THE EARLS BARTON NEIGHBOURHOOD DEVELOPMENT PLAN REGULATION 16 CONSULTATIONS

LEGAL SUBMISSIONS

Introduction

1. We are instructed by Pegasus Group ("Pegasus") on behalf of Redrow Homes (South Midlands) ("Redrow") in respect of the Earls Barton Neighbourhood Development Plan ("the Neighbourhood Plan"/the Examination Plan") which has been submitted for consultation under Regulation 16 of the Neighbourhood Planning Regulations 2012.

2. We also act for Redrow in respect of Application Ref: WP/2013/0457: Outline application with all matters reserved except access for up to 85 dwellings, public open space and associated infrastructure on land off Station Road and Allebone Road, Earls Barton ("the Application" and "the Site" respectively) which was refused by Wellingborough Borough Council ("the Borough Council") on 29 January 2014 and the section 78 Appeal against that refusal, Ref: APP/H2835/A/14/2213617 ("the Appeal") which was heard at inquiry before Inspector Keith Manning on 12-14 August 2014. On 15 August 2014 that appeal was recovered by the Secretary of State for the reason that "the appeal involves a proposal for residential development of over 10 units in areas where a qualifying body has submitted a neighbourhood plan proposal to the local planning authority."

3. These legal submissions are submitted alongside representations from Pegasus, which provide a detailed factual background and proposed modifications. We therefore do not cite the factual background at length here. Instead we set out our legal opinion as to the applicable law and the

correct approach to the basic conditions under paragraph 8 of Schedule 4B of the Town and Country Planning Act 1990, before focussing on three discrete legal objections which need to be considered, fully addressed, actioned and reported upon through the examination process and the modifications recommended in the Examiner's Report:

(a) Unlawful use of a village boundary as a policy to constrain the delivery of housing;

(b) Failure to carry out Site Assessment in accordance with NPPG;

(c) Failure to carry out the Strategic Environmental Assessment Directive.

4. Finally, we indicate that this case would be suitable for a neighbourhood plan examination hearing to address the above issues and make further observations on the purpose of and conduct at a neighbourhood plan examination hearing.

The Basic Conditions

5. Paragraph 8 of Schedule 4B of the Town and Country Planning Act 1990 provides that an independent examiner must consider whether the neighbourhood plan meets the "basic conditions". These are set out in paragraph 8(2), which provides (insofar as relevant) that a draft neighbourhood plan will only meet 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;

…

(d) the making of the plan contributes to the achievement of sustainable development;

(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 order does not breach, and is otherwise compatible with, EU obligations, …"

6. The fundamental starting point is that the 'basic conditions' are mandatory tests. They must be assessed with due rigour by an Examiner (and thus any qualifying body and assisting local authority during preparation phases):

"8(1) The examiner must consider the following (a) whether the draft neighbourhood development order meets the basic conditions (see sub-paragraph (2)),"

"8(6) The examiner is not to consider any matter that does not fall within sub-paragraph (1)").

7. Where an Examiner concludes that there has been a failure in respect of paragraph 8(1)(a) then he must refuse to approve the plan for referendum,

see paragraph 10: "10(4) The report may not recommend that an order (with or without modifications) is submitted to a referendum if the examiner considers that the order does not— (a) meet the basic conditions mentioned in paragraph 8(2)"…"

8. There is no statutory basis for what has become popularly termed as a "light-touch" approach to neighbourhood examination. To the extent that an alternative proposition may be sought to be derived from *R(BDW Trading Ltd) v Cheshire West and Chester City Council* [2014] 1470 (Admin), and the findings as to a distinction between 8(2)(a) "appropriateness" and section 20 PCPA and NPPF paragraph 178 "soundness", those observations must be read in the light of the specific circumstances of the Tattenhall Neighbourhood Plan, notably the findings as to the limited nature of its main housing policy, Policy 1 (set out below).

9. Where a Neighbourhood Plan seeks to go beyond Tattenhall: to become in effect a reduced-scale local plan for one of the largest and most sustainable settlements within the local district, through an ambitious use of housing constraint policies, well in advance of the publication, examination and adoption of strategic polices on housing in the local plan, then the nature and complexity of the issues raised (bearing in mind that the Neighbourhood Plan will have become a surrogate for the strategic forward planning process) a "light-touch" approach could not be fit for purpose.

10. In such a case, as is being presented within the Earls Barton Neighbourhood Plan, the relevant legislation and national policy become principal important "controversial issues" and will need to be grappled with

in the report within the scope of *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953 which sets out the test for adequacy of reasons, which is now well-established as the appropriate standard for plan-making , see *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), [76]). A failure to provide intelligible and adequate reasons will amount to grounds for quashing the relevant component(s) of the plan.

Paragraph 8(2)(a)

11. The statutory requirement under paragraph 8(2)(a) is a strict requirement. It is a duty carefully and systematically to assess the accordance and consistency with national planning policy. It is not a duty simply to "have regard to" national policy and then fail to apply it. In particular, the duty requires very close regard to national policy on housing provision where, as here, certain policies within the plan have been included with the express intention to constrain the delivery of housing within the neighbourhood plan area.

12. The National Planning Policy Framework ("NPPF") is what is referred to in the term: "national policies". The Planning Practice Guidance is covered under "advice", it is expressly guidance, it does not re-write the NPPF or supersede it.

