

Town and Country Planning Act 1990
Neighbourhood Planning (General) Regulations 2012

SOUTH MILTON NEIGHBOURHOOD DEVELOPMENT PLAN 2017-34

INDEPENDENT EXAMINATION

Final Report to South Hams District Council
by Edward Cousins BL, BA, LLM

24th March 2019

Introduction

1. This Report comprises the findings of my examination ('the Examination') into the draft South Milton Neighbourhood Development Plan (*'the Draft Neighbourhood Plan'*). The draft Neighbourhood Plan was submitted for consultation by South Milton Parish Council ('the Parish Council') to South Hams District Council ('the District Council') on 8th November 2017, and the consultation period elapsed on 11th January 2018. The draft Neighbourhood Plan was forwarded to me 14th February 2018 in order to conduct the Examination.
2. On 11th May 2018 I produced an interim report (*'the Interim Report'*). The reasons for this are set out in some detail in the Interim Report. It became clear during the course of the Examination that a number of deficiencies could be identified in the draft Neighbourhood Plan. I concluded that these needed to be addressed before I could be satisfied that the Examination could be completed and the recommendation made that the Neighbourhood Plan could proceed to a referendum. I therefore made a number of specific recommendations in order to ensure future compliance.
3. Since then more work has been undertaken by members of the Neighbourhood Planning Group, and the officers of South Hams District Council and West Dorset Borough Council. I am grateful for the care and consideration of all the points to made in the Interim Report, and the further time and effort that has been undertaken by all concerned in this regard. There has now been produced for my consideration a document described as the 'Final Draft Neighbourhood Plan' (*'the Final Draft Neighbourhood Plan'*), upon which it is stated that it is '*...not to be published until after the Joint Local Plan has been adopted'* i.e. the Plymouth and South West Devon Joint Local Plan 2014-2034 (*'the Joint Local Plan'*).
4. I consider that the various points originally raised have now been addressed, and that there has been compliance with the statutory requirements. The Final Draft Neighbourhood Plan can therefore proceed to a referendum. In this context I note that the final Inspectors' Report on the Joint Local Plan has been received. This Report confirms that the Joint Local Plan, as amended by the Main Modifications as contained in the Appendix, is sound and can proceed to adoption. The Inspectors' Report is the final stage of the lengthy process of the examination of the Joint Local

Plan. This means that the participating Councils can now proceed to adoption. South Hams District Council duly adopted the Joint Local Plan at full Council on 21st March 2019. It is also to be noted that there are only marginal changes to the now approved Joint Local Plan affecting the Draft Neighbourhood Plan.¹

My appointment

5. I have been appointed by the District Council to conduct an independent examination into the Neighbourhood Plan. I am independent of the Parish Council and of the District Council. I do not have any interest in any land that may be the subject of the Neighbourhood Plan, and nor do I have any professional conflicts of interest.

6. I am a retired judge and an Associate Member of Radcliffe Chambers, where I act as a Legal Adviser, Mediator and Arbitrator. I was previously the Principal Judge of the Land Registration Division of the Property Chamber and a Chancery barrister in Lincoln's Inn. I am a specialist property and planning lawyer, with particular expertise in markets and fairs, including street trading; land registration; commons and town and village greens; manorial rights; and mines and minerals. I have wide experience examining neighbourhood plans and conducting public hearings as part of the examination process, when necessary. I was also called to the Bar of Ireland at Trinity Term 2001, and I hold a Practising Certificate in Ireland.

Statutory framework and remit of the examination

7. Section 38A of the Planning and Compulsory Purchase Act 2004 ('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*', and the District Council is a '*local planning authority*', for the purpose of the 2004 Act.

¹ The only relevant modification of note to the Joint Local Plan as reflected in the Appendix - the Main Modifications - is the following - Ref MM35 – Strategy for TTV Policy Area – Policy TTV30 Development in Sustainable Villages – Fig 5.8 and para. 5.158 and 5.10, where South Milton has been deleted from the list of villages able to accommodate around 10 dwellings each.

