



Neutral Citation Number: [2022] EWHC 485 (Admin)

Case No: CO/2831/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 March 2022

Before :

MRS JUSTICE LANG DBE

Between :

THE QUEEN

Claimant

on the application of

PARK LANE HOMES (SOUTH EAST) LIMITED

- and -

ROTHER DISTRICT COUNCIL
(1) BURWASH PARISH COUNCIL
(2) BURWASH: SAVE OUR FIELDS

Defendant
Interested Parties

Jonathan Clay (instructed by **Harrison Grant Solicitors**) for the **Claimant**
Richard Moules (instructed by **Legal Services**) for the **Defendant**
Robert Banks in person for the **Second Interested Party**
The **First Interested Party** did not appear and was not represented

Hearing dates: 13 January, 3 & 4 February 2022

Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the decision (“the Decision”) of the Defendant (“the Council”), made on 9 July 2021, to accept the recommendations of the Examiner into the draft Burwash Neighbourhood Development Plan (“BNDP”), under paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990 (“TCPA 1990”), and to proceed to a neighbourhood planning referendum.
2. The Claimant is the part-owner and developer of land at Strand Meadow, Burwash, East Sussex (“the Site”). The Council is the local planning authority for the area. The Site was allocated for housing by the Council in 2006. On 7 March 2018, the Council granted the Claimant outline planning permission at the Site for a residential development of up to 30 dwellings, but it has not yet gained approval for reserved matters.
3. The First Interested Party is the Parish Council (“the PC”) for the Parish of Burwash. It is the qualifying body responsible for preparing the BNDP. The Second Interested Party (“IP2”) is a group of local residents who are concerned to protect the historic character and appearance of Burwash and the surrounding countryside, which is designated as an Area of Outstanding Natural Beauty (“AONB”). Its aim is to support “the right housing in the right place”.
4. The Claimant challenges the Council’s decision on two grounds.

Ground 1

5. The Council erred in accepting the Examiner’s finding that the draft BNDP met the basic conditions in paragraph 8(2) of Schedule 4B to the TCPA 1990, namely, that:
 - i) having regard to national policies (the National Planning Policy Framework¹ (“the Framework”)) and advice contained in guidance issued by the Secretary of State (the Planning Practice Guidance (“the Guidance”)), it was appropriate to make the plan (sub-paragraph (a)); and
 - ii) the making of the plan was in general conformity with the strategic policies contained in the development plan for the area (sub-paragraph (e)).

Ground 2

6. The Claimant submitted that the procedure adopted by the Council was procedurally unfair because the Claimant was not given an opportunity to make representations on the Examiner’s report/s, or the officer’s report, before the Chief Executive (who was exercising delegated authority), made the decision on 9 July 2021. In consequence, the Claimant’s concerns were not adequately considered by the Chief Executive. The Claimant contends that, before the decision was made it should have been consulted, either at a meeting of all interested parties, or the Examiner should have held a hearing.

¹ The February 2019 edition

7. The Claimant seeks a quashing order quashing the Decision and a declaration that “the BNDP does not comply with the basic conditions and cannot do so without amendment to (a) allocate and identify sufficient land (including the Strand Meadow site) to meet the (minimum) target of 52 dwellings and (b) to amend the settlement boundary to reflect this”.
8. Permission to apply for judicial review was granted on the papers by Dove J. on 15 October 2021.

Planning history

The Development Plan

The Rother District Local Plan

9. The Rother District Local Plan (“Rother DLP 2006”) was adopted in July 2006. It contained both strategic and non-strategic policies. Policy VL1 allocated the Site for housing and recreational purposes. The accompanying plan showed that the Site was mainly within the development boundary for the settlement, but a small area proposed for use as amenity land fell outside the boundary. Policy VL1 provided that proposals would be permitted where no more than 17 dwellings were provided, of which 40% were to be affordable.

The Core Strategy

10. The Core Strategy was adopted in September 2014. It superseded the Rother DLP 2006. However, Policy VL1 was saved, and remains extant. The Council has confirmed that the Site continues to be allocated under Policy VL1 of the Rother DLP 2006.
11. The Overall Spatial Development Strategy is set out in Policies OSS1, OSS2 and OSS3 of the Core Strategy.
12. Policy OSS1: Overall Spatial Development Strategy plans for at least 5,700 dwellings over the period 2011-2028. New sites will be identified in accordance with paragraph (iii)(a)-(e). The focus of new development will be in the Bexhill area, with some development in Battle and Rye (sub-paragraphs (a) and (b)). Sub-paragraphs (c) and (d) make provision for villages as follows:

“(c) Facilitate the limited growth of villages that contain a range of services and which contributes to supporting vibrant, mixed rural communities, notably in relation to service provision and local housing needs, and is compatible with the character and setting of the village;

“(d) Allow for small-scale infill and redevelopment, and otherwise enable local needs for housing and community facilities to be met, in other villages;”

Burwash is a village which contains services, and so falls within sub-paragraph (c). Sub-paragraph (e) provides that the countryside continues to be protected by restriction of new development to that for which a countryside location is necessary or appropriate, primarily for employment uses (sub-paragraph (d)).

13. Paragraph 7.52 of the supporting text states that sites for new development will be set out in due course through a Development and Site Allocations Plan and Neighbourhood Plans. Existing Local Plan housing allocations will be subject to review as part of these processes.
14. Policy OSS2: Use of Development Boundaries maintains the use of development boundaries around settlements, and indicates that existing boundaries will be reviewed by the Development and Site Allocations DPD, according to the specified factors. The supporting text explains the rationale behind the policy, as follows:

“7.60 Development boundaries around settlements are a well-established planning policy tool in East Sussex. They provide a clear and readily understood indication of where development would, and would not, be allowed in principle. Within development boundaries there is a presumption that infilling, redevelopment and changes of use will be acceptable subject to other policies of the plan.

7.61 They help to focus development and investment into sustainable locations and to protect against intrusive development beyond the substantially built-up areas of towns and villages.

7.62 Consideration has been given to whether to retain such prescribed limits, or whether to rely on a criteria-based policy. It is found that the level of certainty they afford, for all involved in planning, continues to be highly valued. They reflect the established settlement pattern and provide a useful reference for the application of policies specifically designed to help meet local needs, such as those relating to community facilities and affordable housing. Therefore the use of development boundaries is maintained.”

15. Policy OSS3: Location of development sets out the factors to be considered in assessing the suitability of a particular location for development, both when allocating land for development and determining planning applications.
16. Policy RA1 in the Core Strategy concerns villages in rural areas. It provides, so far as material, as follows:

“Policy RA1: Villages

The needs of the rural villages will be addressed by:

.....

(v) In order to meet housing needs and ensure the continued vitality of villages, the provision of 1,670 additional dwellings (comprising existing commitments, new allocations and windfalls) in villages over the Plan period 2011 to 2028. This will be located in accordance with Figure 12, subject to refinement in the light of further investigation via the Development and Site Allocations DPD and/or Neighbourhood Plans.”

17. Figure 12 is a table headed “Distribution of Rural Housing Allocations”. It indicates 50 new dwellings for Burwash (including 22 current commitments).

18. The supporting text to Policy RA1 states:

“12.41 ‘Potential new sites’ in Figure 12 refers to sites expected to be formally allocated via the Development and Site Allocation Plan or Neighbourhood Plans. These will normally comprise development sites accommodating 6 or more dwellings.

....

12.43 Developments of less than 6 dwellings, on currently unidentified sites, will count towards the overall rural housing numbers total as ‘small-site windfalls’; an estimated allowance for them has been included for years 5-15. Therefore, to avoid double counting, they are in addition to the ‘Potential new sites’ for individual villages.”

Development and Site Allocations Local Plan

19. The Development and Site Allocations Local Plan (“DSA 2019”) was adopted on 16 December 2019.

20. Chapter 8 provides an “Overview” which addresses the Core Strategy housing development targets. The distribution of dwellings between rural villages at Policy RA1 and Figure 12 is updated at Figure 17 to show a total requirement of 52 (including 30 dwellings at the Site, reflecting the grant of planning permission in 2018).

21. Paragraphs 8.9 and 8.10 refer to Neighbourhood Plans:

“8.9 As well as the preparation of this Plan, a number of Neighbourhood Plans have come forward since the Core Strategy was adopted, all of which embrace site allocations required to meet the housing targets for the settlements that fall within those ‘neighbourhood areas’.