13. It is now well established that the meaning of policy provisions within the NPPF is a matter of objective interpretation for the courts to determine (*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 [18]-[19]; *City and District Council of St Albans v R (on the application of) Hunston Properties Limited and the Secretary of State for Communities and Local Government*

[2013] EWCA Civ 1610 [4]; *Gallagher Homes Ltd v Solihull Metropolitan Borough Council [2014] EWHC 1283 (Admin)*, [25], [91]). Generalising, broad brush statements that an Examiner is content that there has been compliance with policy, without any enumeration or citation of the relevant policy will invariably indicate a failure of interpretation and at the very least inadequate reasoning.

14. The NPPF must also be read as a whole, which will usually require examination of a number of provisions: see *Tewkesbury BC v SSCLG [2013] EWHC 286* (Admin), [62]. Selective citation of the NPPF, without consideration of the full text is equally impermissible and will amount to a failure of interpretation.

15. Therefore an Examiner, in conducting the examination and within the text of his report must clearly identify for each neighbourhood plan policy (a) what the relevant NPPF paragraphs are; (b) what the relevant provisions of the PPG are, with express reference back to the lead policy wording within the NPPF; (c) whether the proposed neighbourhood plan policy is in specific accordance with those NPPF paragraphs; (d) finally, whether the neighbourhood plan policy is in accordance with the NPPF's overarching approach to neighbourhood planning at paragraphs 14, 16 and 184, read as a whole.

Pararagraph 8(2)(e)

16. Paragraph 8(2)(e) also demands a structured approach. For 8(2)(e), Parliament's clear intention was that "the development plan" was to be an

up-to-date development plan with strategic policies examined against up-to-date national planning policy contained in the NPPF.

17. As Greg Clark MP, the Minister of State promoting the Localism Bill observed in the Committee debate 17th sitting: House of Commons 1 March, 2011 (1), Column number 700:

> "it was clear from our extensive discussions that the national planning policy framework and its responsibility for lower-tier plans should be explicit and in the Bill. It is absolutely our intention that everything conforms to that, so that there is a trickle-down through the whole process. One test of the soundness of a neighbourhood plan—as the hon. Gentleman knows, that is a requirement for it even to go to a referendum—is that it has to be consistent with the local plan, which itself has to be consistent with national policy. We are clear, therefore, that that thread needs to run through everything, and the examination arrangements need to reflect that. " [emphasis added]

18. The Examiner must therefore begin by clearly identifying for each policy (a) what the relevant "development plan" is ; (b) whether there are "strategic policies", with which conformity can *actually* be assessed (c) what those policies state; (d) finally, he must demonstrably assess conformity between the neighbourhood plan policy and those relevant strategic policies.

19. Where, on a given issue, there are no "strategic policies" with which to assess conformity of a key policy then the Examiner cannot undertake the task under paragraph 8(2)(e) and must consider that the basic condition. In

such a case, the appropriate course will usually be a modification to remove the relevant neighbourhood plan policy from the plan.

20. Strategic policies on housing provision are the quintessential strategic policies within the development plan (see NPPF, paragraph 156, and NPPG, [070]). Their status is the primary example of a "principal important controversial issue" which must be addressed within the Examiner's Report.

R(BDW Trading Ltd) Trading v Cheshire West and Chester City Council [2014] EWHC 1470 (Admin)

21. The High Court (Mr Justice Supperstone) handed down judgment in *R(BDW Trading Limited (t/a Barratt Homes), Wainhomes Developments Ltd) v Cheshire West & Chester Borough Council* [2014] EWHC 1470 (Admin) on 9 May 2014. It is the only judgment on neighbourhood plan-making to date. However three further challenges are awaiting hearing in the High Court: respectively to the Winslow, Uppingham and Loxwood Neighbourhood Plans. *Tattenhall* is therefore merely the first of a series of decisions on the applicable principles.

22. The High Court dismissed the challenge to the Tattenhall Neighbourhood Plan ("TNP"), albeit on the basis of the specific features of Policy 1 of the TNP, as considered in the Examiner's Report, which was not considered to act as a constraint of delivery of housing as the policy wording simply required that no more than 30 houses be provided at each site.

23. In applying the judgment, the fundamental starting point should be the Examiner's Report referred to extensively within the judgment at [32]: "In

the absence of a current adopted policy setting out housing supply for the whole local authority area, the Neighbourhood Plan does not seek to determine the overall quantum of houses to be built within the Neighbourhood Area during the plan period. Rather, its emphasis is on influencing *how* housing will be delivered." Further on in [32], the court referred to the Inspector's deletion of the final sentence of Policy 1 to remove "Maintain...the existing overall shape of Tattenhall village", a policy that would have placed a physical boundary limit on development, and thus a direct constraint on overall development. [the relevant deleted Policy wording is at the end of paragraph [22]].

24. At [33]: "Policy 1 does not place a limit on the total quantum of housing to be built across the Neighbourhood area" At [34] "placing no cap on the total number of houses". Finally at [36]: "Were Policy 1 to remain as drafted, it would fail to promote housing growth. If this were the case, Policy 1 would not have regard to the Framework and would fail to meet the basic conditions".

25. At [72], the judge placed emphasis, in considering the SEA ground, upon the fact that: "Policy 1 had been amended to remove any limit on the overall number of houses by the time the TNP reached the examination stage." Therefore at [87]-[89], the court endorsed the Examiner's rejection of an overall cap and a settlement boundary as features that would not meet the basic conditions in paragraph 8(2).

26. The court's subsequent discussion of how the basic conditions are to be assessed flows from the nature and limited ambition of the TNP and importantly, the fact that the Cheshire West Local Plan was shortly to proceed to examination, including at [82]: "Whether or not there was any

tension between one policy in the Neighbourhood Plan and one element of the emerging Local Plan was not a matter for the Examiner to determine."

