Neutral Citation Number: [2020] EWHC 227 (Admin)

Case No: CO/3994/20019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 February 2020

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
WILBUR DEVELOPMENTS LIMITED	
- and -	
HART DISTRICT COUNCIL	**Defendant**
HOOK PARISH COUNCIL	**Interested Party**

- -
- -

Victoria Hutton (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Timothy Leader (instructed by **Shared Legal Services**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing date: 21 January 2020

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the Defendant's decision, published on 28 August 2019, to accept the report of the Examiner into the Hook Neighbourhood Plan ("the HNP") under paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990 ("TCPA 1990"), and to proceed to a referendum. The claim is brought pursuant to section 61N(2) TCPA 1990.

2. Hook is a large village in the Hart district of Hampshire, and the Defendant is the local planning authority. The HNP was prepared by Hook Parish Council (the Interested Party), and submitted to the Defendant, pursuant to the provisions of Schedule 4B TCPA 1990. The Examiner recommended that the HNP should be modified, and then put to a referendum. The Defendant accepted the Examiner's recommendations. The referendum took place in October 2019 and the neighbourhood voted in favour of the HNP. However, the Defendant has undertaken not to make the HNP until this claim has been determined.

3. The Claimant is a venture which has been created for the sole purpose of promoting development at a site, known as Owen's Farm, between the settlements of Newnham and Hook, and it has entered into a legal agreement with the owners of Owen's Farm for that purpose. Planning permission has been refused, and Owen's Farm has not been allocated for development in the emerging local plan ("eLP"). The proposed terms of the HNP are likely to affect development at Owen's Farm in future, which has led to this challenge.

4. Permission to proceed with Grounds 1 and 2 of the claim was granted by Lieven J. on the papers on 14 November 2019. Lieven J. refused permission on Ground 3. The Claimant renewed its application for permission in relation to Ground 3, and the application was heard together with the substantive claim.

Statutory and policy framework

(1) Legislation

5. A "neighbourhood development plan" is 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 Planning and Compulsory Purchase Act 2004 ("the PCPA 2004").

6. A "neighbourhood development plan" is part of the statutory development plan for the area it covers: section 38(3)(c) PCPA 2004.

7. The provisions of Schedule 4B TCPA 1990, which make provision for the making of neighbourhood development orders, apply also to the making of neighbourhood development plans: sections 38A(3) and 38C(5) PCPA 2004.

8. A qualifying body may initiate a process for the purpose of requiring a local planning authority to make a neighbourhood development plan: section 38A(1) PCPA 2004. A qualifying body is defined in section 38A(12) PCPA 2004 and includes a parish council.

9. The draft neighbourhood development plan, once prepared, must be consulted upon (regulation 14 of the Neighbourhood Planning (General) Regulations 2012 ("the 2012 Regulations")) and submitted to the local planning authority, with *inter alia* a consultation statement (regulation 15 of the 2012 Regulations).

10. The draft neighbourhood development plan must be publicised by the local planning authority, giving persons an opportunity to make representations upon it (regulation 16 of the 2012 Regulations).

11. Paragraph 7 of Schedule 4B TCPA 1990 requires a local planning authority to submit a draft neighbourhood development plan, after it has been publicised, to independent examination if the requirements of paragraph 6(2) of Schedule 4B are met. This is provided for in regulation 17 of the 2012 Regulations.

12. The Examiner must then consider whether the draft neighbourhood development plan meets the specified statutory requirements, in particular, whether it meets the "basic conditions": Schedule 4B, paragraph 8(1)(a).

13. Paragraph 8(2) provides, so far as is material:

> "(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,
>
> … … …
>
> (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."

14. An Examiner must produce a report. Paragraph 10 of Schedule 4B makes further provision for the duties of the independent Examiner as follows, so far as is material:

> "(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.
>
> (3) The only modifications that may be recommended are –
>
> (a) modifications that the Examiner considers need to be made to secure that the draft order meets the basic conditions in paragraph 8(2),
>
> (b) modifications that the authority need to be made to secure that the draft order is compatible with Convention rights,
>
> (c) modifications that the authority consider need to be made to secure that the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,"
>
> …
>
> (e) modifications for the purpose of correcting errors.
>
> (4) The report may not recommend that an order (with or without modifications) is submitted to a referendum if the Examiner considers that the order does not –
>
> (a) meet the basic conditions mentioned in paragraph 8(2), or
>
> …
>
> (6) The report must -
>
> (a) give reasons for each of its recommendations, and
>
> (b) contain a summary of its main findings."

15. After receiving an Examiner's report, the local planning authority must consider each of the recommendations made and decide what action to take. It must then publish its decision, with reasons, in the manner prescribed by regulation 18 of the 2012 Regulations.

16. Paragraph 12 of Schedule 4B provides, so far as is material:

> "(1) This paragraph applies if an Examiner has made a report under paragraph 10.
>
> (2) The local planning authority must –

(a) consider each of the recommendations made by the report (and the reasons for them), and

(b) decide what action to take in response to each recommendation.

(3) ..…

(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.

(5) ….

(6) The only modifications that the authority may make are-

(a) modifications that the authority consider need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),

(b) modifications that the authority need to be made to secure that the draft order is compatible with Convention rights,

(c) modifications that the authority consider need to be made to secure that the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,"

……

(e) modifications for the purpose of correcting errors.

(7) – (10) …..

(11) The authority must publish in such manner as may be prescribed –

(a) the decisions they make under this paragraph,

> (b) their reasons for making those decisions, and
>
> (c) such other matters relating to those decisions as may be prescribed."

17. If more than half of those voting in the referendum vote in favour of it, the local planning authority must make the neighbourhood plan unless to do so would breach "any EU obligation or any of the Convention rights": s. 38A(4) and (6), PCPA 2004.

18. Section 61N TCPA 1990 makes provision for legal challenges to neighbourhood development plans by way of judicial review. This challenge is made pursuant to subsection (2): proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by Examiner etc.).

(2) National policy and guidance

19. The National Planning Policy Framework ("the Framework") sets out policy in respect of neighbourhood plans. By the date of the Defendant's decision to approve the recommendations in the Examiner's report, the February 2019 edition (which amended the July 2018 edition) had come into force.

20. The Framework provides:

> "**Strategic policies**
>
> 20. Strategic policies should set out an overall strategy for the pattern, scale and quality of development, and make sufficient provision for:
>
> a) housing (including affordable housing), employment, retail, leisure and other commercial development;
>
> b) infrastructure for transport, telecommunications, security, waste management, water supply, wastewater, flood risk and coastal change management, and the provision of minerals and energy (including heat);
>
> c) community facilities (such as health, education and cultural infrastructure); and
>
> d) conservation and enhancement of the natural, built and historic environment, including landscapes and green infrastructure, and planning measures to address climate change mitigation and adaptation.
>
> 21. Plans should make explicit which policies are strategic policies. These should be limited to those necessary to address the strategic priorities of the area (and any relevant cross-boundary issues), to provide a clear starting point for any non-strategic policies that are needed. Strategic policies should not

> extend to detailed matters that are more appropriately dealt with through neighbourhood plans or other non-strategic policies.
>
> …
>
> **Non-strategic policies**
>
> 28. Non-strategic policies should be used by local planning authorities and communities to set out more detailed policies for specific areas, neighbourhoods or types of development. This can include allocating sites, the provision of infrastructure and community facilities at a local level, establishing design principles, conserving and enhancing the natural and historic environment and setting out other development management policies.
>
> 29. Neighbourhood planning gives communities the power to develop a shared vision for their area. Neighbourhood plans can shape, direct and help to deliver sustainable development, by influencing local planning decisions as part of the statutory development plan. Neighbourhood plans should not promote less development than set out in the strategic policies for the area, or undermine those strategic policies [FN 16: Neighbourhood plans must be in general conformity with the strategic policies contained in any development plan that covers their area.]."