8.10 At the present time, Neighbourhood Plans have been ‘made’ (or adopted) for *[list of villages]*. Neighbourhood Plans are also in preparation for Battle, Burwash, Etchingham and Hurst Green.”

22. Figure 18 lists the specific housing allocations made in the DSA 2019. No housing allocations were made for areas in which Neighbourhood Plans had been made, or were in the course of preparation, including Burwash.

23. Policy OVE1 provides:

“Policy OVE1: Housing supply and delivery pending plans.

Housing sites sufficient to meet the Core Strategy requirement of at least 5,700 net additional homes over the period to 2028 will be met by allocations and other provisions in this Plan and Neighbourhood Plans. No phasing restrictions will be imposed on development allocations, other than for site-specific, normally infrastructure, reasons. Until such time as a Neighbourhood Plan for the relevant settlement with an outstanding Core Strategy housing requirement is in force, planning applications will be favourably considered for development proposals in those settlements where:

(i) they contribute to meeting the housing target for that settlement and accord with the relevant spatial strategy; and

(ii) the site and development proposals are otherwise suitable having regard to other relevant policies of the Core Strategy, including the considerations in OSS2 and OSS3, and of this Plan.”

24. Paragraphs 8.17 and 8.18 of the supporting text explain the rationale behind Policy OVE1, as follows:

“8.17 In view of the fact that the annualised housing requirement has not been achieved to date and that housing delivery is likely to not “catch up” on present projections, it is considered appropriate to not only have a margin of over-provision, particularly in Bexhill where there is a high reliance on a strategic site, but also to avoid unduly deferring the identification of suitable sites and to ensure that planning permissions continue to come forward in a timely manner.

8.18 The following policy is therefore put forward to make clear the Council’s commitment to increase supply and, as far as it is able, to achieve the actual delivery of homes within the plan period of the Core Strategy.”

25. Development boundaries are considered in Policy DIM2: Development Boundaries. It provides that new development shall be focused within defined settlement boundaries, principally on already committed and allocated sites, together with other sites where proposals accord with relevant Local Plan policies. Outside defined settlement boundaries, development shall normally be limited to that which accords with specific Local Plan policies or that for which a countryside location is demonstrated to be necessary.

26. Figure 14 lists the settlements with development boundaries shown on the Policies Map in the DSA 2019. It also lists those with development boundaries in neighbourhood plans, including Burwash. An accompanying note explains that “Until such time as Neighbourhood Plans are in place, the development boundaries of the 2006 Rother District Local Plan continue to be saved, even though in some cases, they may not accommodate the housing requirements of the Core Strategy”.

Delivery of housing in Burwash

27. There has been a persistent under-supply of housing land within Rother District for a number of years. The Council can only demonstrate 2.87 years supply, whereas the national requirement is a 5 year supply. In August 2020, the Council was required to publish a Housing Delivery Test Action Plan because its housing delivery over the past three years was less than 95% of the housing requirement.
28. The Strategic Housing Land Availability Assessment carried out in 2013 (“SHLAA 2013”) identified potential sites for development in Burwash, colour coding them red (not suitable), amber (required further investigation) and green (suitable for development). Only three green/amber sites were identified. Those sites were Strand Meadow (for 17 units at that time); The Old Laundry, which eventually produced 4 units; and Shrub Wood (a proposed development of 42 units was refused planning permission).
29. In response to the request in the Examiner’s clarification note, the Council submitted a statement, dated 10 March 2021, which set out the position concerning the delivery of housing in Burwash. I summarise the statement at paragraphs 30 to 33 below.
30. The statement identified the Core Strategy figure of 52 dwellings on large sites (6 or more dwellings) in Burwash. Sites comprising less than 6 dwellings, and Exception Sites, were accounted for elsewhere, and therefore did not count towards the figure. Completions in the smaller settlements of Burwash Common and Burwash Weald were listed separately in Figure 12 of the Core Strategy (with a zero figure as they are not service villages) and so did not count towards the figure for Burwash Village, though they would count towards the rural area figure of 1,670 in the villages (Policy RA1: Villages, paragraph (v)).
31. In the period 2013 – 2018, there were no completions on large sites in Burwash. There were five net dwellings completed on small sites. There were also ten dwellings completed on an affordable housing ‘Exception Site’ outside the development boundary of Burwash. There were nine net dwellings completed on small sites within Burwash Common, Burwash Weald, and the wider parish area.
32. Since 1 April 2018, there have been no completions on large sites within Burwash. There have been a further three net dwellings completed on small sites in Burwash, and a further two net dwellings within Burwash Weald and the wider parish area.
33. The statement recorded the grant of outline planning permission for 30 dwellings on the Site on 7 March 2018, which reduced the residual requirement to 22 dwellings in Burwash. However, a reserved matters application was refused by the Council on 23 February 2021. The outline permission was due to expire on 8 March 2021.

34. I turn now to consider the recent planning history of the Site in further detail. The grant of outline planning permission to the Claimant, on 7 March 2018, was for a proposed residential development, not to exceed 30 dwellings, with access from Strand Meadow (a road name in an existing development). Numerous pre-commencement conditions were attached to the grant of permission. The outline planning permission was based on the inclusion of 40% affordable homes, in accordance with Policy VL1. The parties entered into an agreement under section 106 TCPA 1990 with numerous obligations, including provision of the full quota of affordable homes, a footpath, recreational land and highway works.
35. On 28 June 2018, the Claimant applied for full planning permission, including *inter alia* removal of the affordable homes obligation, on the ground that the cost of developing the land was higher than anticipated, and so the affordable homes were no longer viable. On 22 January 2019, the Council refused the application on the grounds that (1) the design of the proposed development was uncharacteristic and out of context with the historic settlement of Burwash and the High Weald AONB; and (2) the Claimant had not entered into a section 106 agreement.
36. The Claimant appealed. Shortly before the appeal, the Claimant entered into a planning obligation with the Council which addressed the second reason for refusal. In a decision letter (“DL”) dated 25 July 2019, the appeal was dismissed by an Inspector, appointed by the Secretary of State, on the ground that it would significantly harm the character and appearance of the area, and the landscape of the AONB, which it would fail to conserve or enhance, contrary to Core Strategy policies and the Framework at paragraph 172 (DL 15 and 26). The Inspector considered it was unlikely that the scheme would ever be able to provide affordable housing (DL 29). The Inspector considered that the delivery of new homes was a notable benefit which would help to boost the supply of housing but this could be achieved by a more sensitively designed proposal (DL 28 and 32).
37. On 2 October 2020, the Claimant submitted a reserved matters application. The Council’s Planning Committee refused the application, by a decision notice dated 23 February 2021, on the grounds that the layout, height, scale and mass of the proposed dwellings, along with the proposed parking, were inappropriate. The proposal failed to respect the rural location of the Site, and neither conserved nor enhanced the landscape character and scenic beauty of the AONB. The Claimant has appealed against this decision, and the appeal is pending.
38. On 24 February 2021, the Claimant submitted another reserved matters application, in similar terms to the previous one. This had the effect of preventing the expiry of the outline planning permission on 8 March 2021.

The BNDP

39. In January 2016, the PC agreed to proceed with a neighbourhood plan for the entire parish, including Burwash, Burwash Weald and Burwash Common.
40. The decision was formally registered by the Council on 7 June 2016.

41. The BNDP Steering Group was formed, along with four sub-groups covering the following aspects: environment; infrastructure, including leisure, economy and tourism; housing; and consultation and communication. Planning consultants (Moles Consultancy) were appointed.
42. Through an extensive programme of questionnaire surveys, public consultations, workshops, village events, emails and meetings, the Steering Group was able to gather the views of residents and local businesses on what they wished to see for the future of their parish.
43. Moles Consultancy requested a strategic environmental assessment (“SEA”) screening opinion, indicating that the draft plan would include site allocations. In a letter to Moles Consultancy, dated 19 October 2018, the Council set out the responses of the statutory environmental bodies and advised that a SEA should be undertaken because the BNDP would allocate sites and form part of the development plan; the area is within the High Weald AONB; the historic core of Burwash is a conservation area; and there is a rich historic legacy in many listed buildings. A SEA was duly carried out.
44. The pre-submission draft plan was approved by the PC, and the pre-submission consultation was then launched on 30 May 2019. It ran until 18 July 2019. It was widely circulated, advertised and promoted. Statutory bodies and other organisations were consulted. A total of 539 responses were made either through the website or the dedicated BNDP collection boxes in the village.
45. The Claimant was on the list of consultees and made representations objecting to the pre-submission draft plan in July 2019, on the grounds that it did not meet the basic conditions because of the lack of allocations or proposals for housing, in particular the failure to allocate the Site for housing, and the failure to clarify whether or not the development boundary would need to be extended to accommodate the new dwellings required by the Core Strategy. The Council made formal comments, dated 18 July 2019, indicating that sites should be allocated for housing to ensure that the draft plan met the basic conditions.
46. There were over 1,000 comments which were all individually considered and analysed by the Steering Group. In the light of the responses, the PC made a number of amendments to the draft plan.

