- 2020 -

IN THE MATTER OF THE EXAMINER'S REPORT INTO THE SUBMISSION DRAFT OF THE TYSOE NEIGHBOURHOOD PLAN

TYSOE PARISH COUNCIL

OPINION

Timothy Jones

Tysoe Parish Council,
C/o Cllr David Roache,
Vice Chairman,
Tysoe Parish Council.

OPINION

1. This Opinion relates to Tysoe Neighbourhood Plan (TNP) produced by Tysoe Parish Council (TPC) for the area of its parish. This rural parish is in Stratford-on-Avon district to the east of Shipston-on-Stour. It contains two small settlements: the larger Middle/Upper Tysoe and the smaller Lower Tysoe. The 2011 census records that the parish has a population of 1,143 living in 511 houses.

2. TNP is at the regulation 16 stage. Consultation it ended on 28th June 2019. On 24th October 2019 TPC received comments on it from the local planning authority, Stratford on Avon District Council (SDC). The reason that SDC gave for this delay of almost four months was a lack of resources.

3. During this period, in July 2019, SDC issued their Regulation 19 Site Allocations Plan (SAP). TPC had understood that this would be put to SDC's Cabinet, following examination, in summer 2020. However it has recently become clear that it will not be submitted for examination this month as originally proposed and that there will be a considerable delay.[1] It is normal to give very limited weight to a plan at this stage. The SAP proposes five reserve sites in the parish. Of these, one coincides with one of TNP's reserve sites and one coincides with one of TNP's allocated sites.

4. On 23rd January 2020 TPC received a fact-check version of the examiner's report ("the Report"). This recommends a number of modifications to TNP and stated that (subject to these modifications) it was compliant with basic conditions and ready to go to referendum.

5. The Report includes the following.

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[1] I do not know whether the statement in paragraph 5.6 of the Report *"SDC anticipates that the Site Allocations Plan will be submitted for examination and adopted in 2020"* remains correct, but adoption in 2020 now sounds optimistic.

5.6 SDC is in the process of preparing its Site Allocations Plan. Its primary purpose will be to provide further detail to that already included in the adopted Core Strategy and to identify potential reserve housing sites and mechanisms for their release. Policies SAP1 and SAP2 respectively propose a series of reserve sites throughout the District and mechanisms for their release. Five reserve sites are identified… Policy SAP6 also proposes built up area boundaries (BUABs)…

5.7 …The recommended modifications… seek to ensure that the relationship between the policies in the adopted development plan, the emerging neighbourhood plan and the emerging Site Allocations Plan is properly configured.

6.10 As submitted the Plan does not fully accord with this range of practical issues. The majority of my recommended modifications in Section 7 relate to matters of clarity and precision. They are designed to ensure that the Plan fully accords with national policy.

7.20 I have considered this part of the Plan very carefully. I looked at the Lower Tysoe BUAB in detail when I visited the neighbourhood area. I also walked between the two proposed BUABs through the proposed Strategic Gap (Natural Environment Policy 6). Having considered all the evidence available to me, including the Parish Council's response to the clarification note, I have concluded that the proposed BUAB for Lower Tysoe does not meet the basic conditions. Three principal factors have affected this judgement. I address them in the following paragraphs of this report.

7.21 The first is the conformity or otherwise of this approach to the development plan. Plainly it is at odds with the emerging Site Allocations Plan. It is also at odds with previous local plan work which was replaced with the Core Strategy. In the round the submitted Plan has sought to produce its own evidence and demonstrate local preferences.