21. The Claimant relied in particular upon paragraph 31 of the Framework which provided, in respect of all types of plans:

> "Preparing and reviewing plans
>
> 31. The preparation and review of all policies should be underpinned by relevant and up-to-date evidence. This should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned, and take into account relevant market signals."

22. The Planning Practice Guidance ("PPG") gives guidance on neighbourhood plans.

23. Paragraph 009 provides, so far as is material:

> **009**: "**Can a neighbourhood plan come forward before an up-to-date Local Plan is in place?**
>
> Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its local plan …..

> A draft neighbourhood plan or Order 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 or Order 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. For example, up-to-date housing needs evidence is relevant to the question of whether a housing supply policy in a neighbourhood plan or Order contributes to the achievement of sustainable development.
>
> Where a neighbourhood plan is brought forward before an up-to-date Local Plan is in place the qualifying body and the local planning authority should discuss and aim to agree the relationship between policies in:
>
> - the emerging neighbourhood plan
> - the emerging Local Plan
> - the adopted development plan
>
> with appropriate regard to national policy and guidance.
>
> The local planning authority should take a proactive and positive approach, working collaboratively with a qualifying body particularly sharing evidence and seeking to resolve any issues to ensure the draft neighbourhood plan has the greatest chance of success at independent examination.
>
> The local planning authority should work with the qualifying body to produce complementary neighbourhood and Local Plans. 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 requires that the conflict must be resolved by the decision maker favouring the policy which is contained in the last document to become part of the development plan.
>
> …."

24. Paragraph 074 provides:

> **074:** "**General conformity with the strategic policies contained in the development plan**
>
> **What is meant by 'general conformity'?**

> When considering whether a policy is in general conformity a qualifying body, independent Examiner, or local planning authority, should consider the following:
>
> - whether the neighbourhood plan policy or development proposal supports and upholds the general principle that the strategic policy is concerned with
>
> - the degree, if any, of conflict between the draft neighbourhood plan policy or development proposal and the strategic policy
>
> - whether the draft neighbourhood plan policy or development proposal provides an additional level of detail and/or a distinct local approach to that set out in the strategic policy without undermining that policy
>
> - the rationale for the approach taken in the draft neighbourhood plan or Order and the evidence to justify that approach."

Facts

Hook Neighbourhood Plan

25. The HNP is the draft neighbourhood plan, for the period 2018 – 2032, for Hook Parish. The administrative area of Hook Parish was designated as the Neighbourhood Plan Area by the Defendant on 2 October 2014.

26. The HNP was prepared by Hook Parish Council (which is a qualifying body).

27. The HNP was subject to a strategic environmental appraisal dated November 2018.

28. The HNP was consulted upon in April/May 2019 pursuant to regulation 14 of the 2012 Regulations.

29. Policy HK6 of the consultation draft stated:

> "**HK6 Hook to Newnham Gap**
>
> 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."

30. The supporting text explained the policy as follows:

> "**Maintaining the gap between Hook and Newnham**

8.12 The countryside around Hook plays an important role in defining its character but to the west the village is relatively close to Newnham. 'Gaps' are planning policies used to prevent the physical and visual coalescence of settlements and maintain their separate identity. They also provide green open space which supports wildlife, provides corridors between urban areas and may contain public rights of way.

8.13 To support the designation of a gap in the narrow area of open land between Hook and Newnham the evidence within the Hart Landscape Capacity Study 2016 has been used. This includes an assessment of the visual sensitivity of the landscape and consideration of the way people see it. It is based upon an assessment of:

- General visibility which considers the level of visibility ... in an area based on the nature of the landform and vegetation cover alongside key views and the contribution the area makes to the visual setting of an area. Areas containing wider panoramas across an area of countryside will be more sensitive.

- Population which considers the number of people likely to perceive change in the landscape. The purpose of people being within an area is also considered, as the nature of the activity will have a bearing on how visually sensitive the landscape is (e.g. residential and recreational pursuits, such as walking, are considered to be more sensitive than transient views of people travelling through ….)

- Mitigation potential which considers the likelihood of a change being mitigated, without the mitigation measures themselves having an adverse effect (e.g. planting trees to screen a development in a large scale, open landscape could have as great an impact as the development itself).

8.14 The Hook to Newnham Gap falls within local character area H0-01 land west and north of Hook as identified in the Hart LCA Study 2016. It is described as very scenic with picturesque qualities. There are panoramic views including views to the wider countryside. It is used by many people for walking/dog walking and there is limited opportunity for mitigation of development. The visual sensitivity of the area is recorded as being high. The gap covered by Policy HK6 and defined on Fig. 8.13.1, has been defined by a combination of site visits to identify the areas most important to preventing physical and visual coalescence and the use of identifiable boundaries on the ground to make it easy to implement…..

…..”

31. Policy HK7 of the consultation draft stated:

> “**HK7: Views**
>
> Development must not adversely impact on the views described below:
>
> From the Hook settlement boundary towards the north-east and east across the valley of the River Whitewater and its setting must be protected as part of the overall strategy to protect the environment and amenity of the Whitewater Valley.
>
> From the Hook settlement boundary to the west across the Gap towards Newnham must be protected as part of the overall strategy to protect the environment and amenity of this area of open countryside and prevent coalescence between the settlements of Hook and Newnham.
>
> From the east side of Newnham towards the west side of the Hook settlement must be protected as part of the enjoyment of the public right of way as a countryside amenity within the Gap between these two settlements.”

32. The supporting text explained the policy as follows:

> “**Important views**
>
> 8.17 There are some particularly important views both into and out of the village of Hook and these are indicated on Figure 8.16.1. They were originally identified in the Hart Urban Characterisation and Density Study (2010) and are amplified below.
>
> 8.18 …
>
> 8.19 On the west side of the settlement the landscape is irregular in pattern and comprises woodland and open fields with hedgerow boundaries which provides enjoyable views towards Newnham … There is a well-used public right of way (PRoW) across the gap between Newnham and Hook and the view can be appreciated from footpaths running along the edge of Hook. As you leave Newnham along the PRoW the boundary of Hook quickly comes into view … and there are well-established trees and hedges which provide a much valued and pleasing view of the west side of hook adding to the enjoyment of this leisure route.”

33. In a letter dated 20 November 2018, the Claimant’s planning consultants, RPS, made representations in response to the regulation 14 consultation, objecting to Policies HK6 and HK7.

