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25 September 2015

Dear Sirs

HADDENHAM NEIGHBOURHOOD PLAN

Please see enclosed documents relating to an application for judicial review to quash the decision of Aylesbury Vale District Council ("the Council"), dated 11th September 2015 to make the Haddenham Neighbourhood Plan ("HNP").

Yours faithfully

pp.

BERNARD RALPH
Partner

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25 September 2015

PRE-ACTION PROTOCOL LETTER
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Sirs,

Haddenham Neighbourhood Plan

Introduction

1. This is a pre-action letter in support of an application for judicial review to quash the decision of Aylesbury Vale District Council ("the Council"), dated 11th September 2015 to make the Haddenham Neighbourhood Plan ("HNP").

Proposed Claimant

2. We are instructed by Lightwood Strategic Limited, c/o Bernard Ralph, GCL Solicitors LLP, Connaught House, Alexandra Terrace, Guildford, Surrey, GU1 3DA.

The decision in question

3. The decision of the Council dated 11th September 2015 to make the HNP ("the Decision").

The details of the action that the proposed defendant is expected to take

4. Please reply to this letter by 4 pm on 7th October 2015 confirming that you accept that the Decision was unlawful and that the Council will (i) consent to the Claimant's application for judicial review and (ii) pay the Claimant's costs of and relating to this prospective claim.

Factual Background

5. The material facts so far as they relate to the Claimant's grounds of challenge are set out in the attached annex, which includes a draft copy of the Proposed Claimant's Statement of Facts and Grounds. If you disagree with any of the facts set out in that draft, please say so, with reasons, in your reply to this letter.

Grounds of Challenge

6. The Claimant's draft grounds of claim are set out in the attached annex. The Claimant reserves the right to add to or modify these grounds in light of the Council's response to this pre-action protocol letter.

Further information required

7. We believe that the attached draft amended grounds which are based on existing documents, are more than sufficient to justify the quashing of the Decision. However we reserve our position in the light of your response.

Interested Party

8. Haddenham Parish Council, Banks Park, Banks Road, Haddenham, Aylesbury, Buckinghamshire HP17 8EE

Legal Advisers

9. Bernard Ralph, GCL Solicitors LLP, Connaught House, Alexandra Terrace, Guildford, Surrey, GU1 3DA (br@gclsols.com).

10. Christopher Boyle QC and Andrew Parkinson of Landmark Chambers are instructed as counsel.

Costs

11. This is an Aarhus claim as it relates to the *"national law relating to the environment"*: see ***SSCLG v Venn*** [2014] EWCA Civ 1539, where the Court of Appeal approved the Secretary of State's concession that *"since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in the Convention is arguably broad enough to catch most, if not all, planning matters"* – at para. 11.

12. Please confirm that you accept that the Aarhus costs limits as set out in CPR r. 45.43 apply.

Timeframe for response

13. By 4 pm on 7th October 2015.

Yours faithfully

pp.

Bernard Ralph

cc Haddenham Parish Council

IN THE HIGH COURT OF JUSTICE CO/ /2015

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

The QUEEN (on the application of LIGHTWOOD STRATEGIC LIMITED)

Claimant

-and-

AYLESBURY VALE DISTRICT COUNCIL

Defendant

-and-

HADDENHAM PARISH COUNCIL

Interested Party

DRAFT STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

Introduction

1. This is an application for judicial review to quash the decision of the Defendant, Aylesbury Vale District Council ("the Council"), dated 11th September 2015, to make the Haddenham Neighbourhood Plan ("HNP").

2. The Claimant is a developer who has applied for planning permission on Land to the north of Aston Road, Haddenham, Buckinghamshire, HP17 ("the Site"), which is partially allocated by Policy HD5 in the HNP.

3. The Claimant objected to the HNP on the basis that it failed to comply with the statutory requirements set out in paragraph 8(1) of Schedule 4B to the Town and Country Planning Act 1990 ("the 1990 Act") and the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations").

4. The Interested Party, Haddenham Parish Council ("HPC") is the "qualifying body" responsible for the production of the HNP.

5. The Council is the Local Planning Authority ("LPA").

Factual Background

6. In June 2013, HPC applied for Haddenham Parish to be designated as a Neighbourhood Area for the purpose of preparing a neighbourhood plan. The Council approved the Neighbourhood Area application on 30 July 2013.