Submission stage

47. The PC submitted the submission version of the draft plan to the Council on 27 August 2020, with a consultation statement. It included a range of policies for the future of Burwash, however I need only consider those which are in issue in this claim. The draft plan identified the delivery of new housing as extremely important. It set out the results of an extensive review of housing needs and potential development sites. The plan explained that its policies reflected the dual aspirations of meeting local housing needs and protecting the historical character of the village, and the AONB. The plan accepted the housing target of 52 dwellings in Burwash, as set out in the Core Strategy, together with the DSA 2019. However, the plan was unable to make allocations because, in the view of the community, the two main sites on which the target was based (the Site and the Shrub Wood Meadow/Denton Homes site) were not suitable, and this had been

confirmed by the dismissal of the developers' applications. The existing development boundaries were retained, as no allocations were made.

48. The Council undertook a public consultation on the draft plan between 11 September and 6 November 2020. Representations were received from a range of organisations and 28 local residents (see the Examiner's Report at paragraphs 4.8 and 4.9).
49. On 19 October 2020, the Claimant responded to the consultation, and made representations, objecting to the proposed plan. The primary objection was that it did not meet the basic conditions because it failed to identify or allocate any housing sites (including the Claimant's Site) in accordance with the strategic policies in the development plan, and failed to expand the development boundary to allow for new housing. It was therefore contrary to the Framework and the Guidance.
50. The Council made its own representations to the Examiner on the draft plan. In preparation for this, an officer's report was submitted to the Cabinet meeting on 2 November 2020 advising members that the draft plan did not comply with basic condition (e) because it was not in general conformity with the strategic policies in the development plan. The officer's report identified the relevant strategic policies as those in the Core Strategy (not the policies in the Rother DLP 2006 or the DSA 2019). The report proposed that the Council send a representation to the Examiner in the terms set out in representation 1 of Appendix 1 to the report. Key extracts are set out below:

“1. General comments on the Neighbourhood Plan itself

.....

When ... BPC submitted their application for Burwash parish to be designated a Neighbourhood Area, it was agreed that the allocation of housing sites to meet the target set out within the adopted Core Strategy was 'scoped' into the remit of the Neighbourhood Plan. However, the Burwash NDP does not allocate any housing sites to meet the target of 52 dwellings (seen as a *minimum* figure), nor does it make any amendments to the existing development boundary to accommodate the outstanding figure for the settlement of Burwash”

....

“...The residual amount of housing of 22 dwellings to be allocated is highly likely to require a revised development boundary.”

“There are two SHLAA sites, Strand Meadow and Shrub Lane (which were categorised as green and amber sites respectively) which have not been allocated with the Plan and there is no clear evidence to support this decision....”

.....

“Notwithstanding the comments made above that the BNP does not meet the basic conditions as stated previously in the RDC Regulation 14 comments, in the absence of allocations set out in the NDP, planning applications for development within Burwash Parish will be considered in the context of Policy OVE1 in the DaSa which states” *[The text of the policy is set out at paragraph 23 of my judgment]*

“Including allocations within the Neighbourhood Plan ensures positive planning for development in the area and does not leave the parish vulnerable to speculative planning applications. Having a Neighbourhood Plan, which includes housing allocations to meet the outstanding target, offers far better protection from speculative development than without it. When making the application to undertake the Neighbourhood Plan, BPC opted to include allocations within the Plan and as such no respective housing allocations were considered within the District Council’s now adopted DaSA Local Plan. This leaves a ‘planning void’ in Burwash parish, with no possible positive plan-led remedy to fill this void....”

51. The Steering Group responded to the OR in a letter to Cabinet Members, dated 31 October 2020, stating:

“We are writing to you because we are very concerned that the Cabinet has been asked to make a decision on Monday 2nd November 2020 on the basis of a report and appendix which are inaccurate and, if adopted would leave the District Council at risk.

We have not provided a line by line commentary on the report and Appendix but have kept this letter to the core areas of real concern, which are as follows:

1. Failure to meet the basic conditions

RDC Officers claim that the Plan does not meet the basic conditions because

- a. the Plan does not allocate sites
- b. the Plan does not seek to amend the existing development boundaries to make up the shortfall.

Concerning a. above:

The guidance issued by the Ministry of Housing, Communities & Local Government confirms that:

“The scope of neighbourhood plans is up to the neighbourhood planning body. Where strategic policies set out a housing

requirement figure for a designated neighbourhood area, the neighbourhood planning body does not have to make specific provision for housing, or seek to allocate sites to accommodate the requirement.”

- Our own consultant confirmed this position and we have also had this confirmed by another consultant who has advised on over 20 Neighbourhood Plans.
- Additionally, at a meeting held on 5th November 2018 an RDC Officer informed the Burwash NDP Steering Group representatives and a District Councillor that we did not have to allocate any sites but did have to accept the housing target.
- The Burwash NDP is clear in its acceptance of the housing target of 52 homes.
- Para 104 of Planning Practice Guidance contains further advice which supports this position.

In terms of b. above:

- There is no requirement to alter existing development boundaries in order to make up any housing target shortfall.
- It is clear that as there is no requirement to have to allocate sites in order to accommodate the housing target then it cannot mean that boundary changes are required in order to prevent a shortfall in the housing target.

It is also clear that in providing their opinion on whether the Plan meets the basic conditions that RDC Officers have ignored the following guidance issued by the Ministry for Housing, Communities & Local Government on this matter.

“Does the local planning authority consider whether a neighbourhood plan or Order meets the basic conditions when a neighbourhood plan or Order is submitted to it?”

When a draft neighbourhood plan or Order is submitted to a local planning authority the authority is considering the draft plan or order against the statutory requirements set out in paragraph 6 of Schedule 4B of the Town and Country Planning Act 1990 (as amended). A local planning authority has to be satisfied that a basic condition statement has been submitted but it is not required to consider whether the draft plan or order meets the basic conditions. It is only after the independent examination has taken place and after the examiner’s report has been received that the local planning authority comes to its formal view on whether the draft neighbourhood plan or Order meets the basic conditions. The local planning authority should

provide constructive comments on an emerging plan or Order before it is submitted.”

- RDC Officers have therefore exceeded these requirements by producing this Representation which includes their views that the Plan does not meet the basic conditions when the guidance is clear that this should not be considered until after the Examiner’s report has been received.

On this critical issue RDC Officers have not only misinformed the Cabinet about the need for allocation of sites and to amend existing development boundaries but are also looking to influence the Examiner by including their assessment in advance of the Examiner’s report and contrary to Government guidance.

2. DaSa

The RDC report identifies a planning void created by the failure to allocate sites and the omission of sites for Burwash within the DaSa. This leads the Cabinet to believe that RDC Officers were unaware by the time that the DaSa was being written and consulted upon that Burwash would not be allocating any sites. This is completely incorrect.

On 5th November 2018 RDC Officers were advised by representatives from the Burwash NP Steering Group at a meeting held at the Town Hall, also attended by Cllr. Kirby–Green, that Burwash NDP would not be allocating any sites within the Plan but did accept the housing target of 52 homes. An RDC Officer advised us at that meeting that there was no requirement for neighbourhood plans to include the allocation of sites.

On 15th April 2019, an RDC Officer wrote to our NP consultant requesting an update on the local NP’s she was assisting with, including Burwash, so that RDC could report to the Inspector conducting the EIP hearings on the DaSa. The specific hearing dealing with the DaSa and its relationship with the Neighbourhood Plans was set for 8th May 2019.

Our consultant responded to this RDC Officer cc other Officers on 24th April 2019 stating :

“Sorry for the delayed response. Please see below an update on the proposed timescales for the groups that I am working with. I trust that this will help with your EIP.

Burwash is the only plan not allocating sites.”