27. That principle does not follow when the Neighbourhood Plan does all of the things that the Examiner celebrated the TNP for not doing: (a) imposing a settlement boundary; (b) fixing development on a single identified site; (c) acting as a *de facto* obstacle to any development over and above the figure identified; (d) pre-empting the determination of the final OAN for the district.

1) The Village Boundary

28. The village boundary contained in Chapter 5, Section 6.1 and Policy EB.GD1 and EB.GD2 is a straightforward constraint on the delivery of housing within the neighbourhood plan area and the Borough as a whole.

29. All policy wording referring to the village boundary is therefore contrary to basic condition 8(2)(a) as it has been produced in a manner that is flatly contrary to national planning policy on housing provision. It is contrary to basic condition 8(2)(d) as it cannot contribute to the achievement of sustainable development, only frustrate it. Finally, it is contrary to basic condition 8(2)(e) as it is not in conformity, general or otherwise, with strategic policies within an up-to-date development plan.

National Planning Policy Framework

30. Paragraph 14 makes clear that the presumption in favour of development requires: "local planning authorities should positively seek opportunities to

meet the development needs of their areas and should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change".

31. Paragraph 15 confirms that that requirement extends to neighbourhood plans: "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."

32. Paragraph 16 then confirms that: "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…"

33. Paragraph 17 then confirms: "Every effort should be made objectively to identify and then meet the housing .., needs of an area."

34. It has now been established by the High Court that correctly identifying "objectively assessed need" is the fundamental component of meeting the paragraph 47 "policy imperative" to boost significantly the supply of housing (*Gallagher v Solihull MBC*, 31(ii) and [91] "a consideration of particular standing" and *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [108]).

35. Finally, it is clear from paragraph 47 that the assessment of full, objectively assessed needs, must proceed on the basis of adequate, up-to-date and relevant evidence (NPPF, paragraph 158).

36. As a matter of correct interpretation, "significantly boost[ing] the supply of housing" through identifying "objectively assessed need" is plainly not the same thing as "growth". "Growth" is used in several places within the NPPF: notably in a very general way in the Foreword: "Development means growth", "So sustainable development is about positive growth". References to these components is therefore not a substitute for proper engagement within paragraph 47, within the NPPF as a whole.

37. Under paragraph 49, a policy which imposes a housing constraint will be automatically out-of-date from the moment of adoption.

38. Paragraph 184 read properly clearly implies that there must be an up-to-date local plan in order for a neighbourhood plan to be able to reflect the policies of the local plan and for it to plan positively to support those policies. The fourth and fifth sentences of paragraph 184 read together make this plain. The third sentence states that "Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan", and this provides the context for the two sentences that follow. The fourth sentence states that "To facilitate this, [i.e to make it possible for neighbourhood plans to be in general conformity] 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." The fifth sentence ties neighbourhood plans to policies in up to date local plans: "Neighbourhood plans should reflect these policies [i.e policies in up to date local plans] and neighbourhoods should plan positively to support them."

Planning Practice Guidance

39. The 'Neighbourhood Planning' section of the PPG is in very general terms, such that on detailed inspection it is of limited interpretative value. Paragraph 9 is a good example of this. It does not endorse the approach being employed at Earls Barton whereby a neighbourhood plan pre-empts decisions on housing that will have to be determined at examination. The title asks whether a Neighbourhood Plan "Can …come forward before an up-to-date Local Plan is in place?" It then states that a Neighbourhood Plan might in theory be "developed" before or at the same time that a local authority is producing its Local Plan. There is no definitive statement in the PPG as to whether adoption ("making") can take place. No explanation is provided as to how specifically strategic housing policies are to be examined/assessed. The final paragraph/sub-paragraph is particularly important, the Neighbourhood Plan is clearly intended to endure, not to be rendered out-of-date by a Local Plan which is adopted later.

40. The provisions are therefore either (a) supportive of Pegasus' position: "not tested against the policies in an emerging Local Plan"; or (b) highly conditional to the point of limited interpretive value: "the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions"; or (c) somewhat vague statements of best practice: "should discuss and aim to agree the relationship between policies in: - the emerging neighbourhood plan [etc]".

41. In any event, the specific text cannot be a definitive interpretation of paragraph 8(2)(e) of Schedule 4B, as set out above.

42. Nothing within this PPG paragraph can be said to override the clear language of the NPPF's paragraphs 184 and 185, which, as observed above,

proceeds on the assumption that the adoption of a neighbourhood plan should ordinarily follow that of "the Local Plan", especially where there is likely to be conflict, which will occur where the neighbourhood plan seeks to constrain housing without making provision for objectively assessed need.

43. The PPG's reference to paragraph 8(2)(e) in paragraphs 74 to 77 is to the same effect, pitched at a very general level, or supportive of the principled position set out above, the reference to paragraph 156 is clearly in line with the above position.

44. The above analysis in relation to the NPPF is further supported by paragraphs 69 and 70: "Paragraph 16 of the National Planning Policy Framework is clear that those producing neighbourhood plans or Orders should support the strategic development needs set out in Local Plans, including policies for housing and economic development. … More specifically paragraph 184 of the National Planning Policy Framework states that neighbourhood plans and Orders should not promote less development than set out in the Local Plan or undermine its strategic policies."

