow the existing built-up area rather than encompassing the open area of **WAL3**, the boundary of that proposed allocation site would itself be defensible as it is bounded by a road. Delivery of dwellings on that site may be required in order for Waltham to deliver a share of new homes proportionate to its scale in accordance with the overall policy of the emerging Local Plan. I note that reliance is placed in the justificatory text on development permitted by permissions **14/00777 15/01011/OUT** coming forward to provide 26 and 45 homes (total 71). However, that may not take place, or may not be sufficient to meet housing requirements which are estimated to exceed 71. That total shortfall would be much larger than the margin built into the emerging Local Plan.

[54] Paragraph: 044 Reference ID: 41-044-20160519.

122. In my judgment, it is necessary for sufficient flexibility to be introduced into **Policy S1** to accommodate development on **WAL3** as being in accordance with the Neighbourhood Plan, should that site remain allocated in the adopted new Local Plan and required for housing. If the Neighbourhood Plan were adopted before the Local Plan, the Local Plan would prevail anyway as the later document. However, making such a change would be appropriate to minimise potential conflicts in accordance with the NPPG guidance I have set out above, and to ensure that the Neighbourhood Plan does not end up promoting less development than the Local Plan. I address the detailed wording below.

123. Beyond the exclusion of potential allocation **WAL3**, it seems to me that it is unnecessary for the precise route across individual plots of land to be subjected to minute scrutiny. Unlike an examination of a Local Plan, (as I have stated above) my role is not to test the "*soundness*" of a neighbourhood development plan and ensure that the boundary is the best or most appropriate of all possible alternatives, only that the overall plan is appropriate having regard to national policy. Private ownership of particular small areas of land may be subject to change during the course of the plan period, and the ownership of the land is not in itself generally a matter that should dictate where to impose policy boundaries for the purpose of the planning system.

124. I am satisfied that there is logic in restricting development so as to prevent sprawl into open land even where that land happens to be in the same ownership as an existing house (for instance as part of a large garden). As I understand it from the evidence, the boundary was extended to the south of the property known as Cedar Wood on the basis that the principle of development had been accepted by the grant of planning permission in 1980 to construct a dwelling (not subsequently constructed). That appears to be a rational reason to include the site within the boundary.

The question whether the Neighbourhood Development Plan is otherwise overly restrictive of residential development

125. Representations have been made that the Neighbourhood Development Plan should:

(1) allocate sites for housing;

(2) investigate whether the urban extension to Melton Mowbray may need to be extended into the neighbourhood area; and

(3) specify a minimum number of homes to be provided.

There is no requirement in law or policy that neighbourhood plans have to allocate sites for housing or specify a particular "*requirement*" figure for housing in the neighbourhood area. Neighbourhood Plans are required by law to be in general conformity with the strategic policies of local plans, and in accordance with policy not to plan for less development or to frustrate the achievement of the local plan's strategy. Furthermore, the question of housing requirements is being addressed at the level of the emerging Local Plan. As I have indicated above, I am not assessing the "*soundness*" of this plan and it is not part of my remit to test whether it is the best possible neighbourhood plan in the context of all possible alternatives. I do not consider it appropriate to require this Neighbourhood Development Plan to allocate sites or to set housing targets, and to do so would risk unnecessary conflict and duplication of work.

126. I am therefore satisfied that it is consistent with the NPPF to designate "*limits to development*". There is no inherent conflict between planning positively to boost the supply of housing at local and neighbourhood level (such as by allowing for housing site allocations) whilst also setting limits beyond which housing development is controlled more carefully.

127. On 25th March 2015, a ministerial statement was issued by the Rt Hon. Sir Eric Pickles, in the following terms:

> *"…emerging…neighbourhood plans…any additional local technical standards or requirements relating to the construction, internal layout or performance of new dwellings. This includes any policy requiring any level of the Code for Sustainable Homes to be achieved by new developmen*t".

There is no exception for "*legacy cases*" in circumstances where the plan has not yet been made. The NPPG states:

> *"Local planning authorities have the option to set additional technical requirements exceeding the minimum standards required*

by Building Regulations in respect of access and water, and an optional nationally described space standard. Local planning authorities will need to gather evidence to determine whether there is a need for additional standards in their area, and justify setting appropriate policies in their Local Plans."