7.43 The second reason for the recommended deletion of the [reserved sites] policy is that the proposed two sites are different from the wider package proposed in the emerging Site Allocations Plan. Plainly the two Plans are separate processes and will be assessed on their own merits. In this context whilst the Parish Council has attempted to find appropriate sites, in my judgement the evidence and justification is not sufficient for their retention, particularly with reference to the lack of release mechanism. This conclusion overlaps with Planning Practice Guidance (PPG). Paragraph ID:41-009-20190509 comments that there should be relationship between the adopted development plan, an emerging neighbourhood plan (here the submitted Plan) and an emerging local plan (here the Site Allocations Plan) where two plans are being prepared at the same time. In particular it comments that 'the local planning authority should work with the qualifying body so that complementary neighbourhood and local plan policies are produced. It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging local plan, including housing supply policies.' I am not satisfied that the submitted Plan has achieved this outcome. It has an ability to generate a lack of clarity within the Plan period and to create precisely the type of situation which PPG seeks to avoid.

7.91 On the second point the majority of the land within the proposed gap is in agricultural use and consists of large open fields. There is no direct evidence that they are any significant risk of incremental development which would gradually reduce the effectiveness of the existing separation between the two settlements and result in coalescence…

7.92 This conclusion is reinforced by four other related factors. The first is that the proposed Strategic Gap is partly within the Cotswold AONB. As such there are already strong national policy restrictions that would prevent the type of built development that the Parish Council is seeking to achieve by designating a specific strategic gap… The third is that in several cases the boundaries of the strategic gap are difficult to determine, or in some case vary on a seasonal basis.

The Law

6. An examiner's power to recommend modifications is limited by the Town and Country Planning Act 1990 ("TCPA") in the following terms:

The only modifications that may be recommended are -

(a) modifications that the examiner considers need to be made to secure that the draft [NP][2] meets the basic conditions mentioned in paragraph 8(2),

(b) modifications that the examiner considers need to be made to secure that the draft [NP] is compatible with the Convention rights,

(c) modifications that the examiner considers need to be made to secure that the draft [NP] complies with the provision made by or under sections 61E(2), 61J and 61L,

(d) modifications specifying a period under section 61L(2)(b) or (5), and

(e) modifications for the purpose of correcting errors.[3]

7. The word *"only"* prevents examiners recommending any other modifications. They can only recommend changes if one of the above applies. In assessing this, one must not take an excessively restrictive view of the power to recommend modifications, but must bear in mind Lindblom LJ's judgment in respect of the related LPA power to make modifications in Kebbell Developments Ltd *v.* Leeds City Council.[4]

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[2] 'NP' means Neighbourhood Plan.

[3] TCPA Schedule 4B, paragraph 10(3). The provisions in (a), (c) and (d) are in the TCPA.

[4] [2018] EWCA Civ 450, 14th March 2018, paragraphs 34 and 35 – this relates to the similar TCPA Schedule 4B paragraph 12(6), which I consider below.

8. The in word 'need' in clause (a) limits the power to modify. It is not enough that in some broad sense examiners thinks that a modification would be desirable or that they would have written the NP differently. The purpose of clause (a) is to ensure compliance with basis conditions. To do this those basic conditions must be correctly understood. The word 'need' also means that the extent of any clause (a) modification should be limited to what is needed. That arises both for the literal meaning of 'need' and from a purposive approach to the Localism Act 2011's intention to advance localism. If a less extensive modification would secure that the draft NP meets the basic conditions, then (unless there is sufficient reason to do otherwise) that lesser modification should be recommended.

9. Basic condition (a) is, *"having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order".* As Supperstone J explained in BDW Trading Ltd (t/a Barratt Homes) v Cheshire West & Chester BC[5], unlike a Local Plan which needs to be *"consistent with national policy"*, an examiner need only have regard to national policies and advice when deciding whether it is appropriate to make the neighbourhood plan.[6] This is consistent with the desire to advance localism that led to the Localism Act's creation of NPs.

