Oundle Neighbourhood Plan

OPINION

1. This Opinion has been requested by John Parmiter FRICS FRSA MRTPI ('the Examiner') the independent examiner of the Oundle Neighbourhood Plan ('the ONP') following a hearing on 29 October 2019.

2. At that hearing a number of fundamental legal flaws were raised which render the ONP unlawful and contrary to the basic conditions, both of which would prevent the ONP from progressing. The Examiner requested that an Opinion be produced for the benefit of the Neighbourhood Plan Examination.

3. Nina Pindham is instructed by Persimmon, Piers Riley-Smith is instructed by Gladman. This Opinion, as part of the Neighbourhood Plan Examination library, is public.

4. This Opinion will set out why the Plan is unlawful and cannot progress any further. In summary this is for the following reasons:

    - The amendments made to the Plan after the Regulation 14 consultation process were material amendments which changed the nature of the Plan. This required the Town Council to carry out a further Regulation 14 consultation and consult statutory consultees.

    - By failing to do the Town Council circumvented the legal requirements as to consultation, and undermined the statutory purpose of the Consultation Statement. This was also contrary to the Planning Policy Guidance on Neighbourhood Plans.

- The SA procedure was legally flawed and the conclusions reached were not based on the evidence before the Town Council. In some cases the conclusions reached were directly contrary to objective evidence before the Town Council.

Introductory Matters

5. The factual background will be well known to the Examiner and we will not repeat matters which are set out in detail in our Regulation 16 Statements. However for ease of reference it is worth setting out the facts that are particularly relevant to this Opinion.

6. On 22 March 2018 Oundle Town Council ('the Town Council') published a Regulation 14 version of their Neighbourhood Plan ('the Reg 14 Draft Plan). The Reg 14 Draft Plan allocated a number of sites for development. These included Land East of St Christopher's Drive (a Persimmon site), and Land East of Cotterstock Road (a Gladman site).

7. In May 2019 the Town Council published their Sustainability Appraisal Report ('the SA') in support of the neighbourhood plan.

8. Under Section 9 'Next Steps' the Report set out that:

> *This SA Report will be consulted on with the public and the statutory consultees. A copy of the Neighbourhood Plan will be made available on the Town Council's website during the SA Report consultation.*
>
> *Following consultation, comments received will be reviewed and any necessary changes made to the Neighbourhood Plan and SA Report.*
>
> *The Oundle Neighbourhood Plan will then be submitted to East Northamptonshire District Council.*

9. We are instructed that this further consultation was not carried out. Instead in May 2019 the Town Council submitted their Reg 15 version of the Plan ('the ONP'). to East Northamptonshire District Council ('ENC').

10. A number of modifications had been made between the Reg 14 Draft Plan and the ONP:

- Deletion of Land East of Cotterstock Road as a housing allocation;
- Deletion of Land East of St Christopher's Drive as a housing allocation;
- Increase in capacity of Land South of Herne Road from 45 units to 120 units;
- Identification of important views on the policies map;
- Amendments to the settlement boundary.

Legal Principles

11. The process for bringing forward a Neighbourhood Plan is primarily set out in Schedule 4B of the Town and Country Planning Act 1990 ('the 1990 Act'), and Part 5 of the Neighbourhood Planning (General) Regulations 2012 ('the 2012 Regs').

i) Basic Conditions

12. Para 8 (2) of Schedule 4B of the 1990 Act sets out the basic conditions that a Plan must meet to progress to referendum:

> *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.

ii) Consultation Requirements

13. Para 4 of Schedule 4B of the 1990 Act sets out the principles for consultation that are then applied in Regulation 14 of the 2012 Regs. At para 4 (3) it sets out:

"The power to make regulations under this paragraph must be exercised to secure that:

(a) prescribed requirements as to consultation with and participation by the public must be complied with before a proposal for a neighbourhood development order may be submitted to a local planning authority, and

(b) a statement containing the following information in relation to that consultation and participation must accompany the proposal submitted to the authority—

i. details of those consulted,
ii. a summary of the main issues raised, and
iii. any other information of a prescribed description."