45. This is again a clear indication that where a neighbourhood plan contains policies that constrain housing, thus engaging paragraph 47 NPPF, then it is a clear requirement that there must be up-to-date strategic housing policies to assess the relevant policy against.

The Neighbourhood Plan

46. The text of the Earls Barton Neighbourhood Plan makes clear that the fundamental starting point for the Neighbourhood Plan's housing policies has been the needs of *Earls Barton* over the full 15 year period, not those of the wider District. The Plan makes no reference to Earls Barton occupying an important position in the District's settlement hierarchy as the most sustainable settlement outside Wellingborough itself, see page 4, Foreword: "the future housing needs of Earls Barton"; page 13: second bullet on Vision: "Promoting a level of housing and employment growth to provide for the local needs of the community"; page 19: "Residents of Earls Barton accept that *some* housing development over the next 20 years is required to provide for local needs and also to accommodate limited growth of people moving into the area as the village has done over previous plan periods." The NPPF does not recognise that distinction between District and neighbourhood, the starting point must be the objectively assessed needs of the District as a whole, paragraph 14, 16, 47, 49, 159.

47. A *limit* or *constraint* on overall housing provision has therefore become a central feature of the submitted Plan: page 12: "The Earls Barton Neighbourhood Plan seeks positively to provide for the needs of its existing residents while also allowing a *limited* amount of expansion to provide for the wider needs and priorities of the local area", page 14: Development: "Allow *limited* housing development and commercial development to meet local needs and increasing local employment opportunity while providing some degree of expansion", page 22, Policy 6.3. The settlement boundary is tightly drawn and the proposed housing policies, EB.G1, EB.G2 are therefore being presented as effective caps on any significant development above the proposed 280 figure. Again, there is

clear conflict with the NPPF, especially given that such policies will become out of date *ab initio* when made under paragraph 49 and 14. It is axiomatic that advocating "limited growth" cannot be the same thing as "pro-growth", or "growth sufficient to meet the needs of a rising population", or the "policy imperative" of "significantly boosting the supply of housing".

48. The evidence base for those housing constraint policies is near-identical to that relied upon by the Council and now under consideration in the main appeal proceedings, see EBNP Evidence Base Document, "Determining a House Target", page 3, paragraph 1.3: "Identifying a Rural Housing Target for the Joint Core Strategy" and Rural Housing targets for Wellingborough's Principal Villages". The origins of these documents is rather unclear but it appears that they have been based to a significant extent upon what communities are prepared to accept, which is disproportionately weighted in favour of objector responses, a form of unobjectively assessed need.

49. The figures contained within these documents are, in turn are closely related to the figures presented within the Interim Housing Statement which at the inquiry the Neighbourhood Plan's promoter echoed the Council's submissions that the Neighbourhood Plan was based on objectively assessed need. The Interim Housing Statement is, of course, no such thing, it is simply a piece of evidence, produced some 1-2 years before independent examination of the JCS for "Development Management Purposes". The true position is that the primary evidence base underlying the village boundary is of considerably older origin and is now wholly out of date: see page 18, paragraph 8.1: "Earl's Barton village boundary has been informed by the previous boundary identified for the Borough of

Wellingborough Local Plan (1999) and the criteria used for defining this boundary have been adopted and slightly amended." Such evidence does not carry any greater weight when it is simply absorbed into a neighbourhood plan (in purported reliance on paragraph 8(2)(e) of Schedule 4B TCPA), it remains just as out of date and just as flawed as a basis for a plan-making decision.

50. In summary, the policy wording including a settlement boundary is flatly contrary to national policy on housing and is unlawful under 8(2)(a), (d) and (e) and should be removed in its entirety, as set out in the Proposed Modifications.

2) Failure to carry out Site Assessment required under PPG

51. PPG 'Neighbourhood Planning', paragraph 042, requires that where a plan allocates land then a site assessment should take place in accordance with PPG 'Housing and Economic Land Availability Assessment'.

52. There has been no site assessment in respect of Redrow's Station Road Site or any other, save for the allocated site.

53. No explanation has been provided in the supporting evidence, although the PPG is presently a material consideration under basic condition 8(2)(a) and this requirement had been public for some time preceding the examination, including in draft format since late 2013.

54. At the inquiry, it emerged that the constraint policies within the Plan stemmed from two pre-determined spatial priorities: (1) the Appeal site/land to the south outside of the boundary would not be allocated and

(2) the only allocation would be to the north of the village (Cross-examination of Mr Wilson). Put bluntly, it appears that the Plan's authors did not begin the process with an open mind, ready to assess all sites in equal detail or any other allocation. Cllr Gough and Mr Wilson made submissions on "sustainability objections": notably the *localised* congestion and local parking problems at the Appeal Site, but none of these have been recorded within any kind of objective, systematic, evidence based assessment. Equally, such concerns have not been supported by any of the relevant providers of services, or statutory consultees, and none of which are dealt with in the Evidence Base.

55. The Regulation 14 and the present Regulation 16 submissions make clear how Pegasus' efforts to make contact with the Plan's promoters were ignored or rebuffed. That predetermination casts a major shadow over the Neighbourhood Plan promoters' claims as to the robustness of the evidence base and the plan preparation process.

56. Given that pre-determined context, the suggestion that the Plan is based on wide-ranging consultation or local community support needs to be approached with very considerable care. Such consultation as was carried out was rudimentary in the extreme, essentially comprising of a single leaflet, which referred to an overall figure of 400 houses within a circle that did not even cover the appeal site. The number of responses was limited, which should not be concealed by the presentation of percentages of those in favour. It was no replacement for a site assessment process.