128. The combined effect of this is that it is for the Borough Council rather than the Parish Council to stipulate any technical standards that are expected for new construction (which may be drawn from the new harmonised optional national technical standards).[55] Good design and high-quality homes are important and good design is recognised as a core planning principle by the NPPF at paragraph 17, but there seems on the evidence to be no locally distinctive reason to impose particular local standards in this neighbourhood, rather than the national optional technical standards. **Policies H3 and H6** therefore require modification in order to conform to national policy.

129. Some policies require minor amendments to ensure that they are reasonable and not unduly onerous or impossible to discharge. For instance, the requirement in **ENV6** to replace lost trees on a two-for-one basis may not be possible or desirable on land controlled by an applicant for planning permission. Therefore some flexibility must be built into such policies. Applicants for planning permission cannot be required (whether by condition or planning obligation) to carry out works on land outside their control, nor to do anything not directly related to their development and not necessary to make the development acceptable in planning terms. A blanket requirement to do more than replace lost trees is unlikely to normally be justified (albeit that some extra planting to allow for saplings that fail to 'take' is usually justified, dependant on the species and conditions).

Heritage policy regarding ridge-and-furrow fields

130. Objections have been made to **Policy ENV11** which seeks to protect ridge-and-furrow features in the soil. A detailed report by CgMs Consultants has been submitted in connection with those objections. It is said that the features are degraded and so are not particularly well-preserved (preservation 'fair'); that they are fragile and liable to be disturbed by ploughing which of course does not require planning permission; and

[55] NPPG, 'Housing: optional technical standards', Paragraph: 002 Reference ID: 56-002-20160519.

that they are relatively commonplace across England and in the parish (with 105ha in the parish in total), so do not meet the criteria for scheduling.

131. In my judgment, the attack on this policy is misconceived. The CgMs Report states that "*In the case of the ridge and furrow at Waltham on the Wolds the earthwork remains illustrate the final phase of open field cultivation in the parish at the time of enclosure in 1766.*" Further, it is said, "*Within the historic parish of Waltham on the Wolds, there is no documented evidence to suggest that the form of ridge and furrow has 'evolved'; the current earthworks appear to perpetuate the original layout of furlongs and headlands which presumably date back to at least the 12th century".* The report also notes that "*The evidential value of earthwork ridge and furrow is considered good as it provides evidence of earlier agricultural practices.*" On that basis, it is entirely reasonable to consider such earthworks to be local heritage assets.

132. The fact that the planning system only applies to "*development*" for the purpose of the Town and Country Planning Act 1990 does not mean that neighbourhood development plans should fail to protect heritage assets from development. The NPPF makes clear that plans should protect "*heritage assets most at risk through neglect, decay or other threats*" (paragraph 126), and that damage to or the deteriorated state of an asset "*should not be taken account in any decision*" (paragraph 130). It is often precisely assets which are degraded or at risk which require protection.

133. Designation as a heritage asset in a neighbourhood plan does not mean that there must be a disproportionately strict level of protection, regardless of the merits of particular development proposals. It will still be a "*non-designated*" heritage asset for the purpose of paragraph 135 of the NPPF (as defined by Annex 2 thereto). This paragraph makes clear that a balanced judgment will be required taking account of the scale of any harm or loss and the significance of the asset, but also the benefits of any proposal. This is recognised by **ENV11**. The detailed wording of the policy requires improvement which is considered below.

Local Green Space

134. The question has been raised whether the area described as "*Manor Close earthworks field*" in proposed **Policy ENV1**[56] is too extensive to be designated as a Local Green Space. It would appear to measure around 360 metres by 150 metres, which means it will have an area in excess of 5 hectares. Paragraph 77 of the NPPF states that this designation should only be used where the green area concerned is "*local in character and is not an extensive tract of land*". There is no national guidance on what is meant by "*extensive*".

135. I am satisfied as a matter of fact and degree that whilst it is of a significant size in relation to the small settlement of Thorpe Arnold, in the overall context of the Parish this land is not an "*extensive tract*". It is in close proximity to the village. The evidence does not suggest that it is likely to be required for housing, or that there is any difficulty in preserving it beyond the period of the plan. There is something of a question-mark over whether it would be affected by the route of the proposed Distributor Road, but the route of this has not been settled and it would, in my judgment, be incorrect to hinder progress of the Neighbourhood Development Plan until such time as the route of this road was settled. I note in this regard that evidence from GVA dated 13th September 2017 suggests the route will pass to the north of Thorpe Arnold and will not affect this site. The area of green space also appears to be accessible on foot and to be valued by the community for its historic remains and pastoral character. For those reasons, I do not recommend removal of this site from the designation as Local Green Space.