10. In R (Crownhall Estates Ltd) *v* Chichester District Council, Holgate J. said: [7]

> *Paragraph 8(2)(a) confers a discretion to determine whether or not it is appropriate that the neighbourhood plan should proceed to be made "having regard" to national policy The more limited requirement of the basic condition in paragraph 8(2)(a) that it be "appropriate to make the plan" "having regard to national policies and advice" issued by SSCLG, is not to be confused with the more investigative scrutiny required by PCPA 2004 to determine whether a local plan meets the statutory test of "soundness".*

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5 [2014] EWHC 1470 (Admin).

6 Paragraph 84.

7 [2016] EWHC 73 (Admin), paragraph 29(iii).

11. Basis condition (e) is, *"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)"*.

12. The adjective 'general' allows a degree of flexibility and requires the exercise of planning judgement. This condition only applies to strategic policies – it does not have a conformity requirement in respect of non-strategic policies in the development plan or in respect of other local authority documents that do not form part of the development plan (such as *"local plan work"*). The 'development plan' in basic condition (e) (as throughout planning law,) means the adopted development plan only. As Supperstone J said in BDW Trading (t/a Barratt Homes) *v* Cheshire West and Chester Borough Council: [8]

> *... the only statutory requirement imposed by Condition (e) is that the neighbourhood plan as a whole should be in conformity with the plan as a whole. Whether or not there was any tension between one policy in the Neighbourhood Plan and one element of the emerging Local Plan was not a matter for the Examiner to determine.*

13. Supperstone J. also held that it was not the Examiner's role to determine soundness of an NP.[9]

14. In Hoare *v* Vale of White Horse[10] Lang J held that an NP should be in accordance with the strategic policies of the development plan as a whole, but this is not a matter entirely of planning judgment, the meaning of 'general conformity' being a matter for the court. It was not necessary for all site allocation policies to be specifically in accordance with the strategic policies of the development plan. Rather, what was required was that the NP itself be in accordance with the strategic policies as a whole.

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8 [2014] EWHC 1470, paragraph 82, quoted without criticism by Lewis in *R.* (Gladman Developments Ltd) *v* Aylesbury Vale DC [2014] EWHC 4323 (Admin).

9 Paragraph 85.

10 [2017] EWHC 1711 (Admin), [2017] JPL 1406.

15. It follows that the development plan does not include an emerging plan such as *'the emerging Site Allocations Plan'*. This is recognised by Planning Practice Guidance ("PPG") subject to an important qualification:

> *A draft neighbourhood plan… must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. Although a draft neighbourhood plan… is not tested against the policies in an emerging local plan the reasoning and evidence informing the local plan process is likely to be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested.*[11]

16. Later the same paragraph of PPG gives advice to local planning authorities, stating:

> *The local planning authority should work with the qualifying body so that complementary neighbourhood and local plan policies are produced. It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging local plan, including housing supply policies. This is because section 38(5) of the Planning and Compulsory Purchase Act 2004*[12] *requires that the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.*

17. This advice does not alter the law as contained in TCPA and explained by senior judges. It does not justify an absolutist approach to compliance with district council policy and documents related to that policy, an approach that Parliament could have adopted, but did not, and which would detract with the localism that NPs are intended to achieve. I have no doubt that Parliament's not adopting the local-plan approach was deliberate.

Advice

18. Central to my concern about the Report is the way in which is seeks fully accords with national policy and conformity with the emerging plan and with *"previous local plan work which was replaced with the Core Strategy"*. This is a significantly more demanding approach that that provided by Parliament in the basic conditions and one that reduces the element of localism to a significantly greater extent than those

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11 Reference ID: 41-009-20190509.

12 See below.

basic conditions would. In making modifications that *"are designed to ensure that the Plan fully accords with national policy"*, the Report applies the stricter local-plan approach rather than the less demanding NP approach, something that Parliament in drafting the basic conditions did not intend. This was adopting the soundness approach rejected by Supperstone J in BDW Trading. As such it was an error of law.

19. SDC is correctly taking a less absolute approach than the Report, proposing in its response to its paragraph 7.21 the addition of the words, *"However, NDPs are capable of taking a different approach within the broad scope of a higher tier plan and in the round"*.