57. Equally, at the inquiry there was much discussion about the contrasting merits of the northern site where permission has now been granted in

contrast to the southern site. That is a complete diversion from the issue to be determined in the neighbourhood plan examination process. The development of the land to the South does not prevent the delivery of or conflict in any way with the allocation to the North. It is entirely artificial to present the Neighbourhood Plan as an either/or question: e.g. either the delivery of a site in the north with a playing pitch, or site to the south without. The clear requirement from PPG, 042, is that there must be an assessment of sites, and none has occurred.

58. In summary, the Examiner should therefore conclude that basic condition 8(2)(a) has not been met, there has been a failure to have regard to a material consideration in the form of the relevant planning policy guidance. There has clear knock-on implications for 8(2)(d), (e) and (f), and is a further reason for the removal of the village boundary discussed above.

(3) Strategic Environmental Assessment

59. The existence, conduct and adequacy of an SEA goes to the core of compliance under paragraph 8(2)(f), and again interlocks with 8(2)(a) and (d). A significant error of law in SEA terms would amount to a failure to meet one of the basic conditions, and would in due course prevent recommendation by the Examiner.

60. In the present case, the Parish Council and District Council have not complied with the requirements of the SEA Directive and EAPP Regulations 2004 and have conducted SEA through an inadequate and essentially opaque screening exercise.

Screening

61. Regulation 5 of the EAPP 2004 provides:

"5(1) Subject to paragraphs (5) and (6) and regulation 7, where–

(a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and

(b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which–

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

(3) The description is a plan or programme which, in view of the likely effect on sites, has been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.

(4) Subject to paragraph (5) and regulation 7, where–

> (a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;
>
> (b) the plan or programme sets the framework for future development consent of projects; and
>
> (c) the plan or programme is the subject of a determination under regulation 9(1) or a direction under regulation 10(3) that it is likely to have significant environmental effects,

the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

…

(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; or

(b) for a minor modification to a plan or programme of the description set out in either of those paragraphs,

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).

62. Regulation 9 provides:

(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.

63. Schedule 1 sets out a number of criteria:

> "The characteristics of plans and programmes, having regard, in particular, to–
>
> (a) the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources;
>
> (b) the degree to which the plan or programme influences other plans and programmes including those in a hierarchy;
>
> (c) the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development;
>
> (d) environmental problems relevant to the plan or programme; and
>
> (e) the relevance of the plan or programme for the implementation of [EU] legislation on the environment (for example, plans and programmes linked to waste management or water protection).

Characteristics of the effects and of the area likely to be affected, having regard, in particular, to–

(a) the probability, duration, frequency and reversibility of the effects;

(b) the cumulative nature of the effects;

(c) the transboundary nature of the effects;

(d) the risks to human health or the environment (for example, due to accidents);

(e) the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected);

(f) the value and vulnerability of the area likely to be affected due to–

(i) special natural characteristics or cultural heritage;

(ii) exceeded environmental quality standards or limit values; or

(iii) intensive land-use;

and

(g) the effects on areas or landscapes which have a recognised national, Community or international protection status.

64. Regulation 11 provides:

"(1) Within 28 days of making a determination under regulation 9(1), the responsible authority shall send to each consultation body–

(a) a copy of the determination; and

(b) where the responsible authority has determined that the plan or programme does not require an environmental assessment, a statement of its reasons for the determination.

(2) The responsible authority shall–

(a) keep a copy of the determination, and any accompanying statement of reasons, available at its principal office for inspection by the public at all reasonable times and free of charge; and

(b) within 28 days of the making of the determination, take such steps as it considers appropriate to bring to the attention of the public–

(i) the title of the plan, programme or modification to which the determination relates;

(ii) that the responsible authority has determined that the plan, programme or modification is or is not likely to have significant environmental effects (as the case may be) and, accordingly, that an environmental assessment is or is not

required in respect of the plan, programme or modification; and

(iii) the address (which may include a website) at which a copy of the determination and any accompanying statement of reasons may be inspected or from which a copy may be obtained."

65. The Council's Determination is based upon a Screening Report which has never been made public. There is no reference to any applicable policy, guidance or case law on the correct operation of the Strategic Environmental Assessment Directive in the final determination.

66. Article 3(1) and (2) of the SEA Directive and Regulation 5 above make clear that the concept of "setting the framework" for future development consent is a very important consideration in SEA terms.

67. It has been established by the Court of Justice of the European Union that "The fact that the adoption of a plan/programme is not compulsory does mean that SEA is not required for "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of [the SEA Directive]" (C567/10 *InterEnvironnement Bruxelles ASBL v Région de BruxellesCapitale* [2010] ECR I5611).

68. On the basis of that authority, it has been established that SEA can be a requirement for Supplementary Planning Documents (SPDs) (*R (West Kensington Estates Tenants & Residents' Association) v Hammersmith and*

Fulham LBC [2013] EWHC 2834), and there are now a number of neighbourhood plans that have been subject to strategic environmental assessment (albeit that failings in the SEA form part of the challenge to the Neighbourhood Plans at Winsford and Winslow).

69. Article 5(1) of the SEA Directive and Regulations 8 and 12 provide that the environmental report should identify, describe and evaluate "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".