34. In respect of Policy HK6, they said:

> "Hook to Newnham Gap
>
> This policy seeks to restrict development on land situated between Hook and the village of Newnham, which is illustrated as part of Figure 8.13.1. The purpose for this policy is to avoid physical coalescence between the two settlements, and follows a format which is expressed as part of the Policy NBE2 of the emerging Hart Local Plan. The policy also suggests that if a new settlement is progressed around Murrell Green/Phoenix Gren/Winchfield, there will be a need to revisit this policy, to ensure that a sufficient gap to the east of Hook is provided for. Herein lies RPS' concerns with this policy. This is a strategic matte [sic] and one which is inherently bound to the future of the emerging Local Plan.
>
> RPS queries why it is necessary to duplicate a strategic plan policy in any event, though the broader concern relates to the potential for change in the Local Plan and how this may effect Policy HK[6] of the HNP. Although the Local Plan has been through Examination in Public over the November/December months of 2018, there remains significant objection to the principle of Policy NBE2, which may be subject to change in the future. Accordingly, it would be inappropriate to include a policy within the HNP which may affect the implementation of the higher order Development Plan. It is therefore that this policy is deleted from the Plan, to prevent he frustration of the emerging Local Plan and to ensure compliance with the basic conditions of the TCPA 1990."

35. In respect of Policy HK7, they said:

> "Views
>
> This policy is unrecognising of the levels of protection afforded to landscape and conflates the consideration of landscape and coalescence. Land to the west of Hook is not of any landscape value and coalescence here cannot reasonably be mitigated here through the consideration of views.
>
> In accordance with the NPPF paragraph 171 plans should distinguish between the hierarchy of landscape and environmental value and allocate land with the least environmental or amenity value.
>
> Policy HK[7] suggests that these views should be protected as part of the overall strategy to prevent coalescence between the settlements of Hook and Newnham. This reasoning is not related to environmental interests or amenity value and

> therefore should not be treated as a landscape value consideration.
>
> Furthermore, the policy is prejudicial to the Local Plan process as the Council's preferred option would be to see development to the east of Hook. Protecting views to the east would therefore create conflict with the Local Plan.
>
> RPS remains of the view that the Owens Farm site is suitable and the landscape quality here is of limited value and not worthy of protection over other landscapes within the district.
>
> In either scenario, this policy has the potential to frustrate the strategic delivery of growth associated with the Local Plan. The policy is therefore not in accordance with clause E of the basic conditions (NPPF ID: 41-065-20140306) which requires conformity with strategic plans. The policy should therefore be deleted."

36. In respect of the SEA, RPS submitted that it failed to give any detail or clarity in relation to reasonable alternatives, and it did not conduct an assessment of the Hook/Newnham gap, nor did it consider whether there was any reasonable alternative to its extent.

37. The Defendant made the following representations to the regulation 14 consultation (as summarised in the Consultation Statement):

> "**Settlement Gaps Policy [HK6]**
>
> The Parish Council should be aware that following discussion at the Local Plan examination on Policy NBE2 Gaps, the Examiner identified concerns with the justification for this Policy and for identifying gaps without defined boundaries. The Council is therefore proposing a Local Plan Modification to delete Policy NBE2 and the gap designations on the local plan maps. Additional wording regarding the *need to ensure that development does not lead to the physical or visual coalescence of settlements, or would damage settlement's separate identity, either individually or cumulatively with other existing or proposed development* is proposed as a Modification to be added to Policy NBE3 Landscape. Clearly these Modifications are subject to the agreement of the Local Plan Inspector.
>
> If these modifications are incorporated into the final Local Plan this means that whilst Local Gaps can still be identified in neighbourhood plans they will need to be fully justified and evidenced as part of the neighbourhood plan process. At present it is not clear what evidence is used to justify the gap boundary though clearly this could now include the landscape related studies that form part of the Local Plan evidence. We

> are happy to provide further information if that would be helpful.
>
> To reflect existing Policy NBE2 and the proposed amendment set out above, the wording of Policy [HK6] should be amended to "…is designated to prevent physical or visual coalescence of the village…" The map showing the proposed Hook to Newnham Gap is too small in scale to identify the area affected by the Gap designation, particularly along the northern edge. It is not clear precisely what area of land is affected by the designation."

38. In response, Hook Parish Council commented that "The evidence within the Hart Landscape Capacity Study 2016 has been used to support the identification of a gap between Hook and Newnham". It amended the draft HNP "to incorporate more links to the original Hart evidence base to ensure this underpins the policy". It also increased the scale of the map.

39. The Defendant's regulation 14 representations on Policy HK7 were summarised in the Consultation Statement as follows:

> "The protection of these views will need to be properly evidenced – see for example the Rotherwick Neighbourhood Plan. Are all of these views from locations that are freely accessible to the general public? ….. It may be clearer to reword this Policy so that it refers to development not adversely affecting the views at the start of the Policy rather than seeking that they must be protected…."

40. In response to these representations, Hook Parish Council stated:

> "These views were identified in the Hart Urban Characterisation and Density Study (2010) as being important. They have been incorporated into the Neighbourhood Plan and view B added to reflect the large development to the east of the village. The views are all available to the general public.
>
> Amended text"

41. In a letter dated 20 May 2019, in response to the regulation 16 consultation, RPS objected to Policies HK6 and HK7. With regards to HK6, RPS asserted:

    i) the Defendant deleted the gaps policy from the draft Local Plan because "the Inspector was unconvinced with the evidence in front of him that there was justification to support a local gaps policy, including the land identified between Hook and Newnham".

    ii) Both the draft Local Plan and HNP primarily relied on the Hart Landscape Capacity Study. "As the study does not form a sound basis for the inclusion of Policy NBE2 …, RPS also query the legitimacy of relying on this evidence as part of HNP Policy HK6."

iii) The assessment and designation of "medium landscape value" in the Hart Landscape Capacity Study could not be reasonably applied to the proposed Hook to Newnham gap as it was not sufficiently site-specific, and it was only an assessment of potential landscape capacity. A fuller assessment was required.

iv) HK6 was inconsistent with the eLP.

42. With regard to HK7, RPS reiterated the representations made in November 2018. They further submitted that the Hart Urban Characterisation and Density Study 2010 was published before the Framework and so it was based on an out-of-date policy context. Moreover, there was insufficiently detailed evidence about the views to support Policy HK7. Only view C was identified, and it was described as "attractive" not "important". As the Policy had the potential to frustrate the strategic delivery of growth associated with the Local Plan, it was not in conformity with the strategic plans, as required under paragraph (e) of the basic conditions.