Emphasis Added

14. Regulation 14 of the 2012 Regs then sets out the pre-submission consultation and publicity requirements:

Before submitting a plan proposal [or a modification proposal]1 to the local planning authority, a qualifying body must—

(a) publicise, in a manner that is likely to bring it to the attention of people who live, work or carry on business in the neighbourhood area—

(i) details of the proposals for a neighbourhood development plan or modification proposal

> *(ii) details of where and when the proposals for a neighbourhood development plan or modification proposal may be inspected;*
>
> *(iii) details of how to make representations; [...]*
>
> *(iv) the date by which those representations must be received, being not less than 6 weeks from the date on which the draft proposal is first publicised; [and]*
>
> *(v) in relation to a modification proposal, a statement setting out whether or not the qualifying body consider that the modifications contained in the modification proposal are so significant or substantial as to change the nature of the neighbourhood development plan which the modification proposal would modify, giving reasons for why the qualifying body is of this opinion;*
>
> *(b) consult any consultation body referred to in paragraph 1 of Schedule 1 whose interests the qualifying body considers may be affected by the proposals for a neighbourhood development plan [or modification proposal]; and*
>
> *(c) send a copy of the proposals for a neighbourhood development plan [or modification proposal] to the local planning authority.*

15. The references to 'modification proposal' were introduced into Regulation 14 by the Neighbourhood Planning (General) and Development Management Procedure (Amendment) Regulations 2017. The reference relates to modifications made to a made Plan after referendum under Schedule A2 of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act'). That procedure has no relevance to amendments made prior to the making of a Plan, and no relevance to this Opinion.

16. Regulation 14 (b) makes reference to consultation bodies referred to in paragraph 1 of Schedule 1. This paragraph sets out all the relevant consultation bodies for a neighbourhood plan. The list includes – the Local Planning Authority, Natural England, the Environment Agency, English Heritage, the sewerage undertaker, the water undertaker, the strategic highway authority etc.

17. The Planning Policy Guidance for Neighbourhood Plans ('the PPG') gives advice at paragraph 49 as to the pre-submission consultation:

> **At what stage does the pre-submission consultation take place on a draft neighbourhood plan or Order?**

Before the formal pre-submission consultation takes place a qualifying body should be satisfied that it has a complete draft neighbourhood plan or Order. It is not appropriate to consult on individual policies for example. Where options have been considered as part of the neighbourhood planning process earlier engagement should be used to narrow and refine options. The document that is consulted on at the pre-submission stage should contain only the preferred approach.

Paragraph: 049 Reference ID: 41-049-20140306

Emphasis Added

18. Regulation 15 of the 2012 Regs sets out the documents that must accompany a submitted Plan. These include a basic condition statement, and also a consultation statement which is defined at Regulation 15(2) as:

In this regulation "consultation statement" means a document which—

(a) contains details of the persons and bodies who were consulted about the proposed neighbourhood development plan or neighbourhood development plan as proposed to be modified;

(b) explains how they were consulted;

(c) summarises the main issues and concerns raised by the persons consulted; and

(d) describes how these issues and concerns have been considered and, where relevant, addressed in the proposed neighbourhood development plan or neighbourhood development plan as proposed to be modified.

19. Regulation 16 of the 2012 Regs sets out the consultation process that must be carried out by the local authority after the plan proposal is submitted:

As soon as possible after receiving a plan proposal [or a modification proposal] which includes each of the documents referred to in regulation 15(1), a local planning authority must—

(a) publicise the following on their website and in such other manner as they consider is likely to bring the proposal to the attention of people who live, work or carry on business in the neighbourhood area—

(i) details of the plan proposal [or the modification proposal];

(ii) details of where and when the plan proposal or the modification proposal may be inspected;

(iii) details of how to make representations;

