**Town and Country Planning Act 1990**

**Neighbourhood Planning (General) Regulations 2012**

# HOLTON-LE-CLAY NEIGHBOURHOOD DEVELOPMENT PLAN 2017-29

## INDEPENDENT EXAMINATION

**Interim Report to East Lindsay District Council**

**by Edward Cousins BL, BA, LLM**

**May 2019**

**Introduction**

1. This Report comprises the findings of my examination ('the Examination') into the draft Holton-Le-Clay Neighbourhood Development Plan ('the Draft Neighbourhood Plan'). The Draft Neighbourhood Plan has been drafted by the Holton-Le-Clay Neighbourhood Development Plan Steering Group ("the Steering Group") on behalf of the Holton-Le-Clay Parish Council ('the Parish Council'). It was submitted by the Parish Council for consultation to East Lindsay District Council ('the District Council'), and the consultation period elapsed on 26th April 2018. The Draft Neighbourhood Plan was forwarded to me in October 2018 in order to conduct the Examination.

2. Conscious though I am of the considerable time and effort that has gone into the preparation of the Draft Neighbourhood Plan I regret to state that I am unable to recommend that it proceeds to a referendum at this stage. In my judgment, for the reasons set out in this Examination, it will require further consideration and elaboration beyond modifications. I should state that a Health Check was conducted by Mr Andy Booth in October 2016 in which he made a number of recommendations, but some of these do not appear to have been adopted. In my judgment the Draft Neighbourhood Plan needs to be the subject of substantial re-drafting and errors need to be corrected so as to secure compliance with legal requirements. It is within my powers to refuse the existing proposal. However, in view of the fact that, in my judgment, it can be sufficiently modified so as to comply with legal requirements and also having regard to all the hard work and effort that has already gone into to its production, I consider that the Steering Group should be given the opportunity to modify the existing draft so as to enable it to comply. The Draft Neighbourhood Plan as modified can then be put to a referendum. Thus, in such circumstances it would be inappropriate for me to recommend that it proceeds further at this stage as part of the examination process.

3. This interim report comprises a statement of the statutory framework and remit of this examination. I have also made a number of specific recommendations in order to ensure future compliance. In order to facilitate the process of incorporation of the specific recommendations into the text of the Draft Neighbourhood Plan I have annexed to this Interim Report a schedule ("the Schedule") containing a number of comments and recommendations as specified in the table ("the Table").

**My appointment**

4. I have been appointed by the District Council to conduct an independent examination of the Draft 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 Draft Neighbourhood Plan, and nor do I have any professional conflicts of interest.

5. I was called to the Bar of England and Wales in 1971 and practised as a Barrister for over 30 years with expertise in property and land law, and associated Chancery litigation. From 2002 to 2011, I served as the Chief Commons Commissioner appointed under section 17 of the Commons Registration Act 1965. From September 2003, I served as Adjudicator to HM Land Registry, a salaried post established by the Land Registration Act 2002. When, in 2013, this jurisdiction was transferred to the tribunal system, I sat as Principal Judge of the First-tier Tribunal (Property Chamber), and as a Deputy Upper Tribunal Judge (Lands Chamber), until October 2014. I continued to sit as a fee-paid Deputy Chancery Master in the Chancery Division of the High Court of Justice until March 2019.

6. I am an Associate Member of Radcliffe Chambers, where I act as a Legal Adviser, Mediator and Arbitrator. 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 am published in the law of mortgages, commons and greens, and markets and fairs. I also have wide experience examining other 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.

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),*[1]

*(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.

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

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[1] 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.

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 1998[2].

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],*
> *(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),*

[2] 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.

> *(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. Further:

> *"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. Also of note is that 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.'*

20. Further, 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.

21. 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.[3]

(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.[4]

22. 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

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3 As to the publication of the latest version of the NPPF, see paragraph 24, below

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

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.

23. 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 Draft Neighbourhood Plan against emerging policies.