43. RPS also made representations in respect of the SEA, stating:

> "Strategic Environmental Assessment
>
> As set out in the PPG (Paragraph 027, Reference ID: 11-027-20150209) there is no blanket requirement for a Neighbourhood Plan to be subject to a strategic environmental assessment and that this would only be required in limited circumstances where a neighbourhood plan is likely to have significant environmental effects. Given that the HNP does not allocate any land for housing, or for any other use, it is not clear why a SEA has been undertaken in this instance. In addition, as the HNP does not allocate land for housing, it is unclear why it refers to the consideration of 'reasonable alternatives'.
>
> RPS considers that the assessment of reasonable alternatives within the SEA is also lacking in detail and clarity and simply seeks to assess the impact of new development on unspecified sites outside of the settlement boundary. RPS would typically expect such an assessment to identify potential development sites and undertake a more detailed assessment of their potential impacts, both individually and collectively.
>
> With specific regard to Policy HK6: Hook to Newnham Gap, it is clear that no assessment of the gap has been undertaken and that it has been included as it replicates Policy NBE2 of the HDLP (Paragraph 19 of the SEA). As set out above, this Policy is due to be deleted from the local plan and as such it should also be deleted from the HNP. As a minimum RPS would expect the reasonable alternatives assessment to consider whether the full extent of the land should be identified within the Gap or whether a smaller area of land would be sufficient to prevent the coalescence of Hook and Newnham. …"

44. The Defendant submitted the HNP for examination. Although RPS requested a hearing, in accordance with usual practice, the Examiner did not consider it necessary to hold a hearing (see paragraphs 19 to 21 of his Report).

45. On 4 June 2019, the Examiner sought written clarification from the Defendant and the Parish Council on various matters. In relation to Policy HK6, he stated:

> "The Local Plan Inspector considered the inclusion of a "gaps" Policy in the Local Plan and determined that there was insufficient evidence in support of such an approach.
>
> In this respect, does the evidence that the Neighbourhood Plan relies upon differ significantly from that before the Local Plan Inspector? Please can you point out any significant differences."

46. The Parish Council responded, making the following points:

i) The HNP was consistent with Policy NBE2 of the draft Local Plan, which identified the gap between Hook and Newnham and provided that the precise boundary would be determined through a separate development plan document or neighbourhood plan. The evidence on which it was based was intentionally the same.

ii) "From attending the Hearing sessions into the Hart Local Plan, it is our understanding that the Inspector did not consider that there was an issue with the principle of gaps between settlements but was concerned about the lack of defined boundaries and supporting information. Having had the principle of the gap established in the Local Plan, we have sought to address the Inspector's concerns by providing a clear and pragmatic boundary using information on landscape character that was already available and local knowledge."

iii) The location of the gap was further defined in consultation with the local community. It was supported by residents at the Owen's Farm planning appeal public inquiry, held in March 2019.

iv) An Inspector's appeal decision, dated 16 July 2014, refusing planning permission on land in the gap stated:

> "Clearly, development on the appeal sites would not result in the physical coalescence of the two settlements. However, if that was to be regarded as the ultimate benchmark then, taken to its conclusion, the Gap could have been much more narrowly defined in the first place, with development of the two settlements being permitted to advance to within metres of each each other provided a gap were maintained. It was not, however, The Gap's function, as noted above, is wider than that. Given the impacts from the PROW the proposed development would, in my judgment, undermine the function of the Gap and result in an increased perception of coalescence,

> with the further advance of Hook towards its smaller neighbour. This would, in turn, further erode the distinct identities of the two settlements, notably with regard to Newnham's sense of rural isolation and separation. I conclude therefore that the appeal proposal would have an adverse impact upon the Local Gap between Newnham and Hook."

47. The Examiner's report was issued in July 2019. It concluded that, subject to some recommended modification, the HNP met the basic conditions, complied with its EU obligations and should proceed to a referendum.

48. The Examiner's findings on Policy HK6 were as follows:

> "**Policy HK6: Hook to Newnham Gap**
>
> 115 Local Plan Policies CON19 *("Strategic Gaps – General Policy"*) and CON21 *("Local Gaps"*) provide protection from inappropriate development within gaps that separate settlements from one another. Policy CON21 includes a gap between Hook and Newnham.
>
> 116 Policy HK6 seeks to maintain a gap between Hook and Newnham, in order to prevent the physical and visual coalescence of the two settlements. In this respect, Policy HK6 is in general conformity with the Local Plan.
>
> 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.
>
> 118 Whilst the adopted Local Gap policies in the Local Plan pre-date the publication of the first Framework in 2012, I note that a Planning Inspector, in dismissing a planning appeal a number of years after the publication of the Framework [Reference: APP/N1730/A/14/2226609.] referred to the development proposal as having an adverse impact on the Local Gap between Hook and Newnham. The Inspector did not consider the Local Gap policy to run counter to the requirements of national policy and national policy, in the form of the Framework against which this Neighbourhood Plan must be examined states that planning policies should contribute to and enhance the natural and local environment by:
>
> *"…recognising the intrinsic character and beauty of the countryside…"*
> (Paragraph 170, the Framework)

119 The supporting text for Policy HK6 identifies the important role of the countryside around Hook in respect of, amongst other things, defining local character, providing open space and supporting wildlife.

120 The precise boundary of the gap shown on Figure 8.13.1 has emerged through the plan-making process and I note earlier in this Report that the Neighbourhood Plan was supported by an appropriate consultation process.

121 Paragraph 29 of the Framework gives communities the power to develop a shared vision for their area and the community has sought to maintain an important gap between Hook and Newnham. The submitted information provides evidence in respect of how the boundaries of the proposed gap, supported by the community, were determined.

122 There is no requirement for the Neighbourhood Plan to allocate land for development and there is no substantive evidence before me to demonstrate that maintaining a gap between Hook and Newnham would, in itself, mean that Hart District would be prevented from providing housing land to meet its needs, or would necessarily result in the Neighbourhood Plan failing to contribute to sustainable development.

123 The wording of the Policy includes a vague reference to *"proposed"* developments and fails to provide for the balanced consideration of harm and benefits, as required in order for the Neighbourhood Plan to contribute to the achievement of sustainable development. These are matters addressed in the recommendations below.

124 The final sentence of Paragraph 8.14 reads as a policy, which it is not.

- **Policy HK6, change wording to "…on Fig 8.13.1 should not lead to the physical or visual coalescence of these villages or damage their separate identity." Delete rest of Policy**
- **Delete last sentence of Paragraph 8.14 ("Development in the…identify.")**
- **Delete Paragraph 8.16 which is not relevant to the Policy**"

49. The Examiner's findings on Policy HK7 were as follows:

"**Policy HK7: Views**

> 125 Whilst Policy HK7 identifies general views, it goes on to set out stringent requirements for land to *"be protected."* This results in a confusing Policy. Rather than simply ensuring that development respects general views, much of the Policy simply seeks to protect land for its own sake. Such an approach runs the risk of preventing sustainable development from coming forward and fails to meet the basic conditions.
>
> 126 Further to the above, I note that views can change annually, seasonally, monthly, daily and even hourly. Figure 8.16.1 provides only vague information in respect of views and does not provide detailed, substantive evidence in respect of the precise nature of views to be protected. As a consequence, it is not clear to understand how the strict requirements of the Policy might be interpreted by a decision maker, having regard to Paragraph 16 of the Framework.
>
> 127 Notwithstanding the above, I am mindful that the Framework, in Paragraph 127, requires development to be sympathetic to local character, including landscape setting and I recommend:
>
> - **Policy HK7, change text to *"Development should respect views from the Hook settlement boundary towards the north-east and east across the valley of the River Whitewater and its setting; from the Hook settlement boundary to the west, towards Newnham; and from the east side of Newnham (within the Neighbourhood Area) towards the west side of the Hook settlement."***
>
> - **Page 32, add "emerging" to title of section b) and also prior to "Policy" in respect of references to Policy NBE5 in that section**"

50. On 28 August 2019 the Defendant published its decision statement. It confirmed that the Defendant accepted the Examiner's recommendations, that the amendments to the HNP should be made and that the HNP should proceed to referendum. It stated:

> "2.2 The Examiner's report was received on 15 July 2019. The report concludes that subject to making the modifications recommended by the Examiner, the Plan meets the basic conditions set out in the legislation and should proceed to a Neighbourhood Planning referendum. The Examiner also recommended that the referendum area was based on the Neighbourhood Area that was designated by the Council in October 2014.