Flooding policy

136. **Policy ENV15** imposes a requirement to undertake "*a hydrogeological study*" for "*proposals of appropriate scale and where relevant*", to include SuDS 'as appropriate', and not to increase the risk of flooding downstream. The Policy is extremely vaguely worded, such that it is unclear when it would apply. Furthermore, there is detailed national planning policy and guidance on flooding, when to carry out Flood Risk Assessments, and on the format and contents of Flood Risk Assessments. Paragraph 103 of the NPPF already expects development not to increase flood risk elsewhere. In view of this, my recommendation is to delete **Policy ENV15**.

56 Appendix E, reference 52.

137. **Policy ENV16** is supported by the Environment Agency. The NPPF makes clear at paragraph 103 that local authorities should only consider development appropriate in areas at risk of flooding where, informed by a site-specific flood risk assessment, it can be demonstrated that the development is appropriately flood-resilient and resistant. In principle, it is consistent with national policy and sensible for the Neighbourhood Plan to indicate locations where site-specific flood risk assessments are required. It is already national policy to require flood risk assessments in Flood Zone 3 (NPPF paragraph 103). The first two sentences are explanatory rather than statements of policy, and should be incorporated into the explanatory text but removed from the Policy. It is unclear what "*areas potentially affected*" means, and why 2 years' monitoring of the water table will be required in each case by the Policy. Insufficient evidence has been submitted for me to reach a determination about whether this is a reasonable requirement. Monitoring for two years seems likely to be insufficient to identify vulnerability to serious flooding events with less than one in two probability of occurrence, and it might not be necessary in every case having regard to known geological and climate information because the hydro-geology may be capable of being modelled after initial measurements are taken.

138. I have now had regard to the comments made in the letter from the Parish Council dated 7th December 2017, and in my judgment, **Policy ENV16** requires to be modified as follows:

- ***A plan showing the area within which the policy applies should be included;***
- ***The policy should be made less prescriptive about monitoring of the water table at individual sites so that flood risk assessments can be judged on their own merits, unless there is cogent evidence as to why 2 years' monitoring is proportionate and effective. The Parish Council and the Environment Agency should be invited to reconsider this policy and to provide reasoning specifically on these points as to the areas where site-specific flood risks are required, and what evidence is to be expected.***

to which should be added the wording proposed by the Parish Council. [57]

[57] See also para 143(13), below.

Policy E1

139. It is unclear whether the limbs of **Policy E1** are intended to be cumulative or alternative. I would wish to invite representations from the Parish Council as to what was intended.

POINTS ON POLICY DRAFTING

Generally

140. The NPPG states (paragraph 41-041-20140306):

> *"A policy in a neighbourhood plan should be clear and unambiguous. It should be drafted with sufficient clarity that a decision maker can apply it consistently and with confidence when determining planning applications. It should be concise, precise and supported by appropriate evidence. It should be distinct to reflect and respond to the unique characteristics and planning context of the specific neighbourhood area for which it has been prepared."*

Also of importance is paragraph 5 of the NPPG (41-005-20140306), which states:

> *"The National Planning Policy Framework requires that the sites and the scale of development identified in a plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened."*

141. The guidance makes clear that policies in a neighbourhood development plan should be distinct and respond to local circumstances. This means that they must not simply duplicate policies found elsewhere in the neighbourhood development plan.

142. It needs to be clear from the text of the Neighbourhood Plan which passages of text comprise the policies forming part of the statutory development plan, and which passages are merely explanatory reasoning for those policies. The text of some of the policies strays into explanation, which is inappropriate.

Specific Points on draft Policies

143. As I stated in the Interim Draft Report, I suggested a number of recommendations to correct errors and secure compliance with this guidance as to clarity, precision, local distinction, and not imposing excessive or otherwise inappropriate policy burdens. The majority of these suggested recommendations have been accepted by the Parish Council. The current position is as follows:

(1) **Policy S1** should be amended by adding an additional exception to its final sentence, so as to ensure that development on WAL3 will if required be an exception to the limits to development:

> ***"Exceptions will be development essential to the operational requirements of agriculture and forestry; small-scale development for employment, recreation and tourism; development of a site allocated by the Local Plan in accordance with the Local Plan aspirations for that site, where reasonably required for the delivery of housing; and any infrastructure requirements in relation to the Melton Mowbray Eastern Distributor Road."***

(2) **The explanatory text on pages 15-16** is now out of date insofar as it refers to the 'latest estimates' of housing requirements. Pursuant to my power to recommend modifications to correct errors, I recommend that the figures be updated in line with the current submission draft of the Local Plan and any revisions by the Borough Council or findings by its examining inspector.