70. The OPDM's *Practical Guide to the Strategic Environmental Assessment Directive* (2004) provides:

> "2.12 Under Article 3(3) and 3(4), environmental assessment is required for certain categories of plans and programmes only where they are determined to be likely to have significant environmental effects. Plans and programmes in these categories are:
>
> • Plans and programmes of the types listed in Article 3(2) which determine the use of small areas at local level, or which are minor modifications to plans and programmes;
>
> • Plans and programmes of types which are not listed in Article 3(2), which set the framework for future development consent of projects (not limited to projects listed in the Annexes to the EIA Directive).
>
> 2.13 The European Commission guidance (paragraphs 3.33–3.35) suggests that plans or programmes which determine the use of small

areas at local level might include "a building plan which, for a particular, limited area, outlines details of how buildings must be constructed, determining, for example, their height, width or design…. The complete phrase … makes it clear that the whole of a local authority area could not be excluded (unless it were itself small). …The key criterion for the application of the Directive, however, is not the size of area covered but whether the plan or programme would be likely to have significant environmental effects".

71. "Effects" may be both positive and negative. In the *Practical Guide to the Strategic Environmental Assessment Directive*, it is explained that:

> "*B3 – Predicting the effects of the plan or programme, including alternatives*
>
> 5.B.9 Prediction of effects involves:
>
> • Identifying the changes to the environmental baseline which are predicted to arise from the plan or programme, including alternatives. The predicted effects of alternatives can be compared with each other, or with 'no plan or programme' and/or 'business as usual' scenarios where these exist, and against the SEA objectives.
>
> • Describing these changes in terms of their magnitude, their geographical scale, the time period over which they will occur, whether they are permanent or temporary, positive or negative, probable or improbable, frequent or rare, and whether or not there are secondary, cumulative and/or synergistic effects."

72. PPG, *SEA and SA*, Paragraph 027 and 028 provide:

> *Does a neighbourhood plan require a strategic environmental assessment?*
>
> In some limited circumstances, where a neighbourhood plan could have significant environmental effects, it may fall within the scope of the Environmental Assessment of Plans and Programmes Regulations 2004 and so require a strategic environmental assessment. One of the basic conditions that will be tested by the independent examiner is whether the making of the neighbourhood plan is compatible with European Union obligations (including under the Strategic Environmental Assessment Directive).
>
> Whether a neighbourhood plan requires a strategic environmental assessment, and (if so) the level of detail needed, will depend on what is proposed in the draft neighbourhood plan. A strategic environmental assessment may be required, for example, where:
>
> •a neighbourhood plan allocates sites for development
>
> •the neighbourhood area contains sensitive natural or heritage assets that may be affected by the proposals in the plan
>
> •the neighbourhood plan may have significant environmental effects that have not already been considered and dealt with through a sustainability appraisal of the Local Plan.

How do you know if a draft neighbourhood plan might have significant environmental effects?

To decide whether a draft neighbourhood plan might have significant environmental effects, its potential scope should be assessed at an early stage against the criteria set out in Schedule 1 to the Environmental Assessment of Plans and Programmes Regulations 2004.

The local planning authority should put in place a process to provide a screening opinion to the qualifying body on whether the proposed neighbourhood plan will require a strategic environmental assessment. The qualifying body should work with the local planning authority to be sure that the authority has the information it needs in order to provide a screening opinion.

When deciding on whether the proposals are likely to have significant environmental effects, the local planning authority should consult the statutory consultation bodies. Where the local planning authority determines that the plan is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it should prepare a statement of its reasons for the determination. Where a statement of reasons is provided in respect of a neighbourhood plan a copy of the statement should be provided to the qualifying body in order that the statement can be made available to the independent examiner. For example by including it in the basic conditions statement.

Where a neighbourhood plan is likely to have a significant effect on the environment a strategic environmental assessment must be carried out."

73. There is additional guidance at paragraphs 029, 032, 033 which confirms that SEA decisions must inform the preparation of the neighbourhood plan at all relevant stage.

74. As at 30 January 2014, paragraph 027 was in a near-identical format, making an express reference to allocation.

75. As a plan that (at the very least) allocates land, the Borough Council appears to have failed to have regard to the Draft PPG as at 30 January 2014 and certainly as that policy now stands following publication (thereby catching basic condition 8(2)(a)). More pertinently, as a plan that seeks to place a moratorium on all development outside the tightly drawn village boundary for a 15 year period, there has been no ostensible attempt to assess what significant likely effects this policy constraint will have. This is further justification for SEA.

SEA: Reasonable Alternatives

76. Annex I of the Directive and Schedule 2 of the Regulations, notably paragraph (h)/paragraph 8 expands on Article 5(1) and Regulation 12 above and provides that (h): "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;" (see

the equivalent in Environmental Assessment of Plans and Programmes Regulations 2004, Regulation 12 and Schedule 1).

77. An SEA must then demonstrate "equal examination of the alternatives which it is reasonable to select for examination alongside whatever, even at the outset, may be the preferred option." (*Heard v Broadland DC* [2012] EWHC 344 (Admin), [71]; as approved in *Cogent Land LLP v Rochford DC* [2012] EWHC 2542 (Admin) and *R (Chalfont St Peter Parish Council) v Chiltern District Council* [2013] EWHC 1877, [29]). Most recently, Mr Justice Sales observed in *Ashdown Forest Economic Development LLP v SSCLG and Wealden DC* [2014] EWHC 406 (Admin), paragraphs 97-98 that:

> "97 A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see *Heard v Broadland DC* at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative "reasonable alternatives," for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.