> 2.3 Having considered each of the recommendations made in the Examiner's report and the reasons for them, the Council has decided to make the modifications to the Hook Neighbourhood Plan set out in Table 1 below. The Council is satisfied that subject to those changes/modifications which it considers should be made to the Plan as set out in Table 1 below, that the Plan meets the basic conditions set out in the legislation."

The Local Plan and the eLP

51. At all material times, the Local Plan was the "Hart District Local Plan and First Alterations 1996 – 2006 Saved Policies (2009)". Policy CON19 ("Strategic Gaps – General Policy") and CON21 ("Local Gaps") provides protection from inappropriate development in gaps between settlements. Policy CON21 includes a gap between the settlements of Hook and Newnham.

52. The eLP - Hart Local Plan Strategy and Sites 2016 – 2032 - will replace the Local Plan once adopted. It was submitted for examination by the Defendant in 2018. Hearings took place before the examining Inspector in November/December 2018, during which the Inspector proposed that draft Policy NBE2 Gaps should be deleted and replaced by modifications to draft Policy NBE3 Landscape (see the Defendant's representations in the Consultation Statement at paragraph 37 above). At the hearing, the Defendant agreed to draft proposed modifications to give effect to this proposal, for the Inspector's consideration, despite the fact that the Inspector had not yet produced his report.

53. The Inspector wrote to the Defendant on 26 February 2019, to advise on further steps or main modifications required, expressing his views on housing numbers and that Policy SS3 proposing an area of search for a new settlement was not sound. The Inspector did not mention any modifications to draft Policies NBE2 and NBE3 in that letter.

54. In May 2019, the Defendant submitted draft proposed main modifications on various topics to the Inspector, who gave them his initial, though not final, approval.

55. In July 2019, the Defendant published a schedule of "Proposed Main Modifications to the Hart Local Plan Strategy and Sites 2016 – 2032 proposed Submission Version, February 2018", and undertook a consultation procedure. The schedule included the following proposed modifications:

    i) Draft Policy NBE2 - Gaps between Settlements was deleted in full. The reason given was "Coalescence issue incorporated into Policy NBE3 Landscape. Gaps can be identified through the Development Management DPD and Neighbourhood Plans".

    ii) A new paragraph was proposed for the explanatory text for draft Policy NBE3 which stated:

    > "Development in the countryside between settlements can reduce the physical and/or visual separation of settlements.

> Development that would result in a perception of settlements coalescing, or which would otherwise damage their separate identity, will be refused. Both the individual effects of any proposals and the cumulative effects of existing and proposed development will be taken into account. Policies to designate specific areas of 'gaps' between settlements can be prepared through subsequent Development Plan Documents and Neighbourhood Plans."

56. In September 2019, the Defendant sent the consultation responses to the Inspector, with its own responses. The Inspector had indicated to the Defendant that he may require further modifications, in the light of the consultation responses.

57. As at the date of the hearing, the Inspector's report had not yet been received by the Defendant. It is due to be published in 2020. Thereafter, any main modifications will have to be considered, and the Defendant will decide whether to adopt the eLP.

Grounds of challenge

58. The Claimant relied upon the following grounds of challenge.

59. **Ground 1:** The Defendant's conclusion that draft Policy HK6 met the basic conditions was unlawful in that:

    i) it failed to have regard to paragraph 31 of the Framework which requires an adequate evidential basis for a policy, and therefore failed to comply with basic condition (a);

    ii) it failed to have regard to the principle of consistency in decision making set out in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137, and failed to take into account the conclusion of the eLP Inspector that a gap between Hook and Newnham was not supported by adequate evidence;

    iii) alternatively, it failed to give any or adequate reasons for its decision that it was appropriate to approve draft Policy HK6 having regard to national policies and advice contained in guidance issued by the Secretary of State (basic condition (a)).

60. **Ground 2:** The Defendant's conclusion that draft Policy HK7 met the basic conditions was unlawful in that:

    i) it failed to have regard to paragraph 31 of the Framework, which requires an adequate evidential basis for a policy, and therefore failed to comply with basic condition (a);

    ii) it acted irrationally in accepting the proposed modification, and failed to recognise that the proposed modified text failed to meet the basic conditions in that it ran the risk of preventing sustainable development coming forward;

iii) it failed to give any or adequate reasons for its decision that it was appropriate to approve draft Policy HK7 (i) having regard to national policies and advice contained in guidance issued by the Secretary of State (basic condition (a)), (ii) in respect of basic condition (d) to contribute to sustainable development, and (iii) as to why the amended version of the policy did not fall foul of the basic conditions but the original policy did.

61. **Ground 3:** The Defendant's decision breached its obligations under Article 5 of EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment, known as the Strategic Environmental Assessment Directive ("SEA Directive") due to the failure of the HNP Strategic Environmental Assessment to consider reasonable alternatives and/or the Defendant failed to consider the Claimant's argument that the SEA was deficient and/or failed to give intelligible and adequate reasons for finding that the SEA Directive had been complied with.

Conclusions

Grounds 1 and 2

62. It is convenient to consider Grounds 1 and 2 together, because of the overlap between them.

63. A challenge under section 61N(2) TCPA 1990 to a decision of the local planning authority approving recommendations for a local plan can only be made by way of judicial review, on public law grounds. Thus, the Claimant must establish that the Defendant misdirected itself in law, or acted irrationally, or failed to have regard to relevant considerations, or that there was some procedural impropriety. In planning law, the exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26. The Court must be alert to the risk that a legal challenge is being used as a covert way of impermissibly reviewing the planning merits, which I consider to be the case here.

64. The function of the local planning authority, under paragraph 12 of Schedule 4B TCPA 1990, is to consider the Examiner's recommendations, and reasons for them, and to satisfy itself that the draft plan, as modified, meets the basic conditions, is compatible with Convention rights, and meets the specified statutory requirements. Its powers to make modifications are limited to these objectives. The local planning authority is neither intended nor required to duplicate the detailed examination of the evidence, and the planning merits, which has been undertaken by the Examiner. In my judgment, the Examiner's Report in this case provided a sufficient basis upon which the Defendant could properly conclude that the plan met the basic conditions and other statutory criteria, and that his recommendations ought to be accepted.