8. A ‘neighbourhood development plan’ is defined by subsection 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’.

9. 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 development plan, unless material considerations indicate otherwise.

10. 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).”*

11. 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),²*
- (d) *development that consists (whether wholly or partly) of a nationally significant infrastructure project (within the meaning of the Planning Act 2008)”.*

12. The Neighbourhood Planning (General Regulations) 2012 (*‘the General Regulations’*) were made under section 38B of the 2004 Act and prescribe some detailed requirements for neighbourhood development plan proposals and how they are to be consulted upon, publicised and submitted.

13. The procedure for examining draft neighbourhood development plans is provided for in Schedule 4B of the Town and Country Planning Act 1990 (*“the 1990 Act”*), and applied by section 38A(3) of the 2004 Act. Sub-section 7 provides 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.

² 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, This 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.

14. The examiner must make a report on the draft plan pursuant to paragraph 10 of Schedule 4B. This 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 proposal for the plan be refused. The Examiner's report must contain a summary of its main findings and give reasons for each of its recommendations.
15. 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 development plan.

What must an examiner examine?

16. Paragraph 8 of Schedule 4B to the 1990 Act, as modified by section 38C(5) of the 2004 Act, requires the examiner to consider the following:
 - whether the draft plan '*meets the basic conditions*' (*'the Basic Conditions'*). These are defined at sub-paragraph (2);
 - 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 1998³.
17. Paragraph 8(2) of Schedule 4B, as modified by section 38C(5)(d) of the 2004 Act provides that:
 - '(2) A draft [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],*

³ 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.

- (b).....
- (c).....
- (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 [plan] does not breach, and is otherwise compatible with, EU obligations, 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]’.*

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.

18. *“Regulations 32 and paragraph 1 of Schedule 2 of the General Regulations, has prescribed a further condition for the purpose of paragraph 8(2)(g) of Schedule 4B to the 1990 Act, as follows*

‘[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).’”

19. Since 28th December 2018, the General Regulations, Schedule 2 paragraph 1, has prescribed a further Basic Condition, namely:

*‘In relation to the examination of neighbourhood development plans the following Basic Condition is prescribed for the purpose of paragraph 8(2)(g) of Schedule 4B to the 1990 Act—
The making of the neighbourhood development plan does not breach the requirements of Chapter 8 of Part 6 of the Conservation of Habitats and Species Regulations 2017.’*

It is to be noted that a proposed neighbourhood 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.

20. It is also 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. My statutory remit is therefore limited. The examination process is not required to be as intrusive as that required in respect of a local development plan document. Thus:

- (1) The remit of the Examiner in his assessment of 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 National Planning Policy Framework (‘NPPF’) do not apply to a neighbourhood plan.⁴
- (2) 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*’.
- (3) 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.
- (4) The Basic Conditions only require 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. Thus, 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.⁵

⁴ As to the publication of the latest version of the NPPF, see paragraph 23, below

⁵ See *R(Maynard) v Chiltern District Council* [2015] EWHC 3817 (Admin) at [13] per Holgate J.

21. I have a general discretion whether to recommend modification to bring a neighbourhood plan into line with national policy. However, if I find points of departure, I bear in mind that one would normally expect appeal decisions to follow current national policy where it conflicts with a local or neighbourhood development plan. A neighbourhood plan that is at variance with national policy is of limited value. Unless I consider that there is evidence demonstrating good reason to depart from national policy in this neighbourhood, I would expect to recommend that it be followed.
22. My statutory task is to have regard to current national policy and to assess conformity with strategic policies in the current development plan, rather than to assess the Neighbourhood Plan against emerging policies.
23. In July 2018 the NPPF was revised. A further revised version was published by the Secretary of State. in February 2019.⁶ This sets out Government's current planning policies for England and how these are expected to be applied. This document contains a transitional arrangement in paragraph 214 which indicates that the policies contained in the original 2012 edition of the NPPF will continue to apply for the purpose of examining plans, where those plans were submitted on or before 24th January 2019. Where such plans are withdrawn or otherwise do not proceed to become part of the development plan, the policies contained in the revised NPPF will apply to any subsequent plan produced for the area concerned. I have therefore not had regard to the revised NPPF in this Examination.
24. In this Report, I shall first consider the formal compliance with the provision by and under sections 38A and 38B of the 2004 Act. I shall then address the Basic Conditions, before addressing the questions of human rights and the appropriate area for a referendum.