Further into this email she set out a further section on Burwash

“Burwash

- Sites: the plan does not allocate any sites. Although site assessment work was done, the group does not want to allocate sites due to the response from consultation but instead want to agree to the principle of the number of houses allocated to the parish”

These are just two examples of how RDC Officers were advised of the intention not to allocate sites, this was also confirmed at other meetings and in the SEA submission.

We note that modifications and further consultation on the DaSa followed the public hearings with the Inspectors final report being received by RDC on the 11 November 2019.

It is not clear why RDC Officers did not act upon the advice provided that the Burwash NDP would not be allocating any sites. This may have been a significant error or because Officers took the view that they could continue to apply pressure to enforce the allocation of sites. Whatever the thinking RDC Officers are themselves responsible for the planning void.

.....”

Denton Homes and Strand Meadow

a) The application for 42 new units by Denton Homes was overwhelmingly rejected by the Planning Committee in 2017... the only grounds for objection permitted was damage to the ANOBThe developer subsequently appealed but then withdrew citing the Protected Landscape Policy

It is difficult to understand how a smaller development at the same site would not, equally, be damaging to the AONB.

b) The application for 30 units at Strand Meadow was rejected unanimously by the Planning Committee in January 2019 and also turned down on Appeal in July 2019.....

You will recall speaking out against these developments when they came to the Planning Committee because of their impact on the AONB and the unsuitability of these schemes and you rightly mentioned your role in the Strand Meadow refusal within the Liberal Democrat election material. RDC Officers have suggested in their report that these very schemes should now be included within our Plan when they have already been rejected by the community, by the Planning Committee and in the case of Strand Meadow by Government Inspector.

5. Conclusion

.....

This Plan has been produced in line with the core principles of the Localism Act.

Extensive community consultation has been carried out in order to produce this Plan which reflects the views of the community. This is evidenced by over 500 responses from residents during our Regulation 14 consultation. Of these, over 94%, supported the Plan.

From this it is clear that the community accepts the specific housing target of 52 new homes.

Burwash Parish Council brokered the discussions which brought forward the Hastoe Exception Site in Shrub Lane which produced 10 affordable Passivhaus homes for local people. It also actively engaged with Amicus Horizon to ensure they followed through with the proposals to redevelop Rectory Court to provide 15 affordable homes of older persons housing and 4 shared ownership homes which sit comfortably within this historic High Street Conservation area setting. These schemes were widely supported by the community.....”

52. At the meeting on 2 November 2020, the Cabinet did not accept the officer’s proposed representation 1 to the Examiner. Instead, Members resolved that representation 1 of the officer’s draft representations be deferred for further consideration by the Cabinet Portfolio Holder for Strategic Planning, in consultation with officers to consider the comments raised by the Steering Group in the letter of 31 October 2020. Cabinet also authorised the Chief Executive to consider any potential modifications to the Neighbourhood Plan that were raised through the examination process. The Minutes recorded as follows:

“Councillor Vine-Hall, Cabinet Portfolio Holder for Strategic Planning acknowledged the amount of work and effort that had gone into the production of the BNP by the ...Steering Group and Council Planning officers. Unfortunately, mutually poor communication between the ...Steering Group, Burwash Parish Council and the Council had led to neither the BNP nor the Development and Site Allocations Local Plan allocating sites in line with the Core Strategy....”

53. The Council’s representations were duly sent to the Examiner on 6 November 2020. The key parts of the Council’s revised representation 1 read as follows:

“The supporting text to the Burwash Neighbourhood Plan places a strong emphasis on local support for development, the target of 52 dwellings for Burwash is acknowledged and this is welcomed by the Council. However the NDP does not make any amendments or accept that amendments may need to be made to the existing development boundary to accommodate the

outstanding figure for the settlement of Burwash which leaves the LPA with the question of where future development will be located given that no suitable sites were identified within the boundary during a site assessment process earlier in the planning process. The residual amount of housing of 22 dwellings² to be allocated, taking into account existing commitments, is more than likely to require a revised development boundary.

As the Burwash Neighbourhood Plan does not allocate sites, applications within Burwash Parish will continue to be considered in the context of Policy OVE1 in the DaSA ...

During the progress of the Neighbourhood Plan, BPC opted to change from a plan which allocated sites to one which did not allocate sites and this decision overlapped with the advanced stages of submission and examination of the DaSA Local Plan, therefore no Burwash housing allocations were considered within the Council's now adopted DaSA Local Plan. The District Council is now in the early evidence gathering stages of a new Local Plan. Given Burwash's positive acknowledgement of its housing target and that the outstanding quantum of development affected is 22 dwellings which is de-minimus in the context of the overall target in adopted Core Strategy and RDC would not wish this void to impact on a successful examination of the BNP. Policy OVE1 in the adopted DaSA ensures that appropriate sites can come forward in Burwash. In any event, to support the new

Local Plan (2019-2039) Rother has recently launched through its HELAA a 'call for sites' (October 2020) which will consider housing potential across the District."

54. The Council's representations on Policy GP04 Development Boundaries, which were unaltered from the officer's draft, stated:

"5. Policy GP04 Development Boundaries

This policy does not conform with strategic policies in the Core Strategy. The development boundary as set out in the BNP replicates the 2006 development boundary for Burwash and does not make provision for additional development to accommodate

² Taken from the minimum target of 52 dwellings for Burwash village minus the extant outline planning permission at Strand Meadow of 30 dwellings, thus leaving a residual requirement of 22 dwellings. Whilst it is acknowledged that the BNP and a considerable number of residents object to development on this site and the site has been subject to a refusal of full planning permission, it is subject to an extant allocation in the 2006 Local Plan and an outline permission (RR/2017/582/P) exists. It therefore must be accepted as contributing to the overall target of 52 dwellings as the principle of development is established here.

the outstanding housing target in the Local Plan, and therefore needs to be amended. The policy wording makes it clear that, excluding essential operational requirements of utility infrastructure providers, development will generally not be supported outside development boundaries and whilst that is the purpose of development boundaries, by not making any amendments from the 2006 boundary the plan has not taken a positive approach to development.”

55. At the hearing before me on 13 January 2022, Mr Clay for the Claimant referred to the ‘Disclosure of Interests’ in the Minutes for the meeting of 2 November 2020 in which Councillor Vine-Hall said he had “a personal interest as he co-ordinated Rother Neighbourhood Plan Forum” and questioned the propriety of Councillor Vine-Hall’s involvement in the decision-making process. The Council has explained that Rother Neighbourhood Plan Forum is an informal self-help group for towns and parishes preparing Neighbourhood Plans in Rother, which meets one or two times a year. Neither the forum nor any members are involved in any other Neighbourhood Plan other than their own, and that is also the case for Councillor Vine-Hall. Councillor Vine-Hall co-ordinates the Forum in his capacity as Chair of Sedlescombe Parish Council.
56. In my judgment, there was no impropriety on the part of Councillor Vine-Hall. His role in the Forum did not give rise to any conflict of interest. Furthermore, as he is Lead Member on Strategy and Planning and Chairman of the Planning Committee, he was the obvious choice to take on the delicate task of revising representation 1, in discussion with officers and in the light of the Steering Committee’s representations, to give effect to Cabinet’s decision to support the BNDP.

Examination stage

57. In February 2021, the Council appointed Mr Andrew Ashcroft BA (Hons) MA DMS MRTPI, Director of Andrew Ashcroft Planning Ltd, as the Examiner to carry out an independent examination of the draft BNDP. Mr Ashcroft possesses the appropriate qualification and experience to undertake this role. He has over 35 years’ experience in various local authorities as either Head of Planning or Service Director level. He is a chartered town planner, and has significant experience of undertaking other neighbourhood plan examinations and health checks. He is a member of the Royal Town Planning Institute and the Neighbourhood Planning Independent Examiner Referral Service.
58. The initial version of the Examiner’s report was published on the Council’s website on 19 April 2021. The Examiner recommended a number of modifications to the draft plan. Subject to the incorporation of those modifications, he concluded that the basic conditions were met, and he recommended that the draft plan should proceed to a referendum.
59. On 4 May 2021, the Claimant’s consultant, Mr Pickup, sent by email a detailed letter to the Council contending that the Examiner’s report was factually inaccurate in certain respects, and legally flawed.