7. On 15th August 2014, the Council issued a screening opinion which stated that the HNP would require Strategic Environmental Assessment. The screening opinion concluded as follows:

"Having reviewed the criteria Aylesbury Vale District Council concludes that the Haddenham Neighbourhood Development Plan has some potential to have significant environmental effects beyond those expected by 'strategic' district-wide policies of the Local Plan, although the magnitude and location of these effects is difficult to ascertain at this stage of the plan making process. Therefore, the best course of action is to produce a Strategic Environmental Assessment, particularly as this is a process that needs to be started in the early stages of the plan making process and cannot be retrofitted at a later stage."

8. On 8th September 2014, the Claimant submitted a planning application for the Site: ref: 14/02666/AOP ("the Application").

9. The Application sought outline planning permission for up to 350 dwellings, including 45 retirement dwellings, associated garages, parking, estate roads, footways, pedestrian linkages, public open space, burial ground, sports facilities and strategic landscaping. The Site comprises Glebe Land owned by the Diocese of Oxford, together with a large field owned separately by a private owner. It is 22 ha in area.

10. Between 6th December 2014 and 20th January 2015, HPC carried out consultation on the pre-submission version of the plan ("the psHNP"). Policy HD6 of the psHNP allocated part of the Site (7ha out of the total 22ha) for up to 50 dwellings. The policy stated as follows:

"The Neighbourhood Plan allocates land on the Glebe Land between the rear of The Gables and the natural break line in the field for residential development in the second half of the Plan period between 1st April 2023 and 31st March 2033. Planning permission will be granted where an application:

- *Does not exceed 50 dwellings;*
- *Has a design and layout, including lower density at the site edge and a maximum of 2 storeys to provide a graduated transition from the village to open countryside;*
- *Has specific treatment of open space to provide open views out of the village;*
- *Provides effective safe and attractive pedestrian and cycle connection(s) into the core of the village;*
- *Includes a transport management plan to connect into the core of the village and limit the vehicular impact onto Woodways and Thame Road;*
- *Integrates a 0.8 hectare multi-denominational/ civil burial ground."*

11. The supporting text to the policy stated as follows:

"This site has been previously proposed for development; the independent inspector on the application found that the development of the site for 100 dwellings (the application at the time) would be "totally unrelated to and impossible to integrate with the rest of the village" with the existing footpath "singularly unattractive for people walking alone or after dark". It was also considered that it would destroy the "sense of Church End in its historic rural setting" and have a seriously detrimental effect on the character and setting of the Church End part of the Haddenham Conservation Area.

These issues still represent material considerations for future planning applications and would be exacerbated by significantly higher numbers of houses. Development on the site would, in one sense, "round off" the village but it would increase traffic flow through the historic core of the village and affect views from the neighbouring properties in Willis Road, The Gables and the eastern side of Church End.

However, by dividing the sit (sic) into 3 sections, a parcel of land to the North of the site could be developed without a disproportionately adverse impact on the Conservation Area. The site could incorporate a new burial ground; a proposal to develop a natural burial site for strewing ashes was considered appropriate – particularly on this site which was considered geographically well-connected to the church…"

12. At the same time, HPC consulted on a draft version of the Environmental Report prepared under the SEA Regulations ("the dSEA").

13. Pegasus Group, on behalf of the Claimant, submitted representations in January 2015, which were supported by a legal opinion that concluded that the psHNP failed to meet the basic conditions including the failure to record, and therefore accord with, the statutory basic conditions test.

14. On 23rd December 2014, the Application was amended (ref: 14/02666/AOP). Permission was now sought for 280 dwellings, including 35 age restricted dwellings, with associated garages, parking, estate roads, footways, pedestrian linkages, public open space, burial grounds, community sports facility and strategic landscaping.

15. On 27th January 2015, the Submission Draft of the HNP was submitted to the Council ("the dHNP"), together with an updated Environmental Report ("the SEA").

16. Policy HD5 of the dHNP allocated part of the Site for up to 85 dwellings. The area allocated was reduced from 7.1 ha to of 2.8 ha. The allocation was phased to cover the period between 2023 and 2033. The policy read as follows:

The Neighbourhood Plan allocates 2.8 hectares of land on the Glebe Land as shown at Figure 14, between the rear of Willis Road and the hedge line in the field for residential development in the second half of the plan period between 1st April 2023 and 31st March 2033. Planning permission will be granted where an application:

- *Provides 85 dwellings;*
- *Has a design and layout, including lower density and a maximum of 2 storey at the site edge to provide a graduated transition from the village to open countryside;*
- *Has specific treatment of open space to provide open views out of the village;*
- *Provides effective safe and attractive pedestrian and cycle connection(s) into the core of the village;*
- *Includes the implementation of a traffic impact assessment to manage traffic into the core of the village and limit the vehicular impact onto Woodways and Thame Road;*
- *Secures provision of a multi-denominational/ civil burial ground."*

17. The supporting text was identical to that in the psHNP, save that the last sentence regarding the burial ground was modified.