65. It is well-established that a decision letter must be read fairly and in good faith, and as a whole, and in a straightforward down-to-earth manner, without excessive legalism or criticism. An inspector is not writing an examination paper in which he must set out all the relevant policies: *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83, per Lord Hoffmann at 84. In *Clarke Homes v*

Secretary of State for the Environment (1993) 66 P & CR 263, Sir Thomas Bingham MR said at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

66. In my view, similar principles should apply to a Examiner's Report, whilst taking account of the differences between a report and an appeal decision.

67. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath giving the judgment of the Supreme Court gave guidance, at [24] to [26], that the courts should recognise the expertise of the specialist planning inspectors and work from the presumption that they will have understood the policy framework correctly. Although Lord Carnwath was referring to inspectors' appeal decisions, in my view, the same principle applies to examiners of neighbourhood plans.

68. In his Report, the Examiner correctly directed himself, at paragraph 23, on the basic conditions to be met in paragraph 8(2) of Schedule 4B TCPA 1990, including condition (a) which states "… having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order". He referred to the Basic Conditions Statement at paragraph 27. At paragraphs 47 and 48, he expressly stated that he had considered the Framework and the PPG. There was nothing in his Report to gainsay this statement. He was not required to set out the relevant policies; he was not writing an examination paper, and as an experienced planning inspector it can be assumed that he was well aware of them. In my view, his approach and his findings were consistent with the relevant policies in the Framework and the PPG. Therefore, in making its decision, the Defendant was entitled to reply upon the Examiner's reasoning.

69. It is important not to lose sight of the nature and extent of the Examiner's and the Defendant's statutory task. As Holgate J. explained in *R (Crownhall Estates Limited) v Chichester District Council* [2016] EWHC 73 (Admin), at [29(iii)]:

> "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"."

70. A local planning authority is required to give reasons for its decision under paragraph 12(11) of Schedule 4B TCPA 1990. The Defendant relied upon the reasons given by

the Examiner in his Report. As Lindblom LJ held in *R (Kebbell Developments Limited) v Leeds City Council* [2018] 1 WLR 4625, at [45], a local planning authority is entitled to rely upon the reasons given by the Examiner in his Report, where appropriate. This point was conceded by the Claimant. However, it submitted that the Examiner's Report was inadequately reasoned, and so the Examiner's Report became the focus of the reasons challenge.

71. As confirmed by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, the reasons are required to meet the standard set out in *South Buckinghamshire District Council v Porter* (No 2) [2004] 1 WLR 1953, per Lord Brown, at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

72. I agree with the observations of Holgate J. in *R (Crownhall Estates Limited) v Chichester District Council* [2016] EWHC 73 (Admin), where he said, at [57] – [58]:

> "57…. South Bucks was concerned with the obligation to give reasons for a decision determining a planning appeal. Such appeals may involve a range of issues raised by a number of parties to do with the planning merits of a proposal for development. By contrast the ambit of an examination into a neighbourhood plan is rather different. Generally, the main focus is on whether or not the basic conditions in paragraph 8(2) of schedule 4B are satisfied, or would be satisfied by the making of modifications to the plan. The level of scrutiny is

> less than that applied to maters falling within the true ambit of the examination process.
>
> 58. …. Thus the statutory scheme delimits the matters which the Examiner and the local planning authority are able to consider, which in turn will affect the application of the obligation to give reasons. At the very least the statutory process will affect what may be considered by the Court to have been the "principal important controversial issues"; they will not necessarily be any matter raised in the representations on the draft plan."

73. Read fairly and as a whole, I consider that the Examiner's reasoning was both intelligible and adequate, and met the required standard. Therefore, the Defendant acted lawfully in adopting the Examiner's reasons as its own. I consider the individual policies in more detail below.

74. The Claimant alleged that the Examiner failed to have regard to its consultation representations, relying upon the fact that they were not set out fully in his Report. In my view, an Examiner who may well have to consider multiple representations on a neighbourhood plan, is not required to respond to each one *seriatim*, in order to meet the duty to give reasons, and failure to do so will not, of itself, indicate that he has failed to have regard to them. An Examiner is entitled to adopt a more general level of reasoning, focussing on the statutory criteria to be met, while drawing on the evidence and the representations made, as appropriate. In my judgment, this is the approach which the Examiner lawfully adopted in this case.

75. The Examiner gave consideration to the Claimant's request for a hearing. In my view, he was justified in concluding that a hearing was not necessary in this case, bearing in mind that would be a departure from the general rule (see paragraphs 19 to 21 of the Report). The Examiner had a broad discretion as to the conduct of the examination, which he exercised lawfully. The Claimant submitted detailed written representations, which the Examiner considered (paragraph 48 of the Report).

Policy HK6

76. The heart of the Claimant's challenge to the decision in respect of Policy HK6 was that it was inconsistent with the eLP, and the findings of the eLP Inspector upon examination.

77. The Claimant relied upon the principle established in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137 that a previous planning decision in relation to the same land is capable of being a material consideration. Mann LJ stated:

> "… It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there

> is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate." (p.145)

78. This principle has been applied in *DLA Delivery Ltd v Baroness Cumberledge of Newick* [2018] EWCA Civ 1305; *Solihull Metropolitan Borough Council v Gallagher Estates Ltd* [2014] EWCA Civ 1610; *R (on the application of Fox Strategic Land and Property Ltd.) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198 and *Dunster Properties Ltd. v First Secretary of State* [2007] 2 P & CR 26).

79. In *R (Stonegate Homes Ltd) v Horsham DC* [2016] EWHC 2512 (Admin), Patterson J. considered whether a decision on the neighbourhood plan had to be consistent with an individual planning decision, applying the *North Wiltshire* principle. She held, at [64], that the plan making exercise was distinct from determining whether a planning application was acceptable. Given the differences in the contexts, the principle of consistency did not apply. Applying this reasoning, the Defendant submitted that the examination of a local plan for the whole of Hart District was a materially different exercise to the examination of a neighbourhood plan for the Parish of Hook, and so no meaningful comparison could be made. Whilst I accept that submission as regards the entirety of a local plan, I consider a meaningful comparison could be made between specific policies on specific topics, depending upon the nature and content of those policies. However, basic condition (e) of paragraph 8(2) of Schedule 4B 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 in *North Wiltshire* 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. In a departure from usual practice, the Defendant proposed draft main modifications on the basis of provisional indications given by the Inspector at the hearings, without having received either an interim or final written recommendation from the Inspector. The Inspector gave his approval to the Defendant's proposed draft main modifications for the purpose of further consultation, but he has not finally accepted them, either informally or formally. He had indicated to the Defendant that he may require further modifications to them, in the light of the responses to the further consultation. 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.

81. In my judgment, the Examiner and the Defendant correctly directed themselves on their approach to the Local Plan and the eLP, in accordance with the statutory scheme. Both the Examiner and the Defendant satisfied themselves that the plan met basic condition (e), in paragraph 8(2) of Schedule 4B, which requires that:

> "(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)"

82. As the Examiner correctly stated at paragraphs 115 and 116 of his Report:

> "115 Local Plan Policies CON19 *("Strategic Gaps – General Policy"*) and CON21 *("Local Gaps"*) provide protection from inappropriate development within gaps that separate settlements from one another. Policy CON21 includes a gap between Hook and Newnham.
>
> 116 Policy HK6 seeks to maintain a gap between Hook and Newnham, in order to prevent the physical and visual coalescence of the two settlements. In this respect, Policy HK6 is in general conformity with the 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."