60. The Examiner revised his report in the light of the Claimant's comments. On 14 May 2021, Ms Edwards, Senior Planning Officer at the Council, sent an email to the Claimant stating:

“RDC has discussed at length the issues you raised with the examiner, resulting in the examiner's report being amended to address the factual errors that were highlighted. Please find a copy of the report attached; this has been published to the relevant page on the RDC website.”
61. The revised version of the Examiner's report was published on the Council's website on 13 May 2021. The Examiner recommended a number of modifications to the draft plan. Subject to the incorporation of those modifications, he concluded that the basic conditions were met, and he recommended that the draft plan should proceed to a referendum.
62. The Examiner addressed the difficulty that had arisen by the absence of any allocations, given that the DSA 2019 had not made any allocations in Burwash either. He accepted that the decision not to allocate the Site in the draft plan was appropriate, in view of the refusals of the Claimant's applications. After careful consideration, he concluded that Policy OVE1 of the DSA 2019 should be introduced into the draft plan, as an appropriate default policy to apply to planning applications which seek to address the strategic requirement for housing (as recommended in the Council's representations of 6 November 2020).
63. The Examiner also recommended that the development boundary policy be modified (having regard to national policy and so to conform with strategic policies in the development plan), so that it took a more balanced approach towards development which may be supported in the countryside. He noted that the majority of the Site was already within the development boundary, and decided on balance that it was appropriate not to extend the boundary to include the small portion of the Site which lay outside the boundary.
64. The officer's report, dated 6 July 2021, referred back to the earlier officer's report for the meeting of Cabinet on 2 November 2020, and the representations which the Council sent to the Examiner on 6 November 2020. It set out the Examiner's proposed modifications, and his conclusion that the BNDP did meet the necessary basic conditions. The report advised that the Council's planning officers and the PC accepted the Examiner's conclusions, and therefore the recommendation to the Chief Executive was that he endorse the Examiner's recommendations, and put the modified version of the BNDP forward for referendum.
65. On 9 July 2021, the Council's Chief Executive, exercising delegated authority, made the Decision that the Examiner's recommended modifications should be accepted, and that the BNDP should proceed to a Neighbourhood Planning Referendum on 16 September 2021.
66. The Council subsequently agreed to defer the referendum pending the outcome of this claim for judicial review.

Statutory framework

67. The statutory provisions governing the making of neighbourhood development orders and plans were introduced into the TCPA 1990 and the Planning and Compulsory Purchase Act 2004 (“the PCPA 2004”) by the Localism Act 2011.
68. A “neighbourhood development plan” is a plan which “sets out policies ... 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) PCPA 2004.
69. A “neighbourhood development plan” is part of the statutory development plan for the area it covers: section 38(3)(c) PCPA 2004.
70. Section 38B PCPA 2004 provides:
- “(1) A neighbourhood development plan—
- (a) must specify the period for which it is to have effect,
- (b) may not include provision about development that is excluded development, and
- (c) may not relate to more than one neighbourhood area.
- (2) Only one neighbourhood development plan may be made for each neighbourhood area.
- [(2A) Subsections (1)(c) and (2) are subject to section 61G(6D) of the principal Act (as applied by section 38C(5A) of this Act).]
- (3) If to any extent a policy set out in a neighbourhood development plan conflicts with any other statement or information in the plan, the conflict must be resolved in favour of the policy.
- (4) Regulations made by the Secretary of State may make provision—
- (a) restricting the provision that may be included in neighbourhood development plans about the use of land,
- (b) requiring neighbourhood development plans to include such matters as are prescribed in the regulations, and
- (c) prescribing the form of neighbourhood development plans.
- ...”
71. 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.

72. The process for making neighbourhood development plans is set out in Schedule 4B TCPA 1990 and the Neighbourhood Planning (General) Regulations 2012 (“the 2012 Regulations”).
73. As the Supreme Court explained in *R (Oyston Estates Ltd) v Fylde BC* [2021] 1 WLR 2794 at [2], the making of a neighbourhood development plan requires the taking of what may loosely be described as seven consecutive steps, mainly by the relevant local planning authority. They are, in summary:
- i) designating a neighbourhood area;
 - ii) pre-submission preparation and consultation;
 - iii) submission of a proposal;
 - iv) consideration by an independent examiner;
 - v) consideration of the examiner's report;
 - vi) holding a local referendum;
 - vii) making the plan.
74. 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.
75. At pre-submission stage, the draft neighbourhood development plan, once prepared, must be publicised and consulted upon, with details of how to make representations (regulation 14 of the 2012 Regulations). After consideration of the representations, it then has to be submitted to the local planning authority, with *inter alia* a consultation statement (regulation 15 of the 2012 Regulations).
76. 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).
77. 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. Those requirements do not include an assessment as to whether the basic conditions are met. Regulation 17 of the 2012 Regulations makes provision for the documents to be supplied to the Examiner, which include a copy of any representations made in accordance with regulation 16 (regulation 17(d)).
78. 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 TCPA 1990, paragraph 8(1)(a).
79. 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,

(b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,

(c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,

(d) the making of the order contributes to the achievement of sustainable development,

(e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),

(f) the making of the order does not breach, and is otherwise compatible with, retained 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.”

80. A neighbourhood plan examination is normally an entirely written process. Paragraph 9 of Schedule 4B TCPA 1990 provides:

“(1) The general rule is that the examination of the issues by the examiner is to take the form of the consideration of written representations.

(2) But the examiner must cause a hearing to be held for the purpose of receiving oral representations about a particular issue at the hearing—

(a) in any case where the examiner considers that the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case, or

(b) in such other cases as may be prescribed.

.....”

81. Paragraph 10 of Schedule 4B TCPA 1990 makes provision for the duties of the independent Examiner as follows:

“(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
 - (b) comply with the provision made by or under sections 61E(2), 61J and 61L.
- (5)
- (6) The report must -
- (a) give reasons for each of its recommendations, and
 - (b) contain a summary of its main findings.
- (7) The examiner must send a copy of the report to the qualifying body and the local planning authority.
- (8) The local planning authority must then arrange for the publication of the report in such manner as may be prescribed.”

82. After receiving an Examiner’s report, the local planning authority must consider each of the recommendations made and decide what action to take.

83. Paragraph 12 of Schedule 4B TCPA 1990 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) The order on which the referendum is ...to be held is the draft order subject to such modifications (if any) as the authority consider appropriate.

(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,

(d)

(e) modifications for the purpose of correcting errors.

(7) – (9)

(10) In any case where the authority are not satisfied as mentioned in sub-paragraph (4), they must refuse the proposal.

(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.

(12) The Authority must send a copy of the matters required to be published to –

(a) the qualifying body, and

(b) such other persons as may be prescribed.”

84. Paragraph 13 of Schedule 4B TCPA 1990 provides:

“(1) If –

(a) the local planning authority propose to make a decision which differs from that recommended by the examiner, and

(b) the reason for the difference is (wholly or partly) as a result of new evidence or a new fact or a different view taken by the authority as to a particular fact,

the authority must notify prescribed persons of their proposed decision (and the reason for it) and invite representations.

(2) If the authority consider it appropriate to do, they may refer the issue to independent examination.

.....”

85. Regulation 17A(2) of the 2012 Regulations sets out the persons prescribed for the purposes of paragraph 13(1), namely, the qualifying body, any person whose representation was submitted to the examiner, and any consultation body. Regulation 17 also sets out the timetable to be followed.

86. When the authority has made its decision, it must be published, with reasons, in the manner prescribed by regulation 18 of the 2012 Regulations.

87. Paragraph 14 of Schedule 4B TCPA 1990 makes provision in regard to the holding of a referendum, as a result of a local authority’s decision under paragraph 12(4) of

Schedule 4B TCPA 1990. 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 retained EU obligation or any of the Convention rights”: section 38A(4) and (6), PCPA 2004.

88. Section 61N TCPA 1990 makes provision for legal challenges to neighbourhood development plans by way of judicial review. The challenge in this claim 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.).

Policy and guidance

89. The Framework sets out the Government’s planning policies, and how these should be applied. It provides a framework within which locally-prepared plans for housing and other development can be produced (Introduction, paragraph 1). The relevant policies are set out in Appendix 1.
90. The Guidance is guidance (not policy), which is intended to support the policies in the Framework. Relevant extracts are set out in Appendix 1.