18. On 28th January 2015, the Council's Planning Committee heard the Application. The Planning Officer recommended the grant of planning permission, subject to a section

106 agreement. The Planning Committee accepted the recommendation of the Planning Officer.

19. The following day, the Secretary of State for Communities and Local Government issued a holding direction under article 25 of the Town and Country (Development Management Procedure) Order 2010.

20. Between 3rd February 2015 and 17th March 2015, the dHNP was publicised by the Council and representations were invited. Pegasus Group, on behalf of the Claimant, submitted representations on 13th March 2015. These submissions pointed out deficiencies in the SEA, and that the dHNP still failed to record, and apply, the basic conditions test.

21. The consultation period closed on 17th March 2015.

22. On 20th March 2015, following the end of the consultation period on the draft plan, the Council appointed an independent examiner, Mr Nigel McGurk, to review whether the dHNP met the Basic Conditions required by paragraph 8(2) of the 1990 Act, and should therefore proceed to referendum.

23. On 27th March 2015, the Secretary of State for Communities and Local Government called in the Application under section 77 of the 1990 Act.

24. On 4th May 2015, the Council received the Examiner's Report ("the ER"). The Examiner's Report concluded that, subject to making the modifications proposed by the Examiner, the dHNP met the Basic Conditions and should proceed to a Neighbourhood Planning referendum.

25. Policy HD5 was amended to (i) require a policy-compliant application to *"allocate"*, rather than *"secure"* a burial ground; (ii) allow an application to provide *"up to"* 85 dwellings; (iii) remove the reference to phasing.

26. On 4th June 2015, the Council's Forward Plans Manager made the delegated decision for the Council to accept and act upon the Examiner's report and that the dHNP (as modified by the Examiner's Report) should proceed to referendum.

27. A referendum took place on Thursday 16th July 2015. The result was in favour of the plan.

28. On 11th September 2015, the Council's Forward Plans Manager made the delegated decision, pursuant to section 38A(4) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), to "make" the HNP, as more than half of those voting in the referendum voted in favour of the plan.

Legal Framework

29. A Neighbourhood Development Plan ("NDP") is defined 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"*: section 38A(2) of the 2004 Act.

30. A NDP becomes part of the development plan for an area once made: section 38(3)(c) of the 2004 Act. By section 38(6), applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

31. The procedure for the making of NDPs is set out in sections 38A to 38C of the 2004 Act, Schedule 4B to the 1990 Act[1] and in the Neighbourhood Planning (General) Regulations 2012, as amended ("the NP Regulations"). In summary:

    (1) Parish councils or bodies designated as neighbourhood forums are defined as "qualifying bodies" and can initiate the making of a NDP: see section 38A(12) of the 2004 Act.

[1] Section 38A(3) of the 2004 Act provides that the references in Schedule 4B to the 1990 Act to *"Neighbourhood Development Orders"* are to be read as if they were references to *"Neighbourhood Development Plans"*.

(2) Before a Draft Neighbourhood Plan ("dNP") can be submitted to the LPA, a pre-submission version of the plan ("the psNP") must be publicised by the qualifying body for at least six weeks. The qualifying body must consult any of the consultation bodies whose interests it considers may be affected by the draft plan: see regulation 14 and regulation 21 of the NP Regulations.

(3) Once a valid dNP is submitted to the LPA, it must carry out a period of statutory consultation, by publicising the plan for a minimum of six weeks, inviting representations, and notifying any consultation body referred to in the consultation statement. The dNP must then be sent for independent examination: see regulations 16, 17, 23 and 24 of the NP Regulations.

(4) By paragraph 8(1) of Schedule 4B to the 1990 Act, the Examiner must consider whether the proposal meets the *"basic conditions"* as set out in paragraph 8(2). Paragraph 8(6) provides that the Examiner is not to consider any other matters, apart from considering whether the dNP is compatible with the Convention rights.

(5) Paragraph 10 then provides:

(1) The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).
(2) The report must recommend either—
(a) that the draft order is submitted to a referendum, or
(b) that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum, or
(c) that the proposal for the order is refused.