20. The PPG advice quoted above does not justify the Report's approach to seeking full compliance with emerging district policy and SDC documents. It is primarily directed at LPAs. To the extent that it applies to qualifying bodies, it points to good sense of avoiding excessive conflict with emerging policy. Nothing in it requires compliance with emerging policy, which may of course be altered before it becomes adopted policy.

21. TPC main concerns relate to three recommended modifications. Each is an important part of the TNP and in each case the modification is substantial.

(1) The recommendation[13] to delete the proposed BUAB around the settlement of Lower Tysoe.

(2) The recommendation[14] to delete policy Housing Policy 3 which proposes two reserve sites, outside the proposed BUAB around Middle and Upper Tysoe.

(3) The recommendation[15] that TNP should define the boundary of the proposed Strategic Gap between Lower and Middle Tysoe although the Report agrees that a policy to protect the land within the Strategic Gap is acceptable.

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13 Paragraphs 7.20 to 7.24 and 7.26 of the Report.

14 Paragraphs 7.41 to 7.44 of the Report.

15 Paragraphs 7.89 to 7.95 of the Report.

The Lower Tysoe BUAB

22. SDC suggested an alternative less extensive BUAB for Lower Tysoe. This splits the proposed BUAB into two components, avoiding the inclusion of a parcel of undeveloped land that SDC and the examiner were concerned about. TPC made it clear that it would accept this if the examiner believed it to be an improvement. SDC's and TPC's position were in the public domain and no issue of natural justice (in particular the principle of *audi alteram partem* "hear the other side") would a have arisen from adopting SDC's alternative. The Report does not give reason for rejecting this more limited modification. The requirement in TCPA that a report should *"give reasons for each of its recommendations"*[16] implicitly, in accordance with general principles of planning law, requires that reasons should be sufficient. The omission of a consideration whether the modest means of achieving compliance with basic conditions suggested by the LPA would suffice meant that the reasons given were not sufficient.

23. In its reasons for rejecting the Lower Tysoe BUAB, the Report says, *"In the round the submitted Plan has sought to produce its own evidence and demonstrate local preferences."* That is not a reason for rejecting a policy; rather it is what NPs should do, subject only to compliance with basic conditions. It is an important part of the localism that the Localism Act 2011 sought to achieve.

24. The point is reinforced by the fact that Kineton adopted a similar approach for Lower Kineton in its NP. This was accepted by both its examiner and by SDC, something that TPC mentioned both in responses to representations made by residents and others and in its responses to comments from SDC. While each area is different, the raising of this point makes clearer the need to give sufficient reasons.

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16 TCPA Schedule 4B, paragraph 10(6)(a).

25. It follows that there was a breach of the statutory requirement. In determining which modifications to put forward SDC should therefore either explain why its own proposal would not suffice, or limit the modification to that proposal.

The Strategic Reserve

26. NPs may include reserve sites.[17] The strategic reserve included Herberts Farm, which largely correspond with a reserve site that SDC had included in its SAP. It is surprising to see a recommended deletion of this reserve site. If SDC considers that the reserve site that it is itself putting forward is appropriate it may limit the modification so as to retain this site.

27. The Kineton NP had a release mechanism for reserve sites. Regarding the strategic reserve recommendation, TPC considers that the Examiner's main objection could be overcome by the inclusion in the Plan of a release mechanism similar to one included in a nearby NP, that for Kineton, which has been made and hence must have been acceptable to its examiner. While this might be possible, any such mechanism would have to have been subject to consultation and the examiner cannot be faulted for not prolonging the examination to permit such further consultation.

Strategic Gap

28. Designations that can also be in local plans are often contained in NPs and there is no objection in principle to this. There is no reason why a NP should not contain a strategic gap between settlements and no reason why an examiner should not recommend modifying an NP to reduce the extent of that gap.[18]

29. I found the Report's explanation for rejecting this surprising. A boundary does not have to be recognisable on a site visit. It has to make reasonable planning sense. I

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17 As was recommended in the report into the Goring NP Report.