⁶ At page 1 of the Final Draft Neighbourhood Plan there is an incorrect reference to the date of the revised NPPF as being July 2018. This should be corrected to February 2019.

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

25. The Parish Council is a ‘qualifying body’ by virtue of section 38A(12).
26. 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. I am satisfied that the Policies do relate to the use and development of land within the neighbourhood area, and not to extraneous matters.

Section 38B

27. The Neighbourhood Plan must specify the period for which it has effect, which is required by section 38B(1)(a) of the 2004 Act.
28. There is no requirement for a neighbourhood development plan’s period precisely to mirror or coincide with a local plan period. It is not my role to dictate what the neighbourhood development plan period should be. However, I am required to ensure that it specifies that period. Although I originally expressed misgivings as to the lack of clarity in relation to the period specified, I am satisfied that the period specified is now sufficiently clear.
29. 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*’.
30. I am satisfied that the draft Neighbourhood Plan does not relate to more than one neighbourhood area.

Compliance of the draft plan with provision made by or under ss.38A and 38B

31. My duty under paragraph 8(1)(b) of Schedule 4B is to determine whether the draft Neighbourhood Plan is in compliance with provision made by the General Regulations.

32. Paragraph 8 does not state, at least not expressly, that it is any part of my role as independent examiner to enquire into whether the previous consultation and publicity procedures were properly conducted. Indeed, paragraph 7(1)(b) indicates that it was for the Parish Council to determine whether the publicity requirements of the General Regulations (referred to at paragraph 6(2)(d)) were complied with by the qualifying body, before they sent the draft plan proposal to examination. This is reflected in the NPPG.⁷

33. Paragraph 8(6) states that:

‘The examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights).’

Accordingly, I shall not in this Report examine whether the publicity that was carried out was adequate for the purpose of Regulation 14.

34. I would note that paragraphs 6(2)(d) and 6(4)(b) of Schedule 4B required the Parish Council to consider whether all requirements of the General Regulations have been met and, if not, to refuse the proposal. It is clear from paragraph 7(1) of Schedule 4B that if they were not satisfied that the requirements had been met, they would not be under a duty to appoint an examiner.

35. Regulation 15 of the General Regulations requires that when the qualifying body submits the plan proposal it must include a map or statement identifying the area to which the proposed plan relates, a consultation statement, the proposed neighbourhood plan, a statement explaining how the proposed plan meets the requirements of paragraph 8 of Schedule 4B, and an environmental report or statement why one is not required.

36. The legislation is ambiguous as to whether a draft plan for the purpose of paragraph 8 of Schedule 4B is to be deemed to include these other documents. The verb ‘include’ may have as its subject ‘proposal’ or the ‘qualifying body’.

⁷ Paragraph 052 Reference ID: 41-052-20140306.

37. If, as would seem to be the position, a draft plan does not include the other documents, then I would not be permitted to consider whether requirements of regulation 15 had been complied with pursuant to regulation 8(1)(b). However, should that be required, I am satisfied that documents answering to the requirements have been submitted.
38. I consider that I must have regard to those requirements in relation to Strategic Environmental Assessment by virtue of paragraph 8(2)(f) (which requires me to consider whether EU law obligations would be breached by making the plan) and paragraph 8(2)(a), which gives me a discretion to determine whether it is appropriate to make the plan having regard to national guidance and policy. In this regard, I would note that the NPPG states:

'a draft neighbourhood plan proposal must be assessed to determine whether it is likely to have significant environmental effects...