(iv) [in the case of a plan proposal,] a statement that any representations may include a request to be notified of the local planning authority's decision under regulation 19 in relation to the neighbourhood development plan; and

(v) the date by which those representations must be received, being not less than 6 weeks from the date on which the plan proposal or the modification proposal is first publicised; and

(b) notify any consultation body which is referred to in the consultation statement submitted in accordance with regulation 15, that the plan proposal or the modification proposal has been received.

iii) SEA Directive: General Principles

20. For the ONP to be found in conformity with basic condition (f), it is incumbent on the relevant bodies to ensure that the ONP is able to meet the legal requirements for SEA as set out in the SEA Directive.

21. The purpose of the Directive is to provide a high level of environmental protection by incorporating environmental considerations into the process of preparing plans and programmes. The SEA Directive is transposed into UK law through the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations").

22. Neighbourhood plans are land use plans whose existence is provided for by legislation and which set the framework for the future development consent of projects. Therefore they fall within regulation 5(4) of the SEA Regulations. Where it is considered that a neighbourhood plan is likely to have a significant impact on the environment, as here, it is required to undergo SEA (or SA incorporating SEA as is the case here).

23. Article 4(1) of the Directive requires that the SEA and the opinions expressed by the relevant authorities and the public, (as well as the results of any transboundary consultation where relevant), are taken into account during the preparation of the plan and before its adoption or submission to the relevant legislative procedure. Here, in

addition to the requirement to satisfy the basic conditions, the trigger point to ensure that the SEA Directive has been complied with would be the submission to ENC for a referendum to be held on the ONP. Of course, if the neighbourhood plan satisfied basic condition (f) it would also be in compliance with the SEA Directive so in reality there is only one point at which compliance with the SEA Directive needs to be considered (the basic conditions stage).

iv) Consultation on SEA

24. Article 6(2) provides that consultees "*shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan… and the accompanying Sustainability Appraisal*". Accordingly, it is clear that consultation is not a matter that can simply be addressed through a tick-box exercise, it must be a genuine opportunity for responses from consultees to influence both the plan and the SA through the plan-making process.

25. Article 6 is reflected in reg. 13 of the SEA Regulations. This provides (so far as relevant):

> *"13.— Consultation procedures*
>
> *(1) Every draft plan or programme for which an environmental report has been prepared in accordance with regulation 12 and its accompanying environmental report ("the relevant documents") shall be made available for the purposes of consultation in accordance with the following provisions of this regulation.*
>
> *(2) As soon as reasonably practicable after the preparation of the relevant documents, the responsible authority shall–*
>
> *(a) send a copy of those documents to each consultation body;*
>
> *(b) take such steps as it considers appropriate to bring the preparation of the relevant documents to the attention of the persons who, in the authority's opinion, are affected or likely to be affected by, or have an interest in the decisions involved in the assessment and adoption of the plan or programme concerned, required under the Environmental Assessment of Plans and Programmes Directive ("the public consultees");*

(c) inform the public consultees of the address (which may include a website) at which a copy of the relevant documents may be viewed, or from which a copy may be obtained; and

(d) invite the consultation bodies and the public consultees to express their opinion on the relevant documents, specifying the address to which, and the period within which, opinions must be sent.

(3) The period referred to in paragraph (2)(d) must be of such length as will ensure that the consultation bodies and the public consultees are given an effective opportunity to express their opinion on the relevant documents."

v) "Reasonable Alternatives"

26. There is a requirement to assess reasonable alternatives by reg. 12(2) of the SEA Regulations, which provides:

"(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."