85. The Parish Council was aware of the text of the eLP, and attended some of the hearings before the local plan Inspector. The Defendant, in its response to the regulation 14 consultation, informed the Parish Council of the modifications it proposed to make, in the light of the Inspector's observations at the hearings. The Parish Council made its response to the Defendant's representations in the Consultation Statement. The Examiner sought, and obtained, further information about the evidence base from the Parish Council. The Examiner also spent a day visiting the Hook Neighbourhood Area, as part of his assessment.

86. In its letter of 20 May 2019, the Claimant submitted that the local plan Inspector was unconvinced with the evidence in front of him that there was justification to support a local gaps policy between Hook and Newnham and as a result, the Defendant proposed to delete draft Policy NBE2. As the Hart Landscape Capacity Study 2016 had been found not to form a sound basis for the inclusion of Policy NBE2, it ought not to be accepted as evidence in support of Policy HK6. The Claimant also criticised the Study as insufficiently site-specific and only an assessment of potential landscape capacity. These representations formed the basis of the Claimant's submissions in the judicial review.

87. However, it is apparent that the Defendant and the Examiner took a different view to the Claimant and in my view, they were entitled to do so. The Defendant's representations in the regulation 14 consultation, and the modifications made to the draft local plan, showed that a gaps policy continued to be supported in the eLP, albeit in a different form. It was given effect at a strategic level in modified Policy NEB3, which provided that "[d]evelopment which would result in a perception of settlements coalescing or which would otherwise damage their separate identity, would be refused". Policy NEB3 also provided that "[p]olicies to designate specific areas of 'gaps' between settlements" were to be "prepared through subsequent Development

Plan Documents and Neighbourhood Plans". Thus, a policy in the HNP which designated specific gaps in its area was, in principle, in accordance with the eLP.

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 (see paragraph 8.14 of the supporting text to Policy HK6) and using their local knowledge (see the Parish Council's response to the Examiner). The Examiner's Report recorded, at paragraph 120, that the precise boundary of the gap shown on Figure 8.13.1 had emerged through the plan-making process.

89. In my view, both the Examiner and the Defendant were entitled to conclude, in the exercise of their planning judgments, that draft Policy HK6 was underpinned by adequate evidence. Therefore, there was no foundation for the Claimant's submission that they failed to have regard to paragraph 31 of the Framework on the preparation of plans. In truth, the Claimant was expressing its disagreement with the decision-makers' planning judgment in respect of draft Policy HK6.

90. The Examiner gave careful consideration to the terms of draft Policy HK6, and recommended modifications to the wording "to provide for the balanced consideration of harm and benefits, as required in order for the Neighbourhood Plan to contribute to the achievement of sustainable development" (paragraph 123). Therefore, he was alert to the criticisms that the draft policy was potentially too restrictive of development.

91. In conclusion, I consider that the Examiner's reasons, adopted by the Defendant, addressed the principal important controversial issues and enabled the Claimant to understand why the matter was decided as it was. The Claimant, who was a well-informed participant in both the HNP and eLP process, would have been able to assess that its prospects of obtaining permission to develop the Owen's Farm site remained poor, because the policy favoured a settlement gap between Hook and Newnham. Even if, contrary to my finding, there were weaknesses in the reasoning, the Claimant failed to establish that it was substantially prejudiced by them.

Policy HK7

92. Draft Policy HK7 provides that "development should respect views" from *inter alia* the "Hook settlement boundary to the west, towards Newnham". This is the view across the Hook/Newnham gap where Owen's Farm is situated, and so the policy affects the Claimant's potential development of the site.

93. The Claimant submitted in the judicial review, that the evidential basis for the views which draft Policy HK7 sought to protect was inadequate, and so the Examiner and the Defendant failed to have regard to paragraph 31 of the Framework and apply basic

condition (a). Although the Examiner recognised the weaknesses in the draft policy which was originally submitted, he acted irrationally in recommending modifications to the policy, as these modifications were also inadequately evidenced, and ran the risk of preventing sustainable development, thus failing to meet basic condition (d). The modifications were inconsistent with paragraph 127 of the Framework which does not provide support for the protection of views. Finally, the Claimant submitted that the Examiner did not give adequate or intelligible reasons as to why he recommended the modifications, in the light of the defects identified above.

94. In my judgment, the Examiner had regard to the criticisms of the objectors, including the Claimant, finding, at paragraphs 125 and 126 of the Report, that:

i) "Whilst Policy HK7 identifies general views, it goes on to set out stringent requirements for land to be "protected"…Rather than simply ensuring that development respects general views, much of the Policy simply seeks to protect land for its own sake. Such an approach runs the risk of preventing sustainable development from coming forward and fails to meet the basic conditions."

ii) "….. Figure 8.16.1 provides only vague information in respect of views and does not provide detailed, substantive evidence in respect of the precise nature of views to be protected…"

95. However, the Examiner concluded that the policy ought not simply to be rejected on these grounds. There was evidence which supported the importance of the views, in particular, the views from the west of Hook towards Newnham:

i) the Hart Urban Characterisation and Density Study 2010 which described the attractive views from footpaths on the west of Hook across the rolling farmland towards Newnham;

ii) the Hart Landscape Capacity Study 2016 which made specific observations on the visual and landscape sensitivity of land between Hook and Newnham.

96. The Parish Council and the villagers of Hook provided more detail on the nature and location of the views, summarised in paragraph 8.19 of draft Policy HK7.

97. The Examiner also conducted a lengthy site visit where he would have been able to assess the views referred to in draft Policy HK7.

98. The Examiner and the Defendant would have been aware that the Framework requires planning policies to recognise the intrinsic character and beauty of the countryside (paragraph 170(b)). Furthermore, the Examiner stated that he was mindful that the Framework, in paragraph 127(c), required development to be sympathetic to local character, including landscape setting. That policy is broadly expressed, and is capable of encompassing respect for views.

99. The Examiner therefore modified the wording of the policy, so that it was less stringent. The strict and specific requirements that "development should not adversely impact" the views and that each view "must be protected" were deleted and replaced by a less restrictive and more general requirement that "development should

respect" the views listed. In my view, he was entitled to conclude that there was a sufficient evidence base for this modified policy. In making this change, the Examiner expressly had regard to basic condition (d) and the need to contribute to the achievement of sustainable development, rather than impede it. In an exercise of planning judgment, he balanced the competing requirements of protecting the landscape and achieving sustainable development.

100. I agree with the Defendant's submission that there was nothing objectionable in retaining the plan at figure 8.1.16 as it was sufficient to enable the reader to identify the locations from where the key views identified in the policy should be respected.