A neighbourhood plan may require an environmental assessment if it is likely to have a significant effect on the environment. Where this is the case the draft neighbourhood plan may fall within the scope of the Environmental Assessment of Plans and Programmes Regulations 2004. This may be the case, for example, where a neighbourhood plan allocates sites for development.

*A qualifying body is strongly encouraged to consider the environmental implications of its proposals at an early stage...
... A neighbourhood plan or Order must be compatible with European Union obligations, as incorporated into UK law, in order to be legally compliant'.⁸*

39. Regulation 15(1)(e) requires inclusion of the following:

- '(I) an environmental report prepared in accordance with paragraphs (2) and (3) of regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004; or*
(ii) where it has been determined under regulation 9(1) of those Regulations that the plan proposal is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), a statement of reasons for the determination.'

⁸ Paragraphs 051 (Reference ID: 41-051-20150209), 073 (Reference ID: 41-073-20140306), and 078 (Reference ID: 41-078-20140306).

40. Forming part of the documentation forwarded to me for my consideration as part of the Examination I was provided with a copy of an environmental report from AECOM dated November 2017. In the Interim Report I expressed some concern as to its compliance with EU law and with the 2004 Regulations. I considered that the requirement of regulation 15(1)(e)(i) made pursuant to Schedule 4B of the 1990 Act which in turn applies by virtue of s.38A(3) of the 2004 Act had not been met, for reasons explained in the Interim Report. .. Failure to comply was accordingly a failure to comply with provision made by or under s.38A.
41. However, since the production of the Interim Report I have been provided with a number of documents. Four of these documents have been prepared by the Neighbourhood Planning Group in discussion with Officers of the District Council, and the fifth has been prepared by the District Council and agreed with Natural England. They are the following:
1. Updated and revised Environmental Report from AECOM dated 13th September 2018;
 2. Housing Site Assessment Chronology and Evidence base;
 3. Housing Site Assessment;
 4. Note to ‘signpost’ where / how the documents respond to the issues of concern raised in the Interim Report; and
 5. Detailed HRA Screening.
42. As a general point I am now satisfied that all the points raised by in the Interim Report have now been resolved. However, it is necessary to make specific reference to the legal requirements to indicate, in my judgment, that there has been satisfactory compliance.

European law obligations

Strategic environmental assessment

Requirements of the Directive and regulations

43. I am required to check that the making of the order does not breach EU obligations. This means that I must consider whether the SEA Directive and SEA Regulations have been complied with.
44. Directive 2001/42/EC - known as the Strategic Environmental Assessment Directive - on the assessment of the effects of certain plans and programmes on the environment ('the SEA') provides 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 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)).
45. It is currently unclear whether English neighbourhood plans always require strategic environmental assessment. In case C-444/15, *Associazione Italia Nostra Onlus v Comune di Venezia*, the Court of Justice of the EU considered the meaning in the context of legislation that precluded consideration whether the commune (city council)'s plan for 68 dwellings within the Venetian lagoon required strategic assessment. It ruled as follows:

'Article 3(3) of Directive 2001/42, read in conjunction with recital 10 of that directive, must be interpreted to the effect that the term 'small areas at local level' in paragraph 3 must be defined with reference to the size of the area concerned where the following conditions are fulfilled:

- *the plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and*
- *that area inside the territorial jurisdiction of the local authority is small in size relative to that territorial jurisdiction'.*

The use of 'and/or' is ambiguous. It was unnecessary to decide this point in the *Venezia* case, as the plan was prepared and adopted by the same authority. However, English neighbourhood plans are prepared by a parish and adopted by a district. The neighbourhood area in the present case the Neighbourhood Plan embraces the whole area of the Parish Council and so is not 'small in size relative to that territorial

jurisdiction'. On the other hand, it may reasonably be said to be small in relation to the District of South Hams.