(6) Paragraph 12 provides for consideration by the authority of recommendations made by the examiner. By paragraph 12(4):

If the authority are satisfied—

(a) that the draft order meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention rights and complies with the provision made by or under sections 61E(2), 61J and 61L, or

(b) that the draft order would meet those conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner),

a referendum in accordance with paragraph 14, and (if applicable) an additional referendum in accordance with paragraph 15, must be held on the making by the authority of a neighbourhood development order.

(7) The LPA *"must make a neighbourhood development plan to which the proposal relates"* if more than half of those voting in the referendum have voted in favour of the plan: section 38A(4)(a) of the 2004 Act and section 61E(4) of the 1990 Act.

32. The decision of the LPA to "make" the NDP can be challenged by way of judicial review: see section 61N(1) of the 1990 Act, and R (on the application of Gladman Developments Limited) v Aylesbury Vale District Council v Winslow Town Council [2015] JPL 656.

Grounds of Challenge

33. There are three grounds of challenge:

(1) The Examiner erred in his interpretation of the basic conditions test in paragraph 8(4) of Schedule 4B of the 1990 Act.

(2) The decision to make the HNP is unlawful, as the SEA (i) fails to give adequate reasons for the selection of the preferred option for Policy HD5; (ii) unreasonably fails to consider two "reasonable alternatives" to Policy HD5.

(3) The site allocations made in the HNP proceeded on the basis of a material error of fact, which was subsequently uncorrected by the Examiner.

Ground One: Failure to correctly interpret the basic conditions

34. The Examiner, and subsequently the Council, erred in their interpretation of the basic condition test in paragraph 8(2) of Schedule 4B of the 1990 Act.

Legal Framework

35. By paragraph 8(1) of Schedule 4B of the 1990 Act, the Examiner must consider whether the *"basic conditions"* in paragraph 8(2) of schedule 4B are met.

36. By paragraph 8(2):

> *(2) A draft order 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 order,*
> *(b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,*
> *(c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,*
> *(d) the making of the order contributes to the achievement of sustainable development,*
> *(e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),*
> *(f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and*
> *(g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order.*
>
> [emphasis added]

Submissions

37. Under the heading "Basic Conditions", at page 6 of the ER, the Examiner states as follows:

> *"It is the role of the Independent Examiner to consider whether a neighbourhood plan meets the "basic conditions". These were set out in law following the Localism Act 2011. In order to meet the basic conditions, the Plan must:*
>
> - *Have regard to national policies and advice contained in guidance issued by the Secretary of State;*
> - *Contribute to the achievement of sustainable development;*
> - *Be in general conformity with the strategic policies of the development plan for the area;*
> - *Be compatible with European Union (EU) and European Convention on Human Rights (ECHR) obligations.*
>
> *I have examined the Neighbourhood Plan against all of the basic conditions above."*

38. At the bottom of page 6 of the ER, the Examiner states as follows: *"...the opening paragraph of Chapter 2 in the Neighbourhood Plan does provide a correct summary of the Basic*

Conditions". The opening paragraph of Chapter 2 to the dNP states: *"In order to meet the Basic Conditions, this Plan has to: have regard to national planning policies and advice..."*

39. Finally, in his "Summary", at page 23 of the ER, the Examiner states: *"Subject to these modifications, the Haddenham Neighbourhood Plan has regard to national policies and advice contained in guidance issued by the Secretary of State.... Taking the above into account, I find that the Haddenham Neighbourhood Plan meets the Basic Conditions."*

40. On all three occasions the Examiner has incorrectly stated the statutory test:

    (1) The test under paragraph 8(2)(a) is not whether the dNP has had *"regard to"* national policy and guidance. If it was, a dNP could meet the basic conditions if it simply had regard to national policy and guidance; even if it subsequently failed to apply it.

    (2) Rather, the test is whether the *Examiner* considers, having regard to national policies and guidance, it is *"appropriate"* for the dNP to be made.

    (3) This requires the Examiner to exercise his own planning judgment as to whether it would be appropriate for the plan to be made, having regard to matters such as the consistency of the dNP with national planning policy.

41. The Examiner has therefore judged the dHNP against the wrong statutory test.

42. This outcome of this erroneous approach can be seen throughout the ER.

43. The Examiner repeatedly concludes that policies in the dHNP meet the Basic Conditions simply because HPC, or the dHNP itself, has had *"regard to"* national policies instead of assessing whether, in light of those policies, it would be *"appropriate"* to for the dHNP to form part of the development plan.