101. In conclusion, the Examiner, in the exercise of his planning judgment, recommended a modified policy, supported by adequate evidence, which balanced the competing requirements of protecting important views across the landscape, and achieving sustainable development, having regard to the Framework and the basic conditions. The Defendant, exercising its planning judgment, agreed with the Examiner's conclusions. It is not the role of this Court to substitute its planning judgment for theirs.

102. I consider that the Examiner's reasoning was both adequate and intelligible, but even if there was any inadequacy in the reasons, the Claimant has failed to establish substantial prejudice.

103. The draft policy is clear in its terms, and the question whether or not a proposed development respects the identified views will be a matter for the planning decision-maker to determine, on the basis of the details in the application for planning permission before it.

104. For the reasons set out above, Grounds 1 and 2 do not succeed.

Ground 3

105. The Claimant submitted that the HNP Strategic Environmental Assessment was deficient because it failed to consider reasonable alternatives to the Hook to Newnham gap. This point was raised by the Claimant in its consultation representations, but not addressed by the Examiner in his Report.

106. Article 5(1) of the SEA Directive provides that an environmental assessment should contain an environmental report which describes and evaluates the likely significant environmental effects of implementing the plan or programme, and also the reasonable alternatives, which take into account the objectives and geographical scope of the plan or programme.

107. Annex I to the SEA Directive contains a list of the information to be included in an environmental report.

108. The SEA Directive has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations"). Regulation 12 of the SEA Regulations governs the preparation of the environmental report, together with Schedule 2 to the SEA Regulations.

109. The principles to be applied in respect of "reasonable alternatives" were summarised by Hickinbottom J. in in *R (Friends of the Earth) v The Welsh Ministers* [2015] EWHC 776 (Admin); [2016] Env LR 1, at [88]. He said, at sub-paragraphs (iv) and (v):

> "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."

110. The "Strategic Environmental Assessment for the Hook Neighbourhood Plan", was produced by AECOM consultants in March 2019, to accompany the submission version of the HNP. It stated that the purpose of the SEA report was to "identify, describe and evaluate the likely significant effects of the Hook Neighbourhood Plan and alternatives" (page 623). It set out the vision, aims and objectives of the HNP at pages 631 – 633, which included "Maintain a gap and sense of separation between Hook and Newnham" as an environmental and landscape objective. It identified 8 "key sustainability issues" at pages 637 – 639.

111. The SEA Report observed, at page 644, that the HNP did not seek to allocate housing, but sought instead to facilitate appropriate development in the neighbourhood plan area through robust policy approaches. Under the heading "Assessment of reasonable alternatives for the broad location of development in the Neighbourhood Plan area" (page 644), it identified 2 options as "reasonable alternatives". Option 1 envisaged development on previously developed land within the settlement boundary. Option 2 contemplated new development on land outside the settlement boundary. The performance of those options was tested against each of the key sustainability issues, at pages 645 – 647. Specifically, in relation to "Landscape and historic environment" it concluded:

> "Through facilitating development outside the settlement boundary of Hook, Option 2 increases the scope for impacts on landscape character, particularly relating to the potential coalescence of distinctive areas by reducing strategic 'green gaps'" (page 646).

112. Option 2 performed less well than Option 1 in the ranking for "Landscape and historic environment", and less well overall.

113. The SEA Report concluded, at page 657 to 656, as follows:

> "5.42 The assessment has concluded that the submission version of the Hook Neighbourhood Plan is likely to lead to significant positive effects in relation to the 'Population and Community' and 'Health and Wellbeing' SEA themes. These benefits largely relate to the Neighbourhood Plan's focus on encouraging the regeneration of Hook Village Centre with a view to ensuring that it becomes the vibrant heart of the local community, whilst providing the widest possible range of services and facilities. The Neighbourhood Plan also has a strong focus on maintaining access to community facilities.
>
> 5.43 The Neighbourhood Plan also has a strong focus on safeguarding natural assets, protecting biodiversity and enhancing ecological networks, as well as encouraging good design, protecting landscape character and protecting and enhancing the fabric and setting of the historic environment. This will support positive effects in relation to the 'Biodiversity' and 'Landscape and Historic Environment' SEA themes.
>
> 5.44 The Neighbourhood Plan will also initiate a number of beneficial approaches regarding the 'Air Quality', 'Climate Change', 'Land, Soil and Water Resources' and 'Transportation' SEA themes. However, these are not considered to be significant in the context of the SEA process given the scope of the Neighbourhood Plan, the lack of allocations in the Neighbourhood Plan and the scale of proposals."

114. The Examiner and the Defendant had to be satisfied that, in accordance with basic condition (f) of paragraph 8(2) of Schedule 4B TCPA 1990, the plan did not breach, and was otherwise compatible with, EU obligations. The Examiner addressed the SEA at paragraphs 31 to 35, 39 and 45 of his Report.

115. The Examiner referred to the PPG which advises that a neighbourhood plan will only require a SEA in limited circumstances where it is likely to have significant environmental effects (paragraph 27 ID: 11-027-20190722). For example, where a neighbourhood plan allocates sites for development; the neighbourhood area contains sensitive natural or heritage assets that may be affected by the proposals in the plan; or the neighbourhood plan is likely to have significant environmental effects that have not already been considered and dealt with through a sustainability appraisal of the local plan or other strategic policies for the area (paragraph 46 ID: 20150209).

116. The Examiner noted that, following a screening assessment, it was concluded that the HNP did require an SEA because it "could set the framework for future consents under the EIA Directive" and it "seeks to develop sites which are currently unspecified to meet the … target of 87 dwellings".

117. The Examiner considered the SEA Report, noting that the HNP did not allocate any land for development. He concluded that the HNP was compatible with EU obligations under the SEA Directive. The Defendant agreed, and adopted his reasons.

118. In my judgment, the Examiner and the Defendant were entitled to conclude that the SEA assessment complied with the SEA Directive and Regulations, by confining its consideration of "reasonable alternatives" to Options 1 and 2 (development within or outside existing settlement boundaries). This included consideration of the proposed policy of maintaining "green gaps" between Hook and surrounding settlements. This "high level" assessment was appropriate, given that the plan did not purport to allocate housing sites. The legal requirement to assess "reasonable alternatives" did not extend to the fine detail of assessing alternative boundaries for the proposed "green gaps". It was rational to limit the consideration of reasonable alternatives to Options 1 and 2.

119. In my view, there was no obligation on the Examiner or the Defendant to give reasons for not including "reasonable alternatives" for the boundaries of the proposed gaps as part of the SEA as this was not a "principal important controversial issue", for which reasons were required. Indeed, the Claimant's primary submission was that an SEA was not required at all (see paragraph 43 above).

120. Permission to proceed on Ground 3 was refused by Lieven J. for the following reason:

> "I do not consider that ground three (SEA) is arguable. The Examiner had a discretion as to whether or not something was a reasonable alternative. Given the nature that was being considered, and the fact that this was not a plan allocating land for housing or other development, I do not consider there was anything arguably irrational [in the] Examiner not considering a smaller gap."

121. I agree with Lieven J's conclusion.

Final conclusion

122. For the reasons I have given, permission is refused on Ground 3, and Grounds 1 and 2 do not succeed. Therefore, the claim is dismissed.