46. In the present case, since the Environmental Report has been prepared, I infer that the Parish Council and/or the District Council must have considered that the 'small area at local level' exemption did not apply as the area was too large, or that it was considered notwithstanding the limited geographical scope to potentially have effects that, as a matter of planning judgment, were judged to be 'significant'. According to the Environmental Report, as revised and updated in September 2018, the draft Neighbourhood Plan was in any event assessed to have 'significant positive' environmental impacts, such that it *is* likely to have significant effects. The evidence before me therefore indicates that a SEA was required as a matter of EU law, as well as by virtue of Regulation 15 of the General Regulations.

47. Where an environmental report is required under Article 3 of the 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'. 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', including the matters stated 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.

48. 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’.⁹

49. The requirements of the Directive are transposed by the Environmental Assessment of Plans and Programmes Regulations 2004 (‘SEA Regs’). Regulation 12 transposes article 5, and Schedule 2 transposes Annex I.

50. 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 the present case, the Parish Council is a ‘*responsible authority*’ because it proposes and has prepared the Draft Neighbourhood Plan. The District Council is probably also a ‘*responsible authority*’, at least by the present time by reason of the fact that it is the District Council who have sent the documents on to me as the examiner and will ‘make’ the neighbourhood development plan.¹⁰

51. Regulation 5(6) of the SEA 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

⁹ 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 Rochford DC* [2014] EWHC 3866 (Admin) at [84] per Lindblom J.

¹⁰ 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 that the authority has become ‘responsible’ as a matter of law for taking steps in relation to it.

to have significant environmental effects, or it is the subject of a direction under regulation 10(3).'

52. Regulation 8 provides as follows:

'8. - Restriction on adoption or submission of plans, programmes and modifications

(1) *A plan, programme or modification in respect of which a determination under regulation 9(1) is required [a determination whether the plan is likely to have significant environmental effects] 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*

[...]

(3) *The requirements of this paragraph are that account shall be taken of-*

(a) *the environmental report for the plan or programme...'*

53. Regulation 12(2) states that the environmental report must 'identify, describe and evaluate the likely significant effects on the environment of – (a) implementing the plan or programme; and (b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme'.

54. Case law has established that all alternatives to the draft plan must be considered which are 'viable' in the sense of capable of meeting (or 'sensibly may meet') the objectives of the plan, and which are potentially environmentally preferable or equal. All such alternatives, not merely a selection of them, must be identified and assessed on a fair comparative basis in one or more stages, and adequate reasons given for selecting some as reasonable alternatives (and rejecting others) at each stage. It is acceptable for a final Environmental Report to cross-refer to previous documents giving full reasons for discarding options at earlier stages, so long as it is clear what the reasons were, and the exercise does not amount to a paper-chase. It is also possible to correct any deficiencies in an Environmental Report so long as this is done in a manner fair to the public concerned, before a decision on adoption of the plan.¹¹

¹¹ *Hoare v Vale of White Horse DC* [2017] EWHC 1711 (Admin) at [162]-[163] per John Howell QC; *Friends of the Earth v Welsh Ministers* [2015] EWHC 776 at [90]-[109] per Hickinbottom J; *No Adastral New Town Ltd v Suffolk Coastal DC* [2014] EWHC 223 at [127]-[129] per Patterson J; *Cogent Land LLP v Rochford DC* [2012] EWHC 2542 (Admin) at [113] - [126] per Singh J.