> 98 In my judgment, that is the position in the present case, by contrast with the position in *Heard v Broadland DC* . In *Heard* , the plan-making authority failed to explain in outline its reasons for the selection of the alternatives dealt with at the various stages, and failed to explain why ultimately only the preferred option was chosen to go forward for full assessment (see [66] and [70]-[71]). In this case, however, WDC has made rational and lawful choices in narrowing down a field of six options, initially to three (Scenarios A, B and C), and then in choosing only to take Scenario C forward for full detailed strategic assessment. It has explained its reasons for doing so at each stage in some detail in, respectively, chapter 6 and chapter 8 of the Sustainability Appraisal.

78. In her decision in relation to the Slaugham Neighbourhood Plan, Examiner Ann Skippers concluded that the basic condition had not been met for various reasons relating to SEA, including a failure to set out reasonable alternatives:

> "7.26 The next stages of preparing an SEA (sometimes referred to as Stages B and C) would then include consideration of reasonable alternatives. Given that the plan allocates sites, this forms an important part of the plan. There is little information to demonstrate how reasonable alternatives were identified, how they were assessed and compared or why the chosen sites were selected. Although some of the allocated sites were selected as the Parish Council had control over them through ownership or part ownership and this in itself may be sufficient reason in regard

to the SEA, it is not clear how reasonable alternatives were identified or assessed. These concerns have also been expressed in representations and at the hearing. This assessment should have formed part of the SEA process and informed the selection and refinement of the preferred options.

7.27 As the plan allocates sites, site-specific characteristics should have been identified. Instead the SEA relies on the use of some of the environmental criteria from a District level draft Sustainability Appraisal prepared in conjunction with the emerging District Local Plan. Those criteria therefore have not been tested as they form part of a suite of emerging documents at District level. In addition and arguably more importantly, those District level criteria may not be detailed or site-specific enough for use at the scale of the neighbourhood level or sufficient in themselves. Representations have also queried the criteria used.

7.28 The preparation of the Environmental Report (Stage C) must identify, describe and evaluate the likely significant effects on the environment of implementing the policies in the neighbourhood plan and of the reasonable alternatives taking into account the objectives and geographical scope of the plan. It should show how those requirements have been met. The SEA submitted does not do this adequately."

79. Where a neighbourhood plan restricts all development outside a settlement boundary, and in circumstances where a major site is well-known to the plan-making qualifying body through an application (including

a favourable Officer's Report recommending a grant of permission) and a forthcoming appeal, then that application is logically a reasonable alternative, alongside or in conjunction with a higher housing figure for the plan. Here, Option 3: Southern Development was expressly identified as one such alternative but was never subject to SEA.

80. There is a significant contrast here with the Tattenhall Neighbourhood Plan ("TNP") considered by the High Court in *BDW v CWACC*. The Earls Barton Neighbourhood Plan is a significantly more ambitious plan than the TNP, given its intention to (a) allocate at an identified site; and (b) restrict all further development. As a consequence it must be subject to much greater testing and scrutiny.

81. At [72], the judge recognised that the fact that the settlement boundary limit in Policy 1 had been removed was an important factor in the approach to be taken to reasonable alternatives. Whilst Policy 1 of the TNP was cast by the Defendant Council as simply one part of the development plan with allocations to follow in due course through the emerging plan which was approaching examination, the EBNP simply determines that there will be no further new development and sets the development framework for all future consents in the plan period through the settlement boundary at a time when the overall housing requirement has not been confirmed.

82. If the Local Plan does not proceed to adoption and is delayed as has happened in numerous cases, then for several years, until the new local plan is adopted, the neighbourhood plan will constitute the main development plan document for housing applications for the purposes of

section 70 TCPA 1990, containing the only up-to-date strategic housing policies for the neighbourhood plan area.

83. At [68], specific reference is made to CWACC's Officer recording that Policy 1: "was considered to be the only reasonable approach to housing taken in the Neighbourhood Development Plan that would… be supported by the community at referendum stage."

84. That is not the correct approach for addressing the requirements of the SEA or plan making reasonableness of alternatives is to be assessed not by reference to what can be voted upon but the reasonable alternatives for delivery. The description at J/74-75 of the assessment of reasonable alternatives as a pure question of planning judgment is incorrect; it is a mixed question of fact and law. With respect to the judge, *Persimmon Homes (Thames Valley) Ltd v Taylor Woodrow Homes Ltd* [2006] 1 WLR 334, [22] is not applicable to SEA in this manner.

85. At [69], [72]-[75], the judge further records and then agrees with the Council's approach that strategic environmental assessment will take place in higher level development plan documents, notably the emerging CWCLP. As observed above, the relevant emerging JCS may be stalled. There is no higher-level SEA that can cover the allocations at the correct time, and the potential for increased numbers have not been assessed.

86. At [70], it appears that the court placed some substantial weight on the fact that submissions on strategic environmental assessment were not raised before the Examiner. That will not be mirrored in the present case.

Summary Conclusion

87. Where an Examiner is presented with a plan which does not meet any single basic condition or a number of basic conditions, it is not lawful for him to produce a report recommending that the Neighbourhood Plan proceed to referendum: the only lawful course of action is for the Examiner to find that the basic conditions have *not* been met (see paragraph 10(4) of Schedule 4B cited above). Although there is a power to recommend modifications under paragraph 10(2) and (3), given the nature and scale of the errors identified above in respect of SEA, this cannot be rectified through modification and a further SEA exercise should re-commence. The settlement boundary should be removed in its entirety by modification.