27. This requirement has been subject to a significant amount of litigation. The relevant principles were summarised by Hickinbottom J (as he then was) in R (RLT Built Environment Ltd) v Cornwall Council [2016] EWHC 2817 (Admin) at paragraph 40:

"In R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers [2015] EWHC 776 (Admin) at [88], after considering the relevant authorities (including Heard v Broadland District Council [2012] EWHC 344 (Admin), and Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2014] EWHC 406 (Admin)), I set out a number of propositions with regard to 'reasonable alternatives' in this context. That case concerned the law in Wales, but it is derived from the same SEA Directive and the regulations that apply in Wales are substantially the same as the SEA Regulations. The propositions, so far as relevant to this case, are as follows:

'(i) The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. The EIA Directive [i.e. Council Directive 85/337/EC] ensures that any particular project is subjected to an appropriate environmental assessment. The SEA Directive ensures that potentially environmentally-

preferable options that will or may attain those policy objectives are not discarded as a result of earlier strategic decisions in respect of plans of which the development forms part. It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.

(ii) The focus of the SEA process is therefore upon a particular plan – i.e. the authority's preferred plan – although that may have various options within it. A plan will be 'preferred' because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive, the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. The choice of objectives, and the weight to be given to each, are essentially a matter for the authority subject to (a) a particular factor being afforded particular enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.

(iii) In addition to the preferred plan, 'reasonable alternatives' have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.

(iv) 'Reasonable alternatives' does not include all possible alternatives: the use of the word "reasonable" clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.

(v) Article 5(1) refers to 'reasonable alternatives taking into account the objectives... of the plan or programme...' (emphasis added). 'Reasonableness' in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an 'alternative' to the preferred plan, is not a 'reasonable alternative'. An option which will, or sensibly may, achieve the objectives is a 'reasonable alternative'. The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no 'reasonable alternatives' to it.

(vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process.'"

28. As further noted by the Court of Appeal in Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government [2015] EWCA Civ 681:

> *"In Heard v Broadland District Council…at paragraphs 66-71, Ouseley J held that where a preferred option – in that case, a preferred option for the location of development – emerges in the course of the plan-making process, the reasons for selecting it must be given. He held that the failure to give reasons for the selection of the preferred option was in reality a failure to give reasons why no other alternative sites were selected for assessment or comparable assessment at the relevant stage, and that this represented a breach of the SEA Directive on its express terms. He also held that although there is a case for the examination of the preferred option in greater detail, the aim of the Directive is more obviously met by, and it is best interpreted as requiring, an equal examination of the alternatives which it is reasonable to select for examination alongside whatever may be the preferred option."* *(paragraph 10, emphasis added)*

29. Ashdown Forest also establishes that "*where the authority judges there to be reasonable alternatives it is necessary for it to carry out an evaluation of their likely significant effects on the environment, in accordance with regulation 12(2) and paragraph 8 of Schedule 2… In order to make a lawful assessment… the authority does at least have to apply its mind to the question*." (paragraphs 37 and 42, emphasis added).

30. Finally, Ouseley J stated at paragraph 66 in Heard v Broadland that only an "*obvious non-starter"* is exempt from the requirement to be assessed as a reasonable alternative.

vi) PPG on SEA

31. The PPG makes clear that in order to demonstrate that a draft neighbourhood plan contributes to sustainable development, it should be supported by sufficient and proportionate evidence which shows how the neighbourhood plan guides development to sustainable solutions. Whilst there is no legal requirement for a neighbourhood plan to have a sustainability appraisal prior to it being found likely to have significant effects on the environment, preparing a SA incorporating the

requirements of a SEA is useful to help demonstrate that the plan is capable of delivering sustainable development, a neighbourhood plan basic condition. The PPG also makes clear that the material produced as part of the SA of the Local Plan may also be relevant to the neighbourhood plan (Paragraph: 072 Reference ID: 41-072-20140306). Where it is relevant, it is a material consideration that must be taken into account.