Inadequate reasoning in the original Environmental Report relating to the site allocation, and other identified failings

55. An Environmental Report was prepared by the consultancy AECOM and forwarded to me as part of the documentation submitted for the Examination. This purported to give a description of the process and reasons for the selection of alternatives in the non-technical summary, and then in Chapter 4.¹² As expressed in the Interim Report, I considered that the Environmental Report in its original formulation was manifestly inadequate in its reasoning in this regard, for all the reasons stated in paragraphs 59 to 66 thereof. I also expressed concern as to the adequacy of the consultation measures in paragraphs 67 to 74, and in particular to references to the Dairy Site. I therefore considered that the defects in the original Environmental Report were not merely technical or trivial breaches and could not be said to have been compensated for in other ways. I also made reference to other perceived failings in the original Environmental Report in paragraphs 76 to 79 of the Interim Report.
56. For all the reasons set out in the Interim Report, I therefore concluded that the Parish Council would have been in breach of its obligations under European law, as well as the 2004 Regulations, if the Neighbourhood Plan proceeded to adoption without further work. I then went on to state that depending on whether a full comparative examination of all reasonable alternatives had ever been carried out, the Parish Council would either have to undertake a fresh options-appraisal exercise, or properly document and write up the assessment work that has already been done in a revised Environmental Report. I then stated that the revised Environmental Report would then be required to be consulted upon anew and with a revised approach to the consultation process.
57. However, having regard to the revised and updated Environmental Report dated September 2018, and the further documentation supplied, and the explanations provided by the Neighbourhood Planning Group as to the perceived apparent failure to provide to the public the various housing options, to which reference was made in paragraph 68 of the Interim Report, I am now satisfied that these points have been addressed. I am also satisfied that there is no necessity for a further consultation

¹² At pages 13 to 23.

process. Further, I am now satisfied by the explanations relating to my expressed concerns as to accessibility of the public to the Exhibition held in April 2017, and feedback from the public, and other matters referred to referred to in paragraphs 70 to 73 of the Interim Report, and explanations provided as to the allocation of the Dairy Site.

Habitats Regulations Assessment

58. Article 6(3) of the Habitats Directive¹³ 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 it has been ascertained that it will ‘*not adversely affect the integrity of the site concerned*’. If a 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.
59. Those obligations have been transposed into national law by regulations 102, 102A and 103 of the Conservation of Habitats and Species Regulations 2010 (‘the *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...*

¹³ Council Directive 92/43/EEC of 21 May 1992.

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:

'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.'

60. Regulation 107(1) of the Habitats Regulations then sets out 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 TCPA 1990 (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 it includes (but not be limited to) a '*public body of any description or person holding a public office*'. It includes local authorities and parish councils.
61. Case law establishes that 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.¹⁴ Consequently, for instance, the fact that there may be '*boiler plate*' language in the statutory development plan stating that projects cannot be approved if they would harm a protected site, cannot 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.
62. 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 Parish 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.

Information sought in the Interim Report

63. As explained above, the evidence indicates that '*some parts*' of the Parish are within a potential impact zone for a SAC. I stated that there was no specific evidence before

¹⁴ Case C-6/04, *Commission v UK* [2006] Env. L.R. 29 at [51]-[56].

me that there would be a significant adverse impact on the protected site. Natural England had not indicated any particular concern in their consultation response.

64. Nevertheless, I am required as part of my examination to consider for myself whether the Basic Conditions are met, including checking that making the plan would not breach, and would be compatible with, EU obligations. This exercise is required to be done by reference to an adequate evidence base.¹⁵ Paragraph 040 of the NPPG states: *‘Proportionate, robust evidence should support the choices made and the approach taken.’*¹⁶ 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’.

65. The evidence that the examiner requires in order to assess compliance with the Directive must 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 run-offs; visitor

¹⁵ 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.

¹⁶ Paragraph 040 (Reference ID: 41-040-20160211).

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

Further, the proposed neighbourhood development plan has to be considered in combination with other plans and projects which are relevant to the protected sites. These include 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 Parish Council's administrative area. If relevant, sufficient information must be provided about such other plans and projects to enable an evaluation to be made.