(3) **Policy H1** contains explanatory reasoning, which is inappropriate and in any event no longer correct in light of the submission draft of the Local Plan raising the housing requirements. However, it still needs to make clear that its aim is not to prevent allocated sites delivering housing. It also goes without saying that existing permissions may be proceeded with, although acceptance of the principle of residential development on sites with planning permission for this should be recognised in case unimplemented permissions lapse. As a matter of policy, it may be problematic to include an exception for "*failure to deliver the existing commitments*" if landowners on allocated sites decide not to build on those sites in order to promote unallocated sites that they also own. Such a policy could therefore foreseeably have the unintended consequence of

undermining its own spatial strategy. Accordingly, the first sentence must be deleted, and the policy should be modified to read as follows:

> ***"Housing development in the Parish other than on sites allocated in the Local Plan or benefitting from extant planning permission for housing development at the date of adoption of this Plan will be restricted to Windfall development in line with Policy H8 unless there is an increase in housing need across Melton Borough."***

(4) In my judgment **Policy H3** proposes an unworkably precise affordable housing percentage of 32.4%, when we are dealing with allocated sites containing small numbers of new units. There does not appear to be a clear evidential basis for that percentage. The supporting text merely replicates the proportion stated in the then-current draft of the emergent Local Plan (now superseded).[58] National guidance is for neighbourhood plan policies to be distinct and not to merely duplicate local plan policies. Furthermore, as explained above the national policy is to avoid a proliferation of local technical building standards and for any new technical standards to be imposed at the level of local rather than neighbourhood plans. Accordingly, **Policy H3** should be amended by deleting the first sentence and a half and amending what is left, to read as follows:

> ***"The provision of affordable homes for people with a local connection will be supported.***
>
> ***Developments should be 'tenure blind', where affordable housing is indistinguishable from market dwellings and are spread throughout the development."***

(5) **Policy H5** should be amended for clarity by directly incorporating the list of non-designated heritage assets into the box containing the policy, rather than putting them into the explanatory text. In my judgment, the wording is somewhat clumsy. The first sentence says that development is to be '*required*'

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[58] I note that the Pre-Submission Draft of the emerging Local Plan proposed a borough-wide affordable housing target of 37% which exceeds the Neighbourhood Plan target, but that the "*Focused Changes*" proposed for the submission version broke the Borough into 'Value Areas' with differentiated targets. Thorpe Arnold and Waltham on the Wolds are in 'Value Area 2' where a 32% target is now proposed. https://docs.wixstatic.com/ugd/d246bd_a037e6b1178d449fb0d1fcb7b64e0d50.pdf

not to harm the assets, and yet the second sentence clearly contemplates harms potentially being acceptable as part of a planning balance. The second sentence also uses the word '*harm*' when it surely means '*benefits*', because it surely envisages weighing up the harm to the assets against benefits. In my view, it would be clearer to re-word **Policy H5** as follows:

> ***"Development proposals that affect an identified building or structure (listed below) of local significance or its setting will be expected to preserve or enhance the significance and setting of that building or structure. Any benefits arising from a development proposal, or a change of use requiring planning approval, will need to be balanced against the scale of harm or loss and_their significance as heritage assets.***
>
> ***1. Pump Shelter, Melton Road.***
> ***2. Crespina House and pump, Melton Road.***
> ***3. Sawgate House, High Street.***
> ***4. The Mount, High Street.***
> ***5. Threshing Barn, High Street.***
> ***6. Numbers 3,5,7 and 9 Mill Lane.***
> ***7. Manor House, Mill Lane.***
> ***8. Waltham House, Melton Road.***
> ***9. Mud boundary wall, south side of Goadby Road.***
> ***10. Methodist Chapel, Melton Road.***
> ***Thorpe Arnold:***
> ***11. Victorian postbox, Village Hall."***

(6) **Policy H6**. As noted in the Interim Draft Report, in my judgment, this Policy was not supportable as it stood, for the reason set out, and required modification in order to make it workable and consistent with national policies and guidance. In its letter dated 6th December 2017 the Parish Council has addressed these expressed concerns. I am now satisfied that the amended formulation as contained in the letter satisfies these concerns, and that no further consultation is necessary.