32. The PPG provides that where it is determined that a neighbourhood plan is likely to have significant effects on the environment and that a SEA is required, work should start at the earliest opportunity to ensure that the assessment process inform the choices being made in the plan:

> *"Where it is determined that a neighbourhood plan is likely to have significant effects on the environment and that a strategic environmental assessment must be carried out, work on this should start at the earliest opportunity." (Paragraph: 029 Reference ID: 11-029-20150209)*

33. The PPG also provides:

> *"Reasonable alternatives should be identified and considered at an early stage in the plan making process as the assessment of these should inform the preferred approach.*
>
> *This stage should also involve considering ways of mitigating any adverse effects, maximising beneficial effects and ways of monitoring likely significant effects"(Paragraph: 037 Reference ID: 11-037-20150209)*

34. As noted in RLT at paragraph 32:

> *"The SEA Directive seeks to address that issue by requiring SEA to be an integral part of plans and programmes, so that potentially environmentally-preferable alternatives are not discarded as part of the process of approving plans and programmes without proper consideration of the environmental impacts of the various options."*

35. The SEA should identify any likely significant adverse effects and the measures envisaged to prevent, reduce and as fully as possible offset them. Reasonable alternatives must be considered and assessed in the same level of detail as the

preferred approach intended to be taken forward in the neighbourhood plan. (PPG Paragraph: 038 Reference ID: 11-038-20150209)

36. It is therefore clear from the above that the SEA process must be evidence-based, it must inform and influence the plan at the earliest possible stage, consultation responses must be effective to help shape the options considered, the SA must demonstrate 'proper consideration' of the environmental implications of the various options, and reasonable alternatives are to be considered in the same manner of detail as the preferred approach.

vii) Requirement to Found Plan on Objective Evidence

37. The decision in R (Stonegate) v Horsham DC [2016] EWHC 2512 (Admin) is on all fours with the facts here. Stonegate concerned a claim under section 61N of the 1990 Act to challenge the decision to make the Henfield Neighbourhood Plan. The challenge was successful and Patterson J quashed the Council's decision to make the plan because of a failure to correctly carry out a proper SA. In Stonegate there was no evidence to support the view expressed for the rejection of one option over the preferred option beyond assertions by local residents. As Patterson J put it in paragraph 74:

> *"The problem here is that the absolute nature of the rejection of option C is unsupported by anything other than guesswork. At the very least, having received the Barratt decision letter the plan-making authority, the parish council could have contacted the highways authority to obtain their views on the capacity of the broader local highways network in the western part of Henfield. There is no evidence that that was done. There is no evidence that anything was done when the highways objections to residential development on the Sandgate Nursery site was withdrawn either. Until it is, the outcome of significant development on the western side of Henfield on the local road network is unknown. What is known is that the permitted site and the appealed site together do not provide any insuperable highways objections. Without further highways evidence though, the reason for rejecting option C as set out in paragraph 4.19 of the HNP is flawed, based as it is upon an inadequate, if that, evidence base. The requirement, under the Directive, that the alternatives are to be assessed in a comparable manner and on an accurate basis was simply not met."*

38. Which led to the conclusion at paragraph 76:

> *…….The obligation under the SEA Directive is to ensure that the consideration of reasonable alternatives is based upon an accurate picture of what reasonable alternatives are. That was not done here. Not only was the conclusion wrong but, in the circumstances, it was irrational, given the absence of an evidence base. Her flawed report then tainted the decision on the part of the defendant.*
>
> Emphasis Added

Opinion

i) Do the modifications to the ONP require it to go through further Reg 14 consultation?

39. It is important to first understand the amendments that were made to the Reg 14 Draft Plan. These seem to be described in the Consultation Statement as 'relatively minor'. However in our view these amendments are significant and material amendments which changed the nature of the Plan.

40. By removing two sites, increasing the dwelling yield at Land South of Herne Road from "up to 45 dwellings" to "up to 120 dwellings" and making associated changes to the proposed settlement boundary, the amendments changed the spatial strategy of the Plan. This is illustrated by the SA which at Section 6 sets out the various spatial strategy options which were considered.

41. The Reg 14 Draft Plan's spatial strategy was Option 1. The ONP spatial strategy was Option 3. This can only be described as a material amendment to the Plan, and clearly is one that has changed the nature of the Plan because there has been a radical shift in spatial strategy on the Town Council's own evidence.