Case Law

Legal challenges under section 61N(2) TCPA 1990

91. A challenge under section 61N(2) TCPA 1990 to a decision of the local planning authority approving recommendations for a neighbourhood 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.
92. A legal challenge cannot involve an impermissible review of the planning merits. 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.
93. 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, the Court of Appeal has applied the same principle to examiners of neighbourhood plans (*R (Lochailort Investments Ltd) v Mendip DC* [2020] EWCA Civ 1259, per Lewison LJ, at [42]). In my judgment, it is appropriate to apply the principle to Mr Ashworth, given his qualifications and experience.
94. It is well-established that an inspector’s 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 (*South Somerset District Council v Secretary of State for the*

Environment (1993) 66 P & CR 83, per Lord Hoffmann at 84; *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, per Sir Thomas Bingham MR 271-2). In my view, similar principles should apply to an Examiner's Report, whilst taking account of the different functions and procedures applicable to the examination of neighbourhood plan and planning appeals.

The statutory requirements for a neighbourhood plan

95. The Examiner, and in its turn the local planning authority, must satisfy themselves that the draft neighbourhood plan meets the specified statutory requirements, in particular the basic conditions set out in paragraph 8(2) of Schedule 4B TCPA 1990.
96. The relevant legal principles were set out by Holgate J. in *R (Crownhall Estates Limited) v Chichester District Council* [2016] EWHC 73 (Admin), Holgate J. summarised the relevant principles in the following way:

“29. The relevant principles may therefore be summarised as follows:-

i) The examination of a neighbourhood plan, unlike a development plan document, does not include any requirement to consider whether the plan is “sound” (contrast s. 20(5)(b) of PCPA 2004) and so the requirements of soundness in paragraph 182 of the NPPF do not apply. So there is no requirement to consider whether a neighbourhood plan has been based upon a strategy to meet “objectively assessed development and infrastructure requirements”, or whether the plan is “justified” in the sense of representing “the most appropriate strategy, when considered against reasonable alternatives” and based upon “proportionate evidence”;

ii) Where it is engaged, the basic condition in paragraph 8(2)(e) of schedule 4B to TCPA 1990 only requires that the draft neighbourhood plan *as a whole* be in “general conformity” with the strategic policies of the adopted development plan (in so far as it exists) *as a whole*. Thus, there is no need to consider whether there is a conflict or tension between one policy of a neighbourhood plan and one element of the local plan;

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”.

iv) Paragraphs 14, 47 and 156 to 159 of the NPPF deal with the preparation of local plans. Thus local planning authorities responsible for preparing local plans are required to carry out a strategic housing market assessment to assess the full housing needs for the relevant market area (which may include areas of neighbouring local planning authorities). They must then ensure that the local plan meets the full, objectively assessed needs for the housing market area, unless, and only to the extent that, any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF *taken as a whole*, or *specific* policies in the NPPF indicate that development should be restricted (*St Albans City Council v Hunston Properties* [2013] EWCA Civ 1610; *Solihull Metropolitan B.C. v Gallagher Estates Ltd* [2014] EWCA Civ 1610).

v) Those policies in the NPPF (and hence the principles laid down in *Hunston* and *Gallagher* in the interpretation of those policies) do not apply to the preparation by a qualifying body of a neighbourhood plan. Although a neighbourhood plan may include policies on the use of land for housing and on locations for housing development, and may address local needs within its area, the qualifying body is not responsible for preparing strategic policies in its neighbourhood plan to meet objectively assessed development needs across a local plan area. Moreover, where the examination of a neighbourhood plan precedes the adoption of a local plan, there is no requirement to consider whether it has been based upon a strategy to meet objectively assessed housing needs.”

97. In *Lochailort*, Lewison LJ gave further guidance, as follows:

“4. The role of an examiner differs from that of an inspector considering a development plan document, such as a district development plan. This was explained by Holgate J in *R (Maynard) v Chiltern DC* [2015] EWHC 3817 (Admin). He pointed out at [13] (2):

“whereas ... a local plan needs to be “consistent with national policy” an Examiner of a neighbourhood plan has *a discretion to determine whether it is appropriate* that the plan should proceed having regard to national policy. The limited role of an Examiner to have *regard* to national policy when considering a draft policy applicable to a small geographical area should not be confused with the more investigative scrutiny required by PCPA 2004 in order for an Inspector examining a draft Local Plan to determine whether such a plan is “sound”.”
(Original emphasis)

...

6. As we have seen, a neighbourhood development plan must have regard to national policies and advice contained in guidance issued by the Secretary of State. A statutory requirement of this kind requires a decision maker not only to take national policies into account but also to observe them and depart from them only if there are clear reasons for doing so: *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 P & CR 334, 342; *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 at [47]. Accordingly, although, as Holgate J rightly said, an examiner must decide whether it is appropriate for a plan to proceed having regard to national policy, a departure from that policy must be explained.

7. As is well-settled, the interpretation of a planning policy is a question of law for the court. It is to be contrasted with the exercise of planning judgment: *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13, [2012] PTSR 983. The exercise of planning judgment has been described as forbidden territory, into which the court may not stray: *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 (Admin) at [94].”

98. In *BDW Trading Limited v Cheshire West and Cheshire Borough Council* [2014] EWHC 1470 (Admin), the Claimant challenged the examination of a draft neighbourhood plan which contained a policy limiting the size of new housing sites. The criticisms included a failure to consider whether constraint policies in the draft plan were compatible with the Framework (in particular paragraph 47) and a failure to consider whether there was a proper evidential basis to support the draft policy.
99. Supperstone J. rejected the Claimant’s submissions, at [82] – [85]. He held that the criticisms failed to appreciate the limited role of the examination of a neighbourhood plan, and confused them with the more investigative scrutiny of an inspector charged with considering whether a Local Plan is “sound”. Whereas under paragraph 182 of the Framework a local plan needs to be “consistent with national policy”, an examiner of a neighbourhood plan has a discretion to determine whether it is “appropriate” that the plan should proceed having regard to national policy. The examiner had been entitled to conclude that the draft plan had regard to the Framework because the need to plan positively for growth was acknowledged and the relevant policy did not place a limit on the total amount of housing to be built.
100. Supperstone J. explained that the examiner of a neighbourhood plan does not have to consider whether the plan is “justified” in the sense used in paragraph 182 of the Framework (i.e. that the plan is “the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence”). Therefore, the examiner was not obliged to enquire into the justification for the promotion of a 30-dwelling limit.
101. In *R (DLA Delivery Ltd) v Lewes District Council* [2017] EWCA Civ 58; [2017] PTSR 949, Lindblom LJ considered the purpose behind the basic condition of “general conformity”:

“22. . . . The provisions of Part 2 of the 2004 Act envisage a “local development scheme” comprising “development plan documents”, which will together form the statutory development plan for the local planning authority’s area (section 17(3) of the 2004 Act). A neighbourhood development plan, once made, will be a constituent part of the development plan (section 38A(2) of the 2004 Act). As one would expect, the statutory scheme seeks to ensure an appropriate degree of consistency between a neighbourhood development plan and the strategy of the extant, statutorily adopted development plan. That is the essential purpose of the “basic condition” in paragraph 8(2)(e). Section 13 of the 1990 Act requires local planning authorities to keep their development plan documents under review. If a neighbourhood development plan has been made and the local planning authority later produces a development plan document containing new “strategic policies”, that development plan document will, under section 38(5) of the 2004 Act, prevail over any inconsistent policies in the neighbourhood development plan. And if a policy in a neighbourhood development plan is not, or ceases to be, up-to-date, this will be a material consideration in a development control decision, and may justify departing from that policy.

23. Nor, in my view, does the language of paragraph 8(2)(e) bear the interpretation urged upon us by Mr Young. The true sense of the expression “in general conformity with the strategic policies contained in the development plan” is simply that if there are relevant “strategic policies” contained in the adopted development plan for the local planning authority’s area, or part of that area, the neighbourhood development plan must not be otherwise than in “general conformity” with those “strategic policies”. The degree of conformity required is “general” conformity with “strategic” policies. Whether there is or is not sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment (see the judgment of Laws L.J. in *Persimmon Homes and others v Stevenage Borough Council* [2006] 1 W.L.R. 334, at pp.344D-345D and pp.347F-348F).”

102. In *Persimmon Homes and others v Stevenage Borough Council* [2006] 1 WLR 334, the Court of Appeal considered the statutory requirement for a local plan to be “in general conformity” with the structure plan. Laws LJ held:

“21. It is first necessary to identify with some precision the nature of the exercise which the court under s.287 is being asked to undertake. As I have said, s.287 creates a form of statutory judicial review. That being so, (a) so far as the question whether a local plan provision is “in general conformity” with the structure plan involves any issue of statutory construction, it is the court's duty and prerogative to decide for itself what is the correct construction; but (b) so far as the question involves the

application of judgment, or expert or mature opinion, to the circumstances of the case, the court's only role is to supervise the exercise of those faculties by the relevant public decision-maker (here the SBC) according to the conventional public law test of rationality, generally referred to as the *Wednesbury* principle (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).