44. By way of example only:

(1) On page 22, in relation to Policy HD3: Dollicott Housing Allocation: *"...I am satisfied that Policy HD3 has regard to national policy and meets the basic conditions."*

(2) On page 20, the Examiner considers Policy HD2: the Airfield Allocation. He notes that the allocation includes land of good quality agricultural value, and that paragraph 112 of the Framework states: *"where significant development of agricultural land is demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of higher quality."*

However, as part of his assessment of whether the allocation meets the Basic Conditions, the Examiner states: *"...I am mindful that a neighbourhood plan must only have regard to national policy – there is no requirement to implement national policy to the letter. Plan-makers have had regard to national policy – a clear assessment and consultation process has been carried out and background information has been provided, in a transparent manner, establishing why the Airfield allocation is considered to comprise sustainable development."*

45. It is impossible to know whether, applying the correct statutory test, the Examiner would have concluded that the dHNP complied with the Basic Conditions.

46. As such, the Examiner, and subsequently the Council, erred in concluding that the dHNP met the basic conditions test and could therefore lawfully be made.

Ground Two: Failure to comply with EU obligations

47. The decision to make the HNP is unlawful, as the SEA (i) fails to give adequate reasons for the selection of the preferred option for Policy HD5; (ii) unreasonably fails to consider two "reasonable alternatives" to Policy HD5.

Legal Framework

48. The Strategic Environmental Assessment Directive (Directive 2001/42/EC, on the assessment of the effects of certain plans and programmes on the environment), ("the SEA Directive") has been transposed into domestic law by the SEA Regulations.

49. As the HNP was considered likely to have significant environmental effects, HPC was required to carry out an environmental assessment in accordance with the SEA Regulations. Regulation 12 provides:

"Preparation of environmental report

(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.
(2) The report shall 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.
(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required ..."

50. The information referred to in Schedule 2 includes, in paragraph 8: *"An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information."*

51. The requirement to assess reasonable alternatives includes alternatives to the type of development proposed or the areas selected for development: see Save Historic Newmarket v Forest Heath District Council [2011] JPL 123.

52. The European Commission has provided guidance on Article 5(1) of the SEA Directive (the equivalent of reg. 12 of the SEA Regulations). This states that for an alternative to be reasonable, it must be realistic and fall within the legal and geographic competence of the authority. The Planning Practice Guidance ("PPG") describes reasonable alternatives as follows: "*Reasonable alternatives are the different realistic options considered while developing the policies in the draft plan. They must be sufficiently distinct to highlight the different environmental implications of each so that meaningful comparisons can be made. The alternatives must be realistic and deliverable."*

53. The identification of reasonable alternatives is a matter of evaluative assessment for the local planning authority, subject to review by the court on normal public law

principles. However, in order to make a lawful assessment, the authority must apply its mind to the question, and consider whether there are any other reasonable alternatives besides those selected: Ashdown Forest Economic Development v Wealden District Council [2015] EWCA Civ 681 at para. 42.

54. Further, outline reasons must be given for selecting (i) the preferred option over the other reasonable alternatives and (ii) the reasonable alternatives considered in the SEA process. The obligation is only to give the main reasons, so that consultees and other interested parties are aware of why reasonable alternatives and the preferred option were chosen: see R (on the application of Friends of the Earth) v Welsh Ministers [2015] EWHC 776 (Admin) at para. 89.

55. Possible alternatives which are *"obvious non-starters"* do not warrant even an outline reason for being disregarded: see Heard v Broadland District Council [2012] EWHC 344 (Admin) at 66.

56. Regulation 8(2) of the SEA Regulations prohibits a plan being adopted until reg. 12 has been complied with, and the decision maker has taken account of the environmental report for the plan.

Submissions

57. The SEA reveals two significant errors:

58. First, the SEA fails to give adequate reasons for the selection of the preferred option.

59. Two significant changes took place to Policy HD5 between the psHNP (which was subject to the dSEA) and the dHNP (subject to the SEA):

    (1) The quantum of development proposed increased from 50 dwellings to 85 dwellings.

    (2) The area of the allocation reduced from 7.1 ha to 2.8 ha.

60. In order to comply with the requirement to give outline reasons for the selection of the preferred option, the SEA was required to explain both these changes and, by reference to the evidence, explain why they were chosen.