66. I stated that it was impossible on the information before me to evaluate whether any protected European sites are liable to being affected. I also said that it was certainly impossible for me to rule out adverse impacts beyond reasonable doubt, without more information about such matters.
67. I therefore stated that it would be necessary for the Parish Council to provide the requisite information in order for any examiner to reach a decision as to compliance with the Habitats Directive.
68. Having regard to the further information now provided, and in particular to the Habitats Regulations Assessment Screening in which detailed consideration has been

given to the points raised in the Interim Report,¹⁷ I am now satisfied that there has been satisfactory compliance with the regulatory requirements.

General Conformity with the strategic policies in the development plan

69. The Joint Local Plan comprises, so far as is relevant to this Examination, the South Hams Core Strategy (adopted 2006), the Development Policies Development Plan Document (adopted 2010) and the Rural Areas Site Allocations Development Plan Document (adopted 2011). No sites are currently allocated for the Neighbourhood Plan area.
70. The Joint Local Plan is divided into seven sections. On 31st July 2017 it was submitted to the Planning Inspectorate for examination. As previously mentioned, the Inspectors' Report was published on 18th March 2019.
71. No definition is provided by the legislation as to what is meant by '*strategic*' policies in the development plan. This is left to the examiner's planning judgment. Some helpful guidance is given by the Secretary of State, to which I have had regard.¹⁸
72. In my judgment, a strategic policy is one that sets the overall agenda for what development is to be promoted or restricted, and where. Policies relating to broad locations for growth, the quantum and distribution of new homes and industry, significant allocations, and significant restrictive designations such as areas of AONB or designated coastline are strategic, as well as policies providing for significant infrastructure and those setting a framework for how to balance competing considerations. Policies dealing with detailed site-specific matters, design or management of minor uses of land are not likely to be significant. Applying this approach, I have come to the following conclusions:

- (1) I consider that the following relevant adopted policies are strategic: **CS1** (location of development); **CS2** (quantum and distribution of development to 2016); **CS3** (Employment Land Provision to 2016); **CS5** (Previously

¹⁷ At paragraphs 80 to 85, and 89.

¹⁸ NPPG, para 076, ID: 41-076-20140306.

developed Land); **CS6** (overall target for 50% affordable housing); **CS8** (infrastructure); **CS9** (Landscape and Historic Environment); **CS10** (Nature Conservation), **CS11** (Climate Change); **CS12** (Tourism); and **CS13** (Rural Diversification).

(2) There is a strong overlap, if not to say repetition, with **DP2** (Landscape Character); **DP3** (Residential Amenity); **DP5** (Biodiversity and Geological Conservation); **DP6** (on heritage); **DP14** (Protection of Employment land); **DP15** (Development in the Countryside).

(3) **Policy CS1** states that development outside named centres and villages ‘*will be strictly controlled and only permitted where it can be delivered sustainably and in response to a demonstrable local need*’. **DP15** further specifies that within the countryside, development will be permitted where it requires a countryside location and either supports the essential needs of agriculture or forestry, or meets the essential, small scale and exceptional local development needs of a settlement which cannot be met within development boundaries. **Policy CS5** states that between 2001 and 2016, at least 50% of new housing should be on previously developed land. **Policy CS9** requires great weight to be given to protecting the AONB, and to protecting the character of undeveloped parts of the coast so that development not requiring a coastal location will not be provided for. **Policy CS10** requires SSSIs to be subject to a high degree of protection, and development harming a SSSI will only be permitted in exceptional circumstances. **Policies CS1 and DP15** tend to indicate that residential development should not take place in the parish. However, this has to be viewed in the context of the poor affordability of housing locally, and the need evidenced in the Housing Topic Paper, which indicates that the criteria in these policies are likely to be met. There is insufficient information to rule out an adverse effect on the SSSIs. The Neighbourhood Plan aims at increasing affordable housing supply to meet local needs, as well as protecting the local landscape, views and heritage.