22. In my judgment issues of both kinds arise. It is therefore first necessary for the court to ascertain the correct construction of the expression “general conformity”. There is then the question whether the requirement is fulfilled in the particular case. That is not itself an issue of construction, although any proper answer to it must proceed upon a correct interpretation of the relevant structure and local plan policies: as to which, in this case, there is no dispute or difficulty. The question whether there is general conformity between the plans is a matter of degree and, as it seems to me, of planning judgment. As such its resolution on the merits is confined to the relevant planning authorities, including the Secretary of State where his statutory role is invoked. As I have indicated this court's function upon this aspect of the case is limited to the application of the *Wednesbury* principle. ...”

103. In interpreting the phrase “in general conformity” Laws LJ concluded, at [24], that the court must apply “its ordinary meaning as a matter of language, taking into account, however, the practicalities of planning control which are inherent in the statutory scheme”. He considered that the practicalities of planning control militated in favour of a “looser, rather than a tighter approach”. The adjective “general” is there “to introduce a degree of flexibility” (at [26]). At [29], he concluded that, on a “balanced” interpretation of the phrase:

“the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statutes and of the relevant documents. In those circumstances, the answer at length arrived at will be a matter of planning judgment and not of legal reasoning.”

The Examiner’s report

104. I set out below the key parts of the Examiner’s conclusions.
105. Under the heading “Housing Delivery”, the Examiner summarised section 3 of the draft plan which described the efforts to identify potential housing sites to deliver the strategic housing target.³
106. The Examiner referred to the Site at paragraph 7.18:

³ Following the modifications, the text which was in Section 3 became Appendix P.

“7.18 A key element of the mathematical delivery of new houses in the neighbourhood area has been the determination of the planning applications on the Strand Meadow site as being promoted by Park Lane Homes. Outline planning permission for residential development on the site was granted in March 2018 (RR/2017/582/P). Thereafter a full application was refused permission (RR/2018/1787/P). A subsequent appeal was dismissed. This history is important for two related reasons. The first is that the site is allocated for residential and recreational use in the saved policies of the Rother District Local Plan. The second is that the anticipated delivery of 30 dwellings on this site is committed and therefore excluded from the residual requirement for 22 dwellings to be identified on large sites in Burwash village.”

107. The overarching conclusions were summarised at paragraph 7.19:

“7.19 This part of the Plan comes to two overarching conclusions. The first is that ‘everyone involved in researching and contributing to this Plan understands the huge tension between our need for additional housing and the need to protect the AONB. The steepness of the land surrounding each of our ridgetop villages, sloping into the Rother and Dudwell valleys provides irreplaceable natural habitats and long-distance views of unparalleled beauty’ (Section 3 - paragraph 54 of the Plan). The second is that ‘there are no development sites, which meet RDCs requirement of six or more homes within the existing development boundary, which will be supported by RDC and the community. For this reason, we are not allocating any sites for development within this Plan’ (Section 3 - paragraph 64 of the Plan). This approach has generated representations/objections to the Plan from both RDC and the development industry.”

108. The Examiner explained that neither the draft plan nor the DSA 2019 made allocations for Burwash:

“7.20 This outcome reflects the evolution of the neighbourhood plan itself. During its preparation BPC opted to change from a plan which allocated sites to one which did not allocate sites. That decision overlapped with the advanced stages of submission and examination of the DaSALP. As such no Burwash housing allocations were considered within the District Council’s now adopted DaSALP. In this context the neighbourhood area is one which is affected by the provisions of Policy OVE1 of the DaSALP which provides an interim policy approach whilst neighbourhood plans are prepared to address shortfalls in the delivery of strategic growth in certain settlements. Plainly the relationship between the Core Strategy, the DaSALP and the neighbourhood plan has not proceeded as planned. This has created a degree of uncertainty for all

concerned in the delivery of the local element of the strategic housing requirement for Burwash village.

7.21 In this strategic context it would have been helpful if the neighbourhood Plan had identified a site or sites to meet the residual strategic requirement for new development in Burwash village. Nevertheless, BPC has explained in the Plan the way in which it has grappled with the various potential development options on the one hand whilst seeking to respect the character and appearance of the AONB in general and the three settlements in particular on the other hand.”

109. Against that background, the Examiner identified two options:

“7.23 In these wider circumstances I have considered two potential outcomes for the examination of the Plan as follows:

Outcome 1 – To recommend modifications to the Plan in general, and to its approach to housing development in particular so that it will be in general conformity with the development plan and support the delivery of the residual strategic housing requirement in the neighbourhood area and specifically in Burwash village.

Outcome 2 – To recommend that the Plan does not meet the basic conditions as it fails to respond positively to meeting the residual element of the strategic housing for Burwash village in the Core Strategy and as such is not in general conformity with the development plan. In these circumstances the Plan should not proceed to referendum. This approach would correspond to that suggested by several representations from the development industry.”

110. The Examiner recommended Outcome 1 for three reasons:

“7.24 I have considered this matter very carefully. Based on all the available evidence I recommend an approach based on Outcome 1. I have reached this conclusion for three related reasons. The first is that the Plan does not seek to challenge the strategic need for new development in Burwash village in its view that it has been unable to identify sites to accommodate that growth. The second is that the Plan does not include any policies which would directly prevent the delivery of the residual amount of strategic growth in the event that an appropriate site could be identified.

7.25 The third reason is that the wider development plan provides a default mechanism for the scenario which has arisen. Section 8 of the DaSALP updates the delivery of strategic housing in the District beyond the position as identified at the time of the adoption of the Core Strategy. It reaffirms the Core Strategy target for the delivery of 5700 net additional homes in

the period to 2028. The third part of Policy OVE1 of the DaSALP comments that:

'Until such time as a Neighbourhood Plan for the relevant settlement with an outstanding Core Strategy housing requirement is in force, planning applications will be favourably considered for development proposals in those settlements where:
(i) they contribute to meeting the housing target for that settlement and accord with the relevant spatial strategy; and
(ii) the site and development proposals are otherwise suitable having regard to other relevant policies of the Core Strategy, including the considerations in OSS2 and OSS3, and of this Plan'

7.26 This approach is reinforced in RDC's representation to the Plan in which it commented:

'Given Burwash's positive acknowledgement of its housing target and that the outstanding quantum of development affected is 22 dwellings which is de-minimus in the context of the overall target in adopted Core Strategy and RDC would not wish this void to impact on a successful examination of the Burwash Neighbourhood Plan. Policy OVE1 in the adopted DaSALP ensures that appropriate sites can come forward in Burwash. In any event, to support the new Local Plan (2019-2039) Rother has recently launched through its HELAA a 'call for sites' (October 2020) which will consider housing potential across the District'

7.27 This representation pre-dates the Council's separate refusal of the reserved matters application for land off Strand Meadow (RR/2020/1822/P). Nevertheless, that decision reflects the difficulties that have been encountered in identifying and delivering sites for new development in the parish in general, and in Burwash village in particular. In addition, whilst the impact of that decision locally is significant it does not have statistical or strategic implications on the delivery of housing in the wider District. Irrespective of the outcome of the most recent planning application on the Strand Meadow site or the eventual appeal decision on the 2020 proposal, the 22-dwelling residual strategic housing requirement excludes the 30 dwellings that the Strand Meadow site would otherwise deliver.

7.28 In a broader sense the first outcome would:

- reflect the broader work which the community has undertaken on the Plan;

- safeguard the other policies in the plan which meet the basic conditions (subject to recommended modifications);
- provide a set of policies at a neighbourhood level to consolidate the other policies in the development plan; and
- provide a more bespoke set of policies to assist in future work to identify residential sites to meet the strategic housing requirements in the Core Strategy (or a future iteration of that Plan) for the neighbourhood area.

7.29 In particular the first outcome would take account of the approach which was put in place in the DaSALP to reflect the circumstances which prevailed at that time. Policy OVE1 provides a strategic context for settlements where allocations were not identified in that Plan and where their emerging neighbourhood plans were expected to deliver the residual element of their respective housing requirements as identified in the Core Strategy. The policy ensures that in the interim period whilst neighbourhood plans are being prepared development proposals in those settlements would be favourably considered where they contribute to meeting the housing target for that settlement, accord with the relevant spatial strategy and otherwise meet design and other planning considerations. This approach reflected the importance of ensuring strategic housing delivery in the District and took account of the findings of the Planning Inspector's report on that Plan (Issue 5).