61. However, there is no explanation at all in the SEA to explain why a reduced site area of 2.8 ha was eventually chosen as the preferred option. In particular, there is no explanation as to what changed between the psHNP and the dHNP to mean that an allocation on an area of 7.1ha was no longer acceptable; or why an allocation of 85 dwellings was considered to only be acceptable on a site of 2.8 ha, and not on a site of 7.1 ha.

62. Indeed, not only does the SEA not give any reasons for the change in the allocated area between the psHNP and the dHNP, it makes no reference to it at all.

63. Instead, the SEA simply explains why an allocation on the wider 22ha Site was not selected as the preferred option. As it puts it at paragraphs 7.25-7.26:

'The Glebe allocation (HD5, formerly HD6 in the Pre-Submission Plan) has increased from 50 to 85 dwellings in the Submission Plan. It is another site that is part of a larger site that is considered by the Parish Council to be unsuitable and unacceptable if developed as a whole. Such a proposal appears to be capable of delivering between 224 and 400 homes, which is of a scale that would be one means of delivering Option A to the Spatial Strategy of Policy 1. This scale of development in this location would have negative effects on the Conservation Area and on traffic and access that would not be capable of being mitigated with measures in a policy that could overcome these disadvantages.

However, in dividing the larger site into three and increasing the chosen site to 85 dwellings, the policy will have positive effects on housing without undermining the character of the village or the Conservation Area or creating traffic problems that cannot be effectively accommodated. This appears to be a reasonable compromise that will enable a viable, sustainable development scheme to come forward that will win the support of the local community at the referendum."

64. However, whilst this explains why the wider 22ha site was not selected, it does not explain why the allocation for Policy HD5 was reduced from 7.1 ha to 2.8 ha. Further, the reasoning set out above was also used to justify the psHNP policy of 50 dwellings on 7.1 ha (see para. 7.10 of the dSEA) and therefore cannot be relied upon to explain the reduction in the site allocation after the psHNP to 2.8 ha.

65. Further, the SEA fails to explain why a quantum of 85 dwellings was selected for Policy HD5, rather than any other figure up to 224, which was deemed to be unacceptable (see paragraph 7.25 of the SEA).

66. As such, the SEA fails to give adequate reasons for the selection of the preferred option for Policy HD5, and therefore fails to comply with the requirements of the SEA Regulations. The HNP cannot lawfully be made.

67. The Claimant has been substantially prejudiced by the lack of any reasons for the reduction in the allocated area. This is for three main reasons:

    (1) The summary assessment of the proposed policies in the dSEA (Table C at paragraph 7.7) and in the SEA (Table E at page 20) shows that the reduction in the allocated area from 7.1ha to 2.8ha has made no difference at all to the policy's performance against the SA objectives. In those circumstances, the need for written reasons for the change is particularly acute.

    (2) As set out above, the Claimant's Application relating to the Site is currently before the Secretary of State. There is a significant difference between a planning application for a site of which only 2.8 ha is allocated for development; as compared to a site of which 7.1 ha is allocated. The absence of any reasons for the reduction in the allocated area significantly prejudices the Claimant as regards the development of the Site.

    (3) The HNP was being developed at the same time as the Application was being promoted. The Application was strongly opposed by HPC. The Application was considered by the Council's Planning Committee the day after the dHNP was submitted to the Council (that in turn being just one week after the end of the pre-submission consultation). The absence of reasons for the reduction in the allocated area means that it is impossible for the Claimant to determine whether the policy shift between the psHNP and the dHNP was impermissibly and unlawfully influenced by the terms of the Application.

68. In those circumstances, the Claimant has not been able in practice to enjoy the rights conferred on it by the SEA Directive, and the breach has caused substantial prejudice. Neither permission nor relief should be refused on the basis that the error has made no difference to the overall decision: see Walton v Scottish Ministers [2012] UKSC 44, at para. 139 and section 31(3D) of the Senior Courts Act 1981.

69. Second, the SEA unreasonably fails to consider two clear "reasonable alternatives" to Policy HD5.

70. So far as policy HD5 is concerned, HPC's consideration of alternatives through the SEA process is as follows:

(1) The dSEA assesses pre-submission draft Policy HD6 (the precursor to Policy HD5). This is 50 dwellings on an allocated area of 7.1 ha.

(2) Further, *"for completeness"*, there is an assessment of the wider Site of 22 ha on the basis of an allocation for 650 dwellings.

(3) No other alternatives are considered. There is no explanation for why an allocation of 650 dwellings for the Site is considered to be the only reasonable alternative to draft Policy HD6.