42. The pre-submission consultation stage of a neighbourhood Plan is not a token exercise. It is a statutory requirement as made clear by the express language of para 4 (c) of Schedule 4B of the 1990 Act:

> *"The power to make regulations under this paragraph must be exercised to secure that:*

a) *prescribed requirements as to consultation with and participation by the public must be complied with before a proposal for a neighbourhood development order may be submitted to a local planning authority, and*

Emphasis Added

43. The relevant regulation for this requirement is Regulation 14 in the 2012 Regs.

44. The Regulation 14 consultation process is a formal statutory requirement which **must** be carried out **before** a plan is submitted to the local planning authority.

45. The purpose of the Regulation 14 consultation process is twofold.

46. The first purpose (per Reg 14 (a)) is to inform the public to give them details of the proposed plan and allow them to make representations.

47. The second purpose (per Reg 14 (b)) is to consult any of the statutory consultation bodies that '*may be affected by the proposals'* and give them the opportunity to raise concerns or issues that arise in light of their individual statutory duties.

48. It is important to understand this dual purpose because it highlights why a qualifying body cannot rely on future stage in the neighbourhood plan process to legitimate not returning to Regulation 14 stage after making amendments.

49. Any consultation that occurs under Regulation 16 is different than that under Regulation 14 (and is carried out by a different body).

50. While the requirement to consult the public is similar (as seen from the similarity in wording between Regulation 14 (a) and Regulation 16 (a)) the requirements as to consultation bodies is not.

51. A comparison of the wording between Regulation 14 (b) and Regulation 16 (b) shows there is a clear difference:

Reg 14 (b):

consult any consultation body referred to in paragraph 1 of Schedule 1 whose interests the qualifying body considers may be affected by the proposals for a neighbourhood development plan

Reg 16 (b)

notify any consultation body which is referred to in the consultation statement submitted in accordance with regulation 15, that the plan proposal has been received.

52. The only formal consultation of the consultation bodies that are listed in para 1 of Schedule 1 of the 2012 Regs is during the Regulation 14 pre-submission consultation.

53. Once the Plan is submitted to the local authority then the only further step under Regulation 16 is that consultation bodies are notified that a Plan has been received. This is not consultation.

54. If a plan is altered between Regulation 14 and Regulation 16 then there is no requirement to re-consult consultation bodies. Instead the burden is on each individual body to spot that the Plan has been substantially altered and provide further representations on the new Plan.

55. There is a high risk that most would instead assume on notification under Reg 16 (b) that the Plan remained the same and either not provide a further response or a generic holding response.

56. Furthermore the requirements under Reg 16 are only to notify those consultation bodies listed in the consultation statement (based on the previous Reg 14 consultation). Therefore if an amendment were made that meant the Plan would now affect a **further** consultation body (previously un-consulted) they will **not** be consulted or even notified.

57. This is not how the neighbourhood plan process is meant to operate and highlights the unlawfulness of the Town Council's approach.

58. By making major material amendments to the Reg 14 Draft Plan post-consultation the Town Council have both undermined the purpose of consulting the public (as those that were consulted previously would fairly assume the Plan they provided a response on would be the same), and entirely circumvented the requirement to consult statutory consultation bodies. They have submitted an un-consulted upon neighbourhood plan for examination. This is unlawful.

59. This point is reinforced by the PPG which clearly sets out at paragraph 49 that:

> *"…The document that is consulted on at the pre-submission stage should contain only the preferred approach."*

60. By changing the spatial strategy in the Final Plan it is clear that the document consulted upon at pre-submission stage was not the preferred approach. The Reg 14 consultation was therefore contrary to the PPG and thus also fails basic condition (a).

61. The failure to carry out a further Reg 14 consultation is compounded by the knock-on effects this has for other legal requirements in the neighbourhood plan process such as the Consultation Statement.

62. It is a requirement under para 4(3)(b) of Schedule 4B of the 1990 Act, and Regulation 15 (1)(b) of the 2012 Regs to produce a Consultation Statement.