18 As happened with, *e.g.*, the report into the Cheddar NP.

have used the word 'reasonable' because many boundaries, which when looked at in fine detail can be said to be arbitrary, have been accepted. Regarding the third recommendation, TPC considers that the Strategic Gap could be defined in words, but does recognise that this would be rather convoluted. I do not see how defining it in words is significantly different from defining it on a map, other than carrying a greater risk of a lack of clarity. Rather it would be better to define the strategic gap (if SDC considers this appropriate after first reducing its extent) on a map.

30. With regard to paragraph 7.91, the Report can only be criticised for its reference to lack of evidence if this evidence was before the examiner. Whether that was or was not the case, SDC will know of the planning history of the land concerned. This includes the three unsuccessful planning applications for the paddock immediately north of the proposed BUAB around Middle Tysoe and the appeals in respect of two of these and the identification of this land as a reserve site in the SAP. SDC will also be aware of the access provision to the site immediately north of the school and west of Church Farm Court. SDC must act on the facts it knows, whether or not the Examiner ought to have known them.

31. I find the second and third sentences of the Report's paragraph 7.92 surprising. An AONB designation performs a different function to a gap policy. Many gaps are in or partly in AONBs. The comment on the boundary being difficult to determine emphases the need for map. It is neither here nor there that the examiner found it difficult to determine visually on his site visit. The statement that the boundaries of the strategic gap *"in some case vary on a seasonal basis"* is wrong in law. A public footpath follows its defined route. That does not change because a famer informally alters it for some agricultural reason.

A secondary matter

32. Paragraph 7.32 of the Report says, *"The Orchards site in Lower Tysoe now has planning permission. On this basis I recommend that it is deleted from the policy. I also*

recommend consequential modification to how the site is shown on Map 8." This is not one of the grounds for recommending a modification specified by statute and hence is outwith the examiner's powers. Even on the fairly broad approach to 'error' in Kebbell, inclusion of the Orchards site is not an error: it would still be relevant, if, rather than implement the current planning permission, an application were made for a new permission.

Wilbur Developments Limited

33. I had substantially written the above before the judgment of Lang J. in R (Wilbur Developments Limited) *v* Hart District Council,[19] which reinforces my opinion. This contained a gap policy (HK6) in the following terms: *"Development in the Hook to Newnham Gap, as identified on Fig 8.13.1, will only be permitted where it does not lead to the physical or visual coalescence of these villages, or damage their separate identity, either individually or cumulatively with other existing or proposed developments."* Lang J's judgment includes the following:

> *76 The heart of the Claimant's challenge to the decision in respect of Policy HK6 was that it was inconsistent with the eLP,*[20] *and the findings of the eLP Inspector upon examination.*
>
> *79… basic condition (e)… sets out the requirement for a neighbourhood plan to be "in general conformity with the strategic policies contained in the development plan for the area of the authority". In my view, it is neither necessary nor desirable for the Court to develop an additional common law test of consistency between neighbourhood plans and local plans.*
>
> *80. In my judgment, the principle… that decision-making should be consistent was not applicable to the Defendant's decision in August 2019 since the Inspector examining the eLP had not yet reached a final or formal decision on its terms… There are obvious risks in extending the principle of consistency in decision-making to situations where a clear decision has not yet been made, as illustrated in this case where there is a dispute between the parties over precisely what has or has not been decided by the eLP Inspector, and any provisional decision he may have made may subsequently be changed in his final Report.*

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19 [2020] EWHC 227 (Admin), 11th February 2020.