(4) The SEA assesses policy HD5, i.e. 85 dwellings on 2.8 ha (Table E).

(5) It also assesses the same alternative to the policy as was considered in the dSEA (Table F), i.e. 650 units on the wider 22 ha Site. An alternative to Policy HD3's allocation of 25 dwellings at Dollicott is also considered (described as *"perhaps up to 100 dwellings – see para. 7.23"*).

(6) Finally, the SEA considers the alternative of making the proposed site allocation policies without the proposed mitigation measures and, unsurprisingly, finds that this would perform worse against the SA objectives: see Tables E and F.

(7) The SEA justifies its failure to consider any other sites for allocation in the following terms (see para. 7.14):

> *"Two proposed sites (HD3 and HD5) are part of wider sites promoted for development and have been assessed. No other sites were put forward for consideration during that process, as they were not considered suitable in policy (i.e. they would not conform with saved development plan policy or the National Planning Policy Framework) and/ or were not considered acceptable (i.e. their planning history and the community engagement activities indicated clear local objections that were not considered as genuinely reasonable alternatives as defined by the [SEA Regulations]."*

71. It will be clear from the foregoing that neither the dSEA nor the SEA considers whether an allocation of (i) the development proposed in the Application (i.e. 280 dwellings over 22 ha) or (ii) development of more than 50 dwellings on a site of 7.1 ha would amount to a reasonable alternative.

72. For a start, it is clear that, at the very least, both of these options are capable of being reasonable options (they are not, in the words of Ouseley J in Beard, *"obvious non-starters"*):

(1) The first option is currently before the Secretary of State having been called in following a recommendation for approval by the Council's Officers. A similar quantum of housing on the 22 ha Site was assessed by the Council in its SHLAA.

(2) The second is an amalgamation of two options, both of which were considered reasonable by HPC (i.e. 50 dwellings at 7.1 ha in the dSEA and 85 dwellings at 2.8 ha in the SEA) – putting the quantum of the latter policy on the site area of the former policy. Further, HPC's site assessment proforma for the 7.1 ha site states that it had a housing capacity of 213 dwellings, in line with the SHLAA assessment of 220 dwellings; i.e. considerably more than the 50 dwellings assessed by HPC.

73. Despite this, there is no evidence at all that HPC considered whether either of these options would be a "reasonable alternative" to Policy HD6. Instead, the only alternative considered was 650 dwellings on the wider 22 ha Site. Paragraph 7.14 of the SEA showed that HPC considered whether there were any other alternative sites

for development, but not whether there were any other reasonable variations of housing quantum or site area on sites that had already been assessed.

74. This failure to consider further reasonable alternatives to the selected policy is a clear breach of the SEA Regulations: see Ashdown Forest at para. 42.

75. Further, or alternatively, no reasons are given for not assessing these options as alternatives to Policy HD6. This is also a breach of the SEA Regulations: see Friends of the Earth at para. 89.

76. Alternatively, and without prejudice to the foregoing, if HPC did consider and give adequate reasons for concluding that these two options were not *"reasonable alternatives"*, its finding that they were not is *Wednesbury* unreasonable for the reasons set out at paragraph 70 above.

77. This failure to comply with the SEA Regulations is one of substance. The option selected may have been different had HPC assessed the alternatives identified above against the SA Objectives. Again, neither permission nor relief should be refused on the basis that the error has made no difference to the overall decision: see Walton at para. 139 and section 31(3D) of the Senior Courts Act 1981.

Ground Three: Material error of fact

78. The site allocations made in the HNP proceeded on the basis of a material error of fact, which was subsequently uncorrected by the Examiner.

Legal Framework

79. A material error of fact is an established ground of challenge to decisions made by Planning Inspectors: see Haringey LBC v Secretary of State for Communities and Local Government [2009] JPL 74, at paragraph 11. It is submitted that a plan which is made on the basis of a material error of fact is also capable of challenge.

80. The conditions necessary to establish that a decision is unlawful on the basis of an error of fact were set out by Carnwath L.J. (as he then was) in E v Secretary of State for the Home Department [2004] 2 WLR 1351:

First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

81. The same test applies to planning cases: Hiam v SSCLG [2014] EWHC 4112 (Admin) at para. 32.

Submissions

82. Underlying the HPC's allocation of sites were site-specific assessments which were carried out on 18 sites. The Site was assessed as one site (Site 009), and then divided into three individual sites which were individually assessed (Sites 009A, 009B, and 009C).