73. Overall, I am satisfied that there is general conformity with the strategic policies in the adopted development plan.

Appropriateness of making the Neighbourhood Plan

74. In the Interim Report I expressed the view that by reason of the fact that the Joint Local Plan was still awaiting the outcome of the Planning Inspectors' determination, and the perceived inadequate SEA work, I did not consider at that stage for it to be appropriate to recommend that the Draft Neighbourhood Plan should proceed to a referendum, for the reasons stated. I made reference to the national guidance emphasises the importance when allocating sites for development, of '*an appraisal of options and an assessment of individual sites against clearly identified criteria*',¹⁹ and the recommendation that where options have been considered, '*earlier engagement should be used to narrow and refine options*'.²⁰
75. In paragraph 97 of the Interim Report I raised a number of areas of concern as to the consultation responses. I was particularly concerned about the Dairy Site. However, I am satisfied that the revised updated Environmental Report sets out full consideration of reasonable alternatives. I am therefore satisfied that this together with the other additional information provided does clarify how the preferred approach of the Neighbourhood Plan was developed and decisions made.

There are also questions as to drafting of specific policies.

Prematurity

76. In the Interim Report I also made reference to the question of prematurity i.e. whether neighbourhood plans may be promoted before, or at the same time as, local plans by reference to the guidance provided by the NPPG. This issue is no longer relevant as the Joint Local Plan has now been published with very few alterations relevant to the Neighbourhood Plan area and adopted.²¹

¹⁹ Paragraph 041, ID: 41-041-20140306.

²⁰ Paragraph 049, ID: 41-049-20140306.

²¹ See footnote 1, above.

Drafting points and modifications

Modifications of substance

77. In the Interim Report I made reference to extracts from the NPPG and that modifications of substance should be made to the Final Draft Neighbourhood Plan. I am satisfied that this point has been addressed in the revisions made in the Final Draft.
78. In paragraph 105 of the Interim Report I then went to make detailed recommendations in order to correct errors; to secure compliance with guidance as to clarity, precision, local distinction; and not to impose excessive or otherwise inappropriate policy burdens. I am satisfied that all these points have been addressed in the Final Draft Neighbourhood Plan. However, there remains one aspect that still require clarification. That relates to **Policy E&CM1** where I recommended that the first sentence of this Policy should be altered to read ‘*conserve or enhance*’ rather than ‘*and*’. After some debate with the Neighbourhood Planning Group, and on reflection, I consider that the original wording should remain, i.e. the word ‘*and*’ be reinstated.

Achievement of sustainable development

79. 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, plan positively to support local development.
80. I am now satisfied that the Neighbourhood Plan makes a contribution towards sustainable development by supporting appropriate economic development whilst

protecting the local environment. I am also satisfied that there is now adequate information about alternatives and impacts on nearby SSSIs.

The appropriate area for a referendum

81. 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

82. This Neighbourhood 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.²²

83. I am satisfied that the Policies are broadly 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 do not strike an intrinsically unfair balance. The Policies 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.

Summary

84. My original concerns that the Draft Neighbourhood Plan its original form failed to comply with the SEA Directive and 2004 Regulations. This meant that it did not comply with the Basic Conditions.

85. I have now been provided with sufficient information and reasoning to conclude that that all the statutory requirements have now been satisfied, the issues of concern have

²² *R (Skelmersdale Limited Partnership) v West Lancashire Borough Council* [2016] EWHC 109 (Admin) at [30]-[31] per Jay J.

been addressed, to which detailed reference was made in the Interim Report. In my judgment, therefore, I consider that it would be lawful to recommend that the Final Draft Neighbourhood Plan should proceed to a referendum.

Edward F Cousins
Independent Examiner

Radcliffe Chambers
Lincoln's Inn

24th March 2019