24. In July 2018 the NPPF was revised. A further revised version was published by the Secretary of State. in February 2019.[5] This sets out Government's current planning policies for England and how these are expected to be applied. The February 2019 version contains a transitional arrangement in paragraph 214 which indicates that (subject to one or two exceptions) 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.

25. 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.

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

26. The Parish Council is a 'qualifying body' by virtue of section 38A(12).

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5 In so far as the Draft Neighbourhood Plan may provide an incorrect reference to the date of the NPPF,. it should be corrected so as to indicate that it was modified in February 2019.

27. 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***

28. A neighbourhood plan must specify the period for which it has effect, which is required by section 38B(1)(a) of the 2004 Act.

29. 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.

30. 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'.

31. 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***

32. 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.

33. Paragraph 8 of Schedule 4B 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) of Schedule 4B 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)) of Schedule

4B were complied with by the qualifying body, before they sent the draft plan proposal to examination. This is reflected in the NPPG.[6]

34. Paragraph 8(6) of Schedule 4B 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.

35. 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.

36. 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.

37. 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*'.

38. 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

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

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.

39. 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'.*[7]

40. 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.*'

**European law obligations**

***Strategic environmental assessment***

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

*Requirements of the Directive and regulations*

41. 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.

42. 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)).

43. 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 East Lindsey.

44. 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.

45. 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'.[8]

46. 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.

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[8] 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.

47. 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.[9]

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

49. 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*

[9] 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.

*[...]*

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

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

50. 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'.

51. 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.[10]

***Habitats Regulations Assessment***

52. Article 6(3) of the Habitats Directive[11] 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

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10 *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.

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

approved where the plan must nevertheless be carried out for imperative reasons of overriding public interest.

53. 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…*
> *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*.'

54. 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.

55. 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.[12] 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.

56. 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.

57. In the present case a screening report, a Strategic Environmental Impact Assessment (SEA) and Habitats Regulations Assessment have been prepared by ELDC dated 26th November 2014. At that time, the 2016 the NDP included allocations, and the screening report stated that a SEA was required.

58. The health check prepared by Andy Booth in October 2016, commented subsequently that as the NDP no longer included allocations, a "light-touch" sustainability appraisal (incorporating the requirements of the SEA) had been undertaken.

59. However, the '*Scoping report and appraisal of objectives*' (undated) states that ELDC recommended that a '*light-touch*' Sustainability appraisal would provide a good basis for assessing the sustainability of their Plan and to inform its preparations (page 6).

60. Para 7.2 of Basic Conditions Statement says a screening process was carried out by ELDC which determined that the Neighbourhood Development Plan did not require a Strategic Environmental Assessment. For completeness, this ELDC document should be provided to confirm that a full SEA is no longer required.

61. 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

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

breach, and would be compatible with, EU obligations. This exercise is required to be done by reference to an adequate evidence base.[13] Paragraph 040 of the NPPG states: '*Proportionate, robust evidence should support the choices made and the approach taken.*'[14] 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*'.

62. 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 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

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13 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.

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

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.

63. 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.

**The appropriate area for a referendum**

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

**The Convention rights**

65. 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.[15]

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

66. 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**

67. The wording of certain policies is not appropriate, as they are inconsistent with national policy and guidance. I have suggested some possible modifications that could overcome those deficiencies, although that would not overcome the obstacles to adoption to which reference has been made, above.

68. In my judgment, it appears that the Neighbourhood Plan requires substantial reconsideration and further elaboration. In order to facilitate the process of incorporation of the specific recommendations into the text of the Draft Neighbourhood Plan I have annexed to this Interim Report a schedule containing a number of comments and recommendations as specified in the Table.

69. It is with regret that I am therefore unable to recommend that the Draft Neighbourhood Plan be submitted to a referendum. Indeed, for the various reasons set out in this Report a recommendation for refusal could be made at this stage. However, with appropriate modifications the statutory requirements could be satisfied.

Edward F Cousins
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Radcliffe Chambers
Lincoln's Inn

1st May 2019