7.30 The identification of sites to meet the residual housing requirement in the neighbourhood area in general and in Burwash village in particular has not taken place as part of the development of the Burwash neighbourhood plan. In these circumstances the neighbourhood plan has not directly applied itself to meeting the strategic delivery of new housing in the District in general, and in Burwash village in particular as this matter is no longer within the scope of the plan. As such it would be contrary to the wider approach of the Core Strategy and the DaSALP for the potential making of the neighbourhood plan to avoid the ongoing implications of Policy OVE1 of the DaSALP.

7.31 The second outcome would be a matter-of-fact response to a specific, albeit very important, aspect of the Plan. In particular it would offer no benefits beyond those in outcome 1 in housing delivery as the default position in the neighbourhood area would also be Policy OVE1 of the DaSALP in that scenario.”

111. The Examiner therefore recommended a package of modifications, including “the incorporation within the revised Section 3 of an explicit reference to the effect of Policy OVE1 of the DaSALP to ensure its ongoing application in Burwash” (paragraph 7.32).
112. The Examiner's recommendation for a new section 3 to the BNDP was as follows (paragraph 7.32):

“Introduce a new section 3 of the Plan as follows:

‘Section 3: The delivery of the strategic housing requirement for Burwash Village.

The Plan has sought to identify and secure the delivery of the residual element of the 52 dwellings identified for Burwash village in Figure 17 of the DaSALP. The work undertaken by the Parish Council to identify appropriate sites in the neighbourhood area in general, and in and around Burwash village in particular, is detailed in Appendix [insert number] of this Plan.

The matter became more challenging with RDC’s refusal of the reserved matters planning application on the site of Strand Meadow (RR/2020/1822/P). The earlier outline planning permission indicated the delivery of 30 dwellings. A further application (RR/2021/409/P) was submitted shortly after this decision.

This planning application history, together with the wider work on assessing potential sites, highlights the challenges in identifying appropriate and deliverable sites in the neighbourhood area. In these circumstances the Parish Council has decided not to allocate sites for development in this Plan. This decision is based on its detailed assessment of the various development site opportunities and the environmental designation in the parish. Nevertheless, the Parish Council recognises that the strategic housing need remains and that it will need to respond to proposals which may come forward to accommodate that need.

In this context the neighbourhood plan acknowledges that, in these circumstances, Policy OVE1 of the DaSALP will be a key factor in the determination of planning application in the parish which seek to address this strategic requirement for new housing. In particular Policies OSS2 and OSS3 of the Rother Core Strategy would have particular significance. For clarity Policy OVE1 of the DaSALP is reproduced below:

Policy OVE1: Housing supply and delivery pending plans

Housing sites sufficient to meet the Core Strategy requirement of at least 5,700 net additional homes over the period to 2028 will be met by allocations and other provisions in this Plan and Neighbourhood Plans.

No phasing restrictions will be imposed on development allocations, other than for site-specific, normally infrastructure, reasons.

Until such time as a Neighbourhood Plan for the relevant settlement with an outstanding Core Strategy housing requirement is in force, planning applications will be favourably considered for development proposals in those settlements where:

- (i) they contribute to meeting the housing target for that settlement and accord with the relevant spatial strategy; and
- (ii) the site and development proposals are otherwise suitable having regard to other relevant policies of the Core Strategy, including the considerations in OSS2 and OSS3, and of this Plan”

113. The Examiner also recommended a consequential amendment to the Executive Summary of the BNDP:

“In the Executive Summary replace sections 6 to 16 with:

‘6. BPC has undertaken a significant amount of work on identifying appropriate and deliverable housing sites in the parish in general and within and on the edge of Burwash Village in particular. This work is summarised in Appendix [insert number]. Taking account of a series of environmental and topographical issues the Parish Council has decided not to allocate sites in the Plan.

7. Nevertheless, the Parish Council recognises that the strategic housing need remains and the parish will need to respond to proposals which may come forward to accommodate that need. In this context the neighbourhood plan acknowledges that in these circumstances that Policy OVE1 of the DaSALP will be a key factor in the determination of planning applications in the parish which seek to address this strategic requirement for new housing. In particular Policies OSS2 and OSS3 of the Rother Core Strategy would have particular importance.

8. The Parish Council remains committed to playing its part in delivering the strategic housing requirement for the parish as identified in the Core Strategy. It is also committed to exploring other similar proposals to the highly successful Morris Close development in order to provide affordable housing for the community. It will also look into the merits of setting up a vehicle such as a Community Land Trust to assist in the delivery of new homes.”

114. The Examiner considered the PC’s decision not to allocate the Site in the draft plan, at paragraph 7.35:

“7.35 Whilst I understand the approach that BPC has taken on this matter under normal circumstances there would have been

clear merit in allocating the site for residential development in the Plan. It would have acknowledged the grant of outline planning permission and the expectation that reserved matters or full applications would follow and would be positively determined. However, this has not been the case here – two planning applications have been refused. I comment on this issue in greater detail in paragraphs 7.46 to 7.53 of this report. Nevertheless, in general terms the approach taken by BPC reflects the planning history of the site and, in any event, the majority of the proposed Strand Meadow site is already within the Burwash Village settlement boundary.”

115. The Examiner also considered the PC’s decision not to extend the boundary to include the small portion of the Site which lies outside it, at paragraphs 7.49 and 7.50:

“7.49 I sought advice from the Parish Council about its decision not to extend the development boundary of Burwash village to accommodate the full extent of the outline planning permission on land off Strand Meadow. A small part of the site with outline planning permission (on its western boundary) lies outside the 2006 development boundary. It commented:

‘The Parish Council feels the existing settlement boundaries still provide the correct balance of built form and countryside gaps between settlements essential to protect the AONB. Expansion of these boundaries would in particular encourage ridge top development eroding the views of the countryside and potentially linking together our three distinct village settlements. The development at Strand Meadow was considered carefully by the Steering Group and we decided not to include this site on the basis of the very contentious scheme proposed by Park Lane Homes because its inclusion would have been completely at odds with the views of this community’

7.50 I have considered this matter very carefully. In general terms there would be clear merit in the development boundary of Burwash village fully and properly reflecting the development management decisions of RDC. In a broader context it would be unreasonable for any resulting new development on such sites to be classified as being in the open countryside for planning policy and land charges purposes. Similarly, whilst BPC suggest that the inclusion of the site within the development boundary would be at odds with the views of the community those views have already been considered in the round by RDC in its determination of the outline planning application. However, in this specific case, two reserved matters applications have been refused planning permission by RDC. The most recent refusal was in February 2021. On balance given the uncertainty which surrounds this matter I am satisfied that the approach taken in the Plan is appropriate. This is a matter which could be addressed in any review of a ‘made’ neighbourhood plan based on the

determination of current and any future planning applications and/or appeals on the site.”

116. The Examiner recommended modifications to the policy and supporting text on development within and outside the development boundary as follows:

“7.51 The policy itself comments that development proposals outside the defined development boundaries will not be supported unless they are needed to meet essential operational requirements of utility infrastructure requirements. However, this approach is both prescriptive and more onerous than that in national and local planning policies and Policy RA3 of the Core Strategy in particular. In addition, the approach taken is inherently negative as it focuses on development outside the development boundaries rather than on potential development within the three identified development boundaries (and which are the areas towards which the wider development plan directs new development).

7.52 I recommend that the policy is modified so that it takes a more balanced approach towards development which may be supported in the countryside. This would ensure that it has regard to national policy and is in general conformity with the strategic policies in the development plan. I also recommend that the policy includes an element about development within the three development boundaries. This would correspond with the pattern of day-to-day planning applications that are received in the neighbourhood area for minor and/or domestic development proposals. In a broader sense it would bring forward the positive approach for neighbourhood plans expected by the NPPF.

7.53 In this context I also recommend that the policy includes elements to address the need for the delivery of affordable housing and the need to safeguard the historic landscape environment. This overlaps with my recommended modifications to Policies HO01 and EN05 later in this report.

7.54 I also recommend consequential modifications to the supporting text.”

Ground 1

Submissions

117. The Claimant submitted that the Council erred in accepting the Examiner’s finding that the draft plan met the basic conditions in paragraph 8(2)(a) and (e) of Schedule 4B to the TCPA 1990, namely, that:

- i) having regard to national policies (the Framework) and advice contained