88. If, notwithstanding that inherent unlawfulness, the Examiner does make such a recommendation, the relevant local planning authority may then proceed to hold a referendum under paragraph 12, although they are not bound by the Examiner's approval and still retain discretion not to proceed at that stage (paragraph 12(2) and (4)). The statutory framework only makes express provision for a challenge by way of judicial review in relation to decisions under paragraphs 61A(4) and (8), and paragraph 12, and paragraph 14 or 15 of Schedule 4B. It follows that if the identified major defects are not addressed prior to submission and not subject to modification, or recommended withdrawal at examination, then any decision to recommend the plan for referendum would be challengeable by way of judicial review.

89. In summary, the Neighbourhood Plan requires substantial reconsideration, and should be substantially amended in consultation with development industry interests prior to its re-submission after adoption of the local plan.

Requirement for and Conduct of Examination Hearing

90. Paragraph 9 provides:

"9(1) The general rule is that the examination of the issues by the examiner is to take the form of the consideration of written representations.

(2) But the examiner must cause a hearing to be held for the purpose of receiving oral representations about a particular issue at the hearing—

(a) in any case where the examiner considers that the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case, or

(b) in such other cases as may be prescribed.

(3) The following persons are entitled to make oral representations about the issue at the hearing—

(a) the qualifying body,

(b) the local planning authority,

(c) where the hearing is held to give a person a fair chance to put a case, that person, and

(d) such other persons as may be prescribed.

(4) The hearing must be in public

(5) It is for the examiner to decide how the hearing is to be conducted, including—

(a) whether a person making oral representations may be questioned by another person and, if so, the matters to which the questioning may relate, and

(b) the amount of time for the making of a person's oral representations or for any questioning by another person.

(6) In making decisions about the questioning of a person's oral representations by another, the examiner must apply the principle that the questioning should be done by the examiner except where the examiner considers that questioning by another is necessary to ensure—

(a) adequate examination of a particular issue, or

(b) a person has a fair chance to put a case.

(7) Sub-paragraph (5) is subject to regulations under paragraph 11."

91. Several matters arise.

92. First, in the light of the scale of legal objection identified above, we would strongly recommend that the Borough Council appoint an Examiner with legal qualifications, properly exercising its duty under paragraph 7(6):

(6) The person appointed must be someone who, in the opinion of the person making the appointment—

(a) is independent of the qualifying body and the authority,

(b) does not have an interest in any land that may be affected by the draft order, and

(c) has appropriate qualifications and experience."

93. The correct principles for examination remain highly controversial and are the subject of wide-ranging litigation: see the judicial review to a similar settlement boundary policy within the Winslow Neighbourhood Plan, which is due to be heard on 11/12 December 2014, the challenge to the Uppingham Neighbourhood Plan on SEA and other grounds, granted permission by Singh J on 10 August 2014 and a similar challenge to the Loxwood Neighbourhood Plan. All of the challenges arise in circumstances where it is alleged that the Examiner has expressed himself in terms which indicate a fundamental error of law, including a failure to make reference to and apparent abdication of a responsibility to consider the applicable legislation and case law.

94. Second, it will be apparent from the submissions above, the controversial nature of the neighbourhood plan that this is a case that would be suitable for a hearing. The Examiner must have regard to the statutory requirement to ensure adequate examination of issues and to give a person a fair chance to put their case (paragraph 9(2) and 9(6)).

95. Third, each of the three issues explored above is a distinct issue, "a particular issue" in the terms of paragraph 9(2). Each needs to be addressed separately, by reference to the applicable law. It is therefore appropriate that the agenda for the hearing timetables individual agenda items covering: "Policy EB.GD2/Village Boundary", "Site Assessment", and "Strategic Environmental Assessment".

96. Fourth, the examination must be conducted in a manner that allows detailed legal submissions to be made, by reference to the relevant legislation or case law. Paragraph 9 of Schedule 4B does not confer an unfettered discretion as to the conduct of examination hearing. That includes timetabling sessions for submissions on the three issues that give sufficient time for the complexity of the subject matter. The well-established principles on the conduct of hearings are set out in *Dyason v Secretary of State for the Environment* (1998) 75 P & CR 506, 512, which makes clear that informality of procedure must not give rise to laxity in examination:

> The danger is that the "more relaxed" atmosphere could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."

97. Fifth, the examination hearing should therefore be scheduled for at least one day. Examiners at Cringleford, Winsford and Slaugham Neighbourhood

Plan, which contained allocations, all held examinations over one or two days. In the instant case, a hearing of at least one day would be appropriate given the scale of legal objections, and the need to explain the relevant submissions to the Examiner. The practice of conducting examinations in half-day sessions and of artificially limiting submissions to units of 10-15 minutes inevitably curtails submissions. It serves no useful purpose in terms of making the process more accessible, as members of the public are actually prevented from making their own contributions and participants are left unable to explain their case publicly.

98. Sixth, and finally, this is a fast-moving area within planning law. The end of the consultation period on 29 August 2014 does not represent the end of new and relevant developments. It may therefore be necessary to send further submissions in due course.

99. That is consistent with 9(1)of Schedule 4B which provides that the general rule is that an examination is "to take the form of the consideration of written representations" and the broader duty to approach procedural matters in such a way as to ensure adequate examination of the issues and to allow parties a fair chance to put their case, by analogy with paragraphs 9(2) and (5)

100. Paragraph 22 of the NPIERS document "Top Tips for Local Planning Authorities – Independent Examination of a neighbourhood plan" provides that "The Examiner should set ground rules for dealing with late representations on a case by case basis." (This is the only formal statement that we are aware of as to correct procedure towards written

submissions). As soon as the Examiner is appointed, we therefore request that the grounds rules are made clear to all participants.

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