(7) **Policy H7** does appear to me to be dictating that particular architectural styles be followed so as to "*stifle innovation*", contrary to the NPPF. It is legitimate to wish to protect the character and distinctiveness of the locality, but it is

contrary to national policy to dictate details. In my view, sufficient flexibility can be introduced by amendment to read as follows:

> ***"Extensions or modifications to existing properties, to increase or alter their accommodation should be designed to achieve the following objectives:***
> ***- All house extensions or conversions should follow or relate well to the style and vernacular of the original building, paying particular attention to details e.g. roof shapes and pitch angles, fenestration, brickwork and tile colour.***
> ***- The combined building (the original and extension) should not detrimentally change the form, bulk and general design of the original or harm its landscape character or setting."***

(8) As stated **Policy H8** required amendment to correct an omission of the word 'not'. In the Interim Draft Report I highlighted the fact that the final sentence was also too vague and should be deleted unless the Parish Council was able to make cogent representations as to what this was intended to do, and that alternative text would be appropriate. I was minded to recommend modification as set out. This modification has now been accepted by the Parish Council. Thus, should read as follows:

> ***"Policy H8: Windfall Development (including Tandem Development)***
> ***Small-scale development proposals for infill and redevelopment sites will be supported where:***
> - ***It is within the Limits to Developments of the villages of Waltham on the Wolds and Thorpe Arnold.***
> - ***It helps to meet the identified housing requirement for the Parish.***
> - ***It respects the shape and form of each village in order to maintain its distinctive character and enhance it where possible.***
> - ***It provides for a safe vehicular and pedestrian access to the site.***
> - ***It does not adversely impact on the character of the area, or the amenity of neighbours and the occupiers of the dwelling."***

(9) **Policy ENV6** requires re-wording to ensure that it is not unduly onerous. It should be modified as follows:

> ***"Development proposals that will affect trees, woodland and hedges of environmental (biodiversity, historical, arboricultural) significance, or of landscape or amenity value, will be resisted.***
>
> ***Proposals for new-build housing should be designed to retain such trees and hedges wherever possible. Where destruction cannot be avoided, developers will be required to plant replacement trees and/or hedges on site or to contribute to compensatory planting elsewhere in the parish.***
> ***Hedgerows are to be retained and protected. Where minor loss is unavoidable, it must be minimised and loss ~~mitigated~~ compensated for with replacement planting of locally appropriate native species. Development providing a net gain in length and quality of hedgerows will be encouraged."***

(10) **Policy ENV11** requires amendment because the balancing exercise is between the benefits of the development proposal on the one hand, and the harm and significance of damage or loss to the assets on the other. The current wording refers to balancing the harm against the significance. I would recommend modifying the policy as follows:

> *'The areas of well-preserved ridge and furrow earthworks (see Figure 14) are non- designated heritage assets, and any harm to the assets arising from a development proposal, or a change of land use requiring planning approval, will need to be balanced against the benefits having regard to the scale of the harm and the significance of the affected heritage assets.'*

(11) **Policy ENV13** should be corrected by removing the stray quotation mark or apostrophe immediately before the full-stop.

(12) **Policy ENV15** should be deleted entirely for the reasons set out above relating to imprecision and duplication of national policy requirements.

(13) In the Interim Draft Report, I recommended that **Policy ENV16** should be amended by deleting the first three sentences of the Policy and adding them to the explanatory text on page 52; and by re-wording the remainder of the policy

for clarity as to the areas affected and in order to require a proportionate and adequate evidence base. I suggested that specific representations should be made on these points, and that I was minded to recommend a specific modification, as drafted. The Parish Council has now considered the points raised, and further representations have been made. In its letters dated 7th December 2017 and 12th December 2017 the Parish Council has proposed an amended formulation to this Policy. I agree with the proposed wording to **Policy ENV16.**[59]