20 Emerging Local Plan.

83. The statutory scheme does not require that the neighbourhood plan should be in general conformity with the policies in an emerging local plan. As the Examiner correctly stated at paragraph 117:

> *"117 Whilst I note that a representation has been made in respect of the fact that the emerging Local Plan might not include a gap between these two settlements, the emerging Local Plan is precisely that. It is not an adopted document and its precise final content is, as yet, unknown. The Neighbourhood Plan is not examined against emerging planning policy."*

84. However, the Examiner and the Defendant had proper regard to the emerging local plan. Paragraphs 50 and 51 of the Report stated:

> *"50 The emerging Hart Local Plan (2016-2032) is at an advanced stage and is likely to be adopted in the near future. Whilst the basic conditions require neighbourhood plans to be in general conformity with the adopted strategic policies of the development plan, Planning Guidance advises [Planning Policy Guidance, Paragraph: 009 Reference ID: 41-009-20160211.] that the reasoning and evidence informing the Local Plan process is likely to be relevant to the consideration of the basic conditions against which the Plan is tested.*
>
> *51 I note that the Hook Neighbourhood Plan has emerged alongside the emerging Local Plan and that it has taken full account of the reasoning and evidence supporting this emerging District-wide document."*

88. As to the evidence relied upon in support of a gaps policy, the Defendant's view was that the concerns raised by the eLP Inspector were that the boundaries of the proposed gap designations were not adequately defined and justified in the evidence, not that a gaps policy was not justified. The Defendant did not consider that the Hart Landscape Capacity Study 2016 was flawed or inadequate. However, the Study did not purport to identify the boundaries of gaps. Therefore the villagers of Hook, with the assistance of advice from planners, supplemented the evidence base for the policy by undertaking the practical planning work of identifying the boundaries for the HNP, by site visits and by reference to boundaries on the ground… and using their local knowledge…. The Examiner's Report recorded… that the precise boundary of the gap… had emerged through the plan-making process.

Delay

34. While understanding TPC's concern about SDC's delay, this does not give rise to any substantive issue. NP consultation it ended on 28th June 2019. The SAP was issued in July. Most of the four months' delay was after this. If SDC had dealt with the TNP by early August it could not have been fairly criticised.

SDC's consideration of the Report

35. Once it receives the final version of the Report, SDC must consider each of the recommendations made and decide what action to take. It must then publish its decision, with reasons. In deciding what modifications it should make to TNP, its powers are limited by TCPA in a similar way to the powers of examiners as follows:

> *The only modifications that the authority may make are -*
>
> *(a) modifications that the authority consider need to be made to secure that the draft [NP] meets the basic conditions mentioned in paragraph 8(2),*
>
> *(b) modifications that the authority consider need to be made to secure that the draft [NP] is compatible with the Convention rights,*
>
> *(c) modifications that the authority consider need to be made to secure that the draft [NP] complies with the provision made by or under sections 61E(2), 61J and 61L,*
>
> *(d) modifications specifying a period under section 61L(2)(b) or (5), and*
>
> *(e) modifications for the purpose of correcting errors.*[21]

36. The Court of Appeal considered this in R. (Kebbell Developments Ltd) *v* Leeds City Council.[22] Lindblom LJ held:

> *The power in paragraph 12(6)(a) allows the authority a broad discretion in considering whether a particular modification is necessary for the purposes of satisfying the 'basic conditions' in paragraph 8(2): whether the modification '[needs] to be made to secure that the draft order meets the basic conditions'. The question of whether such a modification is necessary, and, if so, what form it should take, requires the exercise of planning judgment. And so does the ultimate question of the 'basic conditions' being met or not, regardless of whether it has been necessary to make modifications to the plan to ensure that they are. To the extent that these are matters of planning judgment, they are for the local planning authority to resolve, subject to review by the court in accordance with the principles of public law. But the broad ambit of a legitimate planning judgment on the question inherent in paragraph 12(6)(a) suggests a generous view of the local planning authority's statutory power, and that the court should be cautious before accepting an argument that the power has been exceeded.* [23]

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21 TCPA Schedule 4B, paragraph 12(6). The provisions in (a), (c) and (d) are in the TCPA.