63. This consultation statement must set out who has been consulted, how they have been consulted, and the issues that have been raised. It is a fundamental part of the neighbourhood plan process and allows for an Examiner to be aware of any issues with a draft Plan which might need further exploration.

64. The consultation statement that was submitted with the Final Plan however entirely relates to responses and issues raised with the Reg 14 Draft Plan. It is entirely silent on any issues that might arise out of the ONP which is entirely different in nature (and has not been consulted upon). By failing to carry out a further Reg 14 consultation the Town Council have entirely undermined the statutory purpose of the Consultation Statement, and rendered it mostly if not entirely irrelevant.

65. It is unclear why a further Regulation 14 consultation was not carried out by the Town Council. It seems that those preparing the SA for the Town Council were under the impression that a further consultation would be carried out as set out in Section 9 of the SA under 'Next Steps':

> *This SA Report will be consulted on with the public and the statutory consultees. A copy of the Neighbourhood Plan will be made available on the Town Council's website during the SA Report consultation.*
>
> *Following consultation, comments received will be reviewed and any necessary changes made to the Neighbourhood Plan and SA Report.*
>
> *The Oundle Neighbourhood Plan will then be submitted to East Northamptonshire District Council.*

66. This highlights the issues that arose out of the SA being produced after the Regulation 14 consultation when it should have been produced before or with the Reg 14 Plan. The SA assumes that the Plan would go through further Reg 14 consultation. So even on Town Council's own supporting documentation a further Reg 14 Consultation should have happened but did not.

67. The Town Council by failing to return to the Reg 14 stage for further consultation after carrying out significant and material amendments that changed the nature of the Plan acted unlawfully. They circumvented the requirement to consult statutory consultees and undermined the public consultation that was carried out. Furthermore this was both contrary to the PPG and undermined the statutory purpose of a consultation statement under Regulation 15.

68. For all these reasons the Town Council have failed to carry out the required consultation on the ONP, and if it were to proceed to Referendum it would be unlawful.

ii) Issue with the SA

69. In this instance, neither the final revisions to the SA or the present version of the Plan have been consulted on. Nor does the SA, and the Plan upon which it is

ostensibly based, reflect the evidence before the Town Council: the conclusions reached in some cases are directly contrary to the evidence before the Town Council. This makes the Plan highly amenable to legal challenge on the basis of the Stonegate decision, as well as contrary to basic conditions (a), (d) and (f).

70. In relation to the St Christopher's Drive site -as demonstrated through chapter 5 of RPS' representations – the Plan does not take account of evidence prepared by ENC over the course of its emerging Local Plan (contrary to the PPG's Neighbourhood Planning Chapter paragraph 009, which confirms such evidence is a material consideration, and paragraph 040 which confirms "*robust evidence should support the choices made and the approach taken*"). The conclusions in the SA, and the justification of the referred approach, are also directly contrary to evidence that was and is before OTC on: highways (the highways authority has confirmed access is not an issue), noise (see Spectrum report), flooding (there will be a requirement to provide greenfield run-off rates plus significant climate change mitigation), and biodiversity (ENC's ecologist confirmed the site is "of quite low ecological value"). In the case of noise, the St Christopher's Drive site was marked "significant negative" yet the non-technical summary of the SA says there was a lack of noise evidence. Most significantly, the SA fails to take account of the SA evidence prepared by ENC for its emerging Local Plan which, following a robust, methodical and criteria-based process, selected the St Christopher's Drive site as the best performing site in all of Oundle (at page 24 Table 4, included as Appendix 13 to RPS' submissions).