83. Each site received a score out of 45. On the basis of this score, the sites were ranked. The final site allocation was made by distributing dwellings to each site in order of ranking priority, in accordance with the maximum amount that each site in ranked order could sustainably accommodate, until the desired total of 430 dwellings was allocated.

84. The process is described in the dHNP at paragraph 6.3 as follows:

"The suitable sites were prioritised by their score and assessed against the sustainability criteria in the SEA/SA to determine how much housing could be accommodated on each site; on some sites this reduced the planned allocation from the "potential housing capacity" based on a residual norm of 30 houses per hectare. Judged against the assessed housing need, this determined the sites to be allocated in the Plan."

85. However, this process was affected by two significant material errors of fact:

86. Site 009A, which is the 7.1. ha site which was originally allocated in the psHNP, and out of which the 2.8 ha site which forms Policy HD5 was created, scored 36 within

its site assessment pro-forma (see page 17). However, in the Site Assessment Report (Annex C to the dHNP), the site is inaccurately recorded as scoring 34.

87. This is simply an error of transferring the correct score from the individual site assessment pro-forma to the overall site allocation-ranking table. It is an uncontentious error of fact. The Claimant can bear no responsibility at all for the mistake.

88. Further, the error was before the Inspector. In representations made during the statutory consultation period, dated 17th March 2015, Mr. Jon Diprose, pointed out the error in the site assessment calculations, and concluded

"Even as submitted, the completed site assessments do not support the site priority order listed in Table 1 of the Site Assessment Report [Ref 1d]; specifically HNP009A is listed with a score of 34 and hence a priority order of 6 whereas it actually scored 36 [Ref 4c] and so should have been given a priority order of 2. As a result, the site allocation policies in Chapter 6 allocate housing development to the wrong sites. As it would obviously be wrong to modify the completed site assessments to match the Plan, the site allocation policies will have to be re-written on the basis of the correct site priority order and the Plan will clearly have to be substantially changed. In my opinion the entire site allocation process is sufficiently flawed as to justify it being entirely re-run, this time with proper community involvement. Either way, I do not see how the Plan as it stands can possibly be considered to be put forward to the referendum phase, or even to public inquiry."

89. The Inspector failed to address this point. On page 9 of his report he stated as follows:

"It is possible for SEAs, not least for those concerning neighbourhood plans, to be undertaken in different ways. Where "scoring" is involved, there is clearly scope for different approaches to result in different scores. Some parts of the process can involve an element of subjectivity and differences of opinion can result."

90. However, this is no answer to this ground, or to the representations made by Mr. Diprose. The complaint here does not relate to the subjective planning judgments made by HPC in compiling the site assessments. Instead, the error is an objective error of calculation.

91. The mistake has played a material part in the allocation of the Site for only 85 dwellings in the dHNP. Had Site 009A received its correct score of 36 it would have been the second highest ranked site. Therefore in distributing the dwellings required

to reach 430 dwellings in total, Site 009A would have been allocated directly after the Airfield, and could have received the additional 45 dwellings that were instead distributed to Dollicott Small, Dollicott Large and Station Road (which were erroneously ranked as sequentially preferential to Site 009A).

92. Further, Site 003, which forms the basis of the Dollicott allocation under Policy HD3, is also incorrectly calculated. Under the "Transport" section of the site assessment pro-forma, on pages 11 and 12, the site scores 1, weighted to 3. However, the "Summary" on page 16 inaccurately gives Transport a score of 6. The score for the Dollicott site should therefore be 32, rather than 35.

93. Again, this is simply an error of transferring the correct score from the subject-specific assessment in the assessment pro-forma to the overall summary table. It is an uncontentious error of fact. The Claimant can bear no responsibility at all for the mistake.

94. Again, the mistake has played a material part in the allocation of the Site for only 85 dwellings in the dHNP. Had Dollicott been scored correctly, it would have been ranked eighth, below Site 009A. This would mean that Site 009A could have been allocated the additional 25 dwellings which were mistakenly allocated to the Dollicott site.

95. Neither mistake was corrected by the Examiner or the Council.

Conclusion

96. For the reasons set out above, the HNP is unlawful and the Council has erred in law in its decision to make the plan.

97. Accordingly, in the first instance, the Claimant respectfully requests that permission to claim judicial review be granted. Ultimately, the remedies which the Claimant seeks are:

(1) A quashing order of the decisions of the Council set out at paragraph 1 above;

(2) Costs; and

(3) Such further or other relief as the Court thinks fit.

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