22 [2018] EWCA Civ 450, [2018] 1 WLR 4625.

23 Paragraph 34.

37. In the following paragraph he said:

> *A realistic view must also be taken of the power in paragraph 12(6)(e) to make modifications "for the purpose of correcting errors". This power is not, I think, confined to the correction of typographical mistakes and other minor infelicities. It embraces amendments necessary to achieve accuracy and consistency in the wording of policies and their supporting text. The local planning authority has a wide discretion in judging what errors need correcting, and how. And again, therefore, the court should not be quick to hold that an authority has gone further than the statutory power permits.*

38. The Court of Appeal went on to consider paragraph 13. This provision, said Lindblom LJ at paragraph 50:

> *is concerned with giving participants in a neighbourhood plan process who qualify as 'prescribed persons' a fair opportunity to address 'new evidence' or 'a new fact' that has emerged after the examination, or a 'different view' taken by the local planning authority 'as to a particular fact' from that expressed by the examiner in his report—when the local planning authority proposes to make a different decision from that recommended by him. It does not generate for participants in the process a general entitlement to consultation after the examination has taken place. Nor was it enacted to give parties a second opportunity to advance a case already heard and considered by the examiner, simply because the local planning authority is minded to depart from a recommendation he has made.*

The relation of the SAP and the Plan

39. The Planning and Compulsory Purchase Act 2004 s38(5) states:

> *If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.*

40. In other words the later document prevails to the extent, if any, that it is inconsistent with the earlier one.

Conclusions

41. Whether TNP as modified by the recommendations other than the three identified above would comply with the basic conditions is not the critical point. Rather SDC must apply the law as to modifications stated above.

42. The report does not give sufficient reasons to justify the extensive modifications that it proposes. If necessary, the TNP should be modified to the least extent necessary to achieve compliance with basic conditions. To some extent this is a matter of planning judgment for SDC, rather than a matter of law. To the extent that it is a matter of law, I have dealt with it above.

Discussions between the examiner and SDC

43. In an email of 21st January 2020 TPC's Cllr David Roache, the examiner said:

> *As an update I have been seeking technical advice from the District Council on the relationship between the proposed approach towards the allocation and the eventual release of reserve housing sites in the submitted Plan and in the emerging Site Allocations Plan. In particular the situation is complicated as there is a common site proposed in both Plans. In addition the Parish Council's response to the clarification note on the eventual release of reserve sites was that it should be 'similar' to that in the Site Allocations Plan.*
>
> *I am satisfied that I now have all the information needed to finalise the fact check report. The provision of technical information and advice was provided in good faith by the District Council. It did not seek to influence my recommended modifications. My approach towards recommended modifications in the fact check report remains unchanged after this technical process. It reflects my professional and independent assessment of the relationship between the submitted Plan and the basic conditions. Plainly this is the natural outcome of the examination process.*

44. I have considerable concerns about the practice of some examiners of having discussions with local planning authorities about substantive matters that are not open to others. Examinations should be open, normally through all substantive comments being on a website, and participants should be able to comment on information provided by others. That applies to "technical" information as well as to arguments. Other parties may not agree with the technical information. However in this case the new information did not make any difference, so it does not give rise to a breach of natural justice.

The way forward

45. It would not be appropriate to have a meeting with the examiner. Whatever happens between the examiner and a participant on a substantive issue should be open to all concerned. A meeting with SDC might well assist.

46. SDC will consider the final version of the report including what modifications to make. The extent to which it modifies the plan is limited as explained above. It should apply the law as explained above and, within that legal framework, its own planning judgment. If errs in law, its decision may be challenged by an application for judicial review. An application for judicial review must be made promptly and, in any event, within six weeks of the decision being challenged.

47. The consultation process followed by SDC to progress its SAP is a wholly separate matter on which I have insufficient information to advise.

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