(14) **Policy T1** (a) should be amended to make clear that the aim is not to allow severe impact on traffic flows, after mitigation. A representation has been made to the effect that travel packs normally include applications for bus passes, rather than providing bus passes. It seems to me to be unduly onerous and rigidly prescriptive to dictate the contents of travel packs, particularly when this Neighbourhood Plan is intended to last over a long period of time in which bus provision and ticketing arrangements may well change, even though the requirements are qualified by "*where appropriate*". Furthermore, planning obligations cannot require activities which are not "*carried out in, on, under or over the land*" and have to be worded negatively or to require financial contributions to other activities (such as travel packs or off-site public transport improvements), and they can only require improvements necessary to make development acceptable in planning terms. I therefore recommend the following modification:

> *"**Development proposals, where appropriate, will be required to demonstrate that:***
> ***a) The cumulative residual impact on traffic flows on the strategic and local highway network (taking account of proposed mitigation measures) will not be severe.***
> ***b) Provision is to be made for accessible and efficient public transport routes within or otherwise serving the development.***
> ***c) Pedestrian and cycle routes are incorporated or improved to serve the development, where necessary and appropriate, to provide safe,***

[59] See also para 138, above.

convenient and attractive routes to shops, employment, schools and community facilities; and which are integrated into wider networks.

d) Existing rights of way are retained or acceptable modifications are provided.

e) Adequate parking and manoeuvring space within the development is provided in accordance with the Highway Authority's standards.

f) The development will not be occupied unless necessary measures (such as 'travel packs') are in place to encourage new residents to use bus services as an alternative to the private car."

(15) In the Interim Draft Report, I suggested that Policy E1 required amendment by insertion of either an "*or*" or an "*and*" for clarity between the two limbs of the policy, to specify whether these are alternative or cumulative tests. I invited written representations about this. As it transpires, it has now been stated by the Parish Council that the two criteria are intended to be cumulative. As a consequence, the word "*and*" should be added at the end of criterion (a).

Achievement of sustainable development

144. Sustainable development is not defined by legislation, but I have had regard to the relevant national policy and guidance. As the ministerial foreword to the NPPF explains, the concept is about ensuring better lives for ourselves without resulting in worse lives for future generations. The NPPF explains that the concept of sustainable development is to advance economic, social and environmental objectives. The NPPF states at paragraph 6 thereof that 'policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system'. Paragraph 16 of the NPPF provides guidance that neighbourhoods should develop plans that support the strategic development needs set out in Local Plans including for housing and economic development, and plan positively to support local development.

145. **I am satisfied that the Neighbourhood Development Plan, and with necessary modifications, could make a contribution towards sustainable development by supporting appropriate economic development whilst protecting the local environment**.

The appropriate area for a Referendum

146. I have considered whether any Referendum should extend beyond the neighbourhood area. In this instance, I can see no particular reason to hold a wider Referendum.

The Convention rights

147. The Neighbourhood Development Plan amounts to an interference with the property rights of landowners insofar as it will form part of the framework for the control of the use and development of land within the neighbourhood area. Article 1 of the First Protocol to the European Convention on Human Rights provides for the state to "*enforce such laws as it deems necessary to control the use of property in accordance with the general interest*" where those laws pursue a legitimate aim and strike a fair balance between the private interests of the proprietor and the general public interest.[60]

148. I am satisfied that the policies as recommended to be modified are justified by legitimate aims, chiefly protection of the environment, amenity of local people, protection of existing employment opportunities; conservation of wildlife and local heritage; and that they strike a fair balance. In that regard, they are in general conformity with the existing statutory development plan, and whilst they establish a presumption for or against particular types of development, they should not predetermine planning decisions which are made on their individual merits.

FURTHER REPRESENTATIONS

149. In the letter from the Parish Council dated 6th December 2017 further representations have been made as to the proposed amendments to the draft Neighbourhood Development Plan as to Housing Provision. My attention has also been drawn to the Addendum to the draft Neighbourhood Development Plan (previously sent to me) as to changes to be sought in relation to the Limits to Development at Thorpe Arnold.

150. I accept these proposed modifications to the draft Neighbourhood Development Plan.

CONCLUSION

[60] *R (Skelmersdale Limited Partnership) v West Lancashire Borough Council* [2016] EWHC 109 (Admin) at [30]-[31] per Jay J.

151. In my judgment, the draft Neighbourhood Plan is now fit for purpose, and I recommend that it proceeds to a Referendum.

Edward Cousins

Independent Examiner

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21st December 2017

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