71. In relation to the Cotterstock Road site -as demonstrated through section 6.2 of Gladman's representations – the ONP reasoning for the de-allocation of the Site is unevidenced and irrational. The impact on highways is relied upon but in the SA at Table 11 on page 29 the site scores a minor positive for transport. While at para 6.5 of the SA the reason given for de-allocation is that the site is already allocated in the RNOTP which is wrong. The need for robust evidence is reinforced in light of the evidence of the ENC whose own evidenced SA for their emerging Part 2 Local Plan at Table 4 finds that the Cotterstock Road site is one of the three best performing sites, and thus allocates it. The Cotterstock Road site has been viewed as acceptable in the past (RNOTP), present (Reg 14 Draft Plan), and future (emerging Part 2 Local

Plan). De-allocation of this Site was, on the Town Council's own admission at 6.5 of SA, based solely on the level of public feedback received at the Reg 14 Stage. This is per Stonegate an unlawful approach.

72. The Plan, and the preferred approach, have also been made contrary to the correct procedure as set out in national planning policy. Specifically, this is the failure to carry out the sequential and exception test, even though two of the allocated housing sites include land within Flood Zone 3, and there are other available sites that are entirely within Flood Zone 1 (such as the previously allocated St Christopher's Drive and Cotterstock Road sites).

73. The above renders the Plan contrary to the basic conditions for two reasons. There is, firstly, a failure to comply with reg. 13(2) of the SEA Regulations. It is imperative that a consultation is carried out when material changes are made that affect the sustainability of the plan, as here. Those who are affected by such changes must be given an opportunity to comment (reg. 13(2)(b)). The consultation responses are to be taken into account and must be capable of influencing the SA and the preferred strategy that is ultimately selected. This is a fundamental requirement of the SEA regime. It has not been achieved in this instance. A failure to demonstrate that this requirement has been satisfied would result in any subsequent plan being unlawful.

74. Secondly, the Town Council have failed to apply a consistent methodology in respect of the Reg. 14 Draft Plan and final versions of the ONP. Where changes have been made to the Reg 14 Draft Plan, those changes were not based on the available evidence and were not made following the correct procedure, taking into account all material considerations. Moreover, the chosen Spatial Strategy, Option 3, is contrary to the SA, which demonstrates that Option 4 scored better.

75. There is also very large question mark over the propriety of allocations as sites were selected based on land being transferred into the ownership of the Town Council (see Table NTS5 and Table 14 of the SA). The SA authors sought to downplay this at the Examination hearing, but the title of the relevant column is clear: the land transfers were reasons for selecting these sites. Even in the alternative, if the basis for the selection of sites is not land being put into public ownership (contrary to what the

Table clearly says) there is no quantifiable evidence in the SA that a new cricket pitch / allotments / cemetery extension land / festival field are in fact required.

76. Accordingly, it would be impermissible in the circumstances to carry on with the "retrofit" process, it is clear that the SA and the ONP are, at present, not fit from purpose. These concerns were raised not only by Persimmon, Gladman, and other developers, but also by ENC and statutory consultees (see comments of the Environment Agency, August 2019).

Conclusion

77. The Plan is currently unlawful and cannot proceed to referendum.

78. A number of significant amendments were carried out to the Plan after the Regulation 14 consultation stage. These amendments included, but were not limited to, changing the spatial strategy that underpinned the Plan. However no further Regulation 14 consultation was carried out.

79. The Regulation 14 consultation process is an express statutory requirement that has a dual purpose for both consulting the public and also statutory consultation bodies. It must be carried out prior to a Plan being submitted to a local authority.

80. Because of the significant changes made between the Reg 14 Draft Plan and ONP this required statutory consultation has not occurred. The consultation of the public has been downplayed, the required consultation of statutory bodies circumvented, and the statutory Consultation Statement undermined. If the Final Plan were to go to referendum it would be unlawful.

81. Furthermore, the Plan is contrary to the SEA Directive as it has failed to comply with reg. 13(2), it fails to meet the requirements as set out in the PPG and case law on SEA (the reasons are inadequate and not evidence-based), it fails to follow correct procedure as set out in the NPPF (the sequential and exception tests must be carried

out). Accordingly the Plan fails to demonstrate that it will achieve the delivery of sustainable development and is contrary to the basic conditions.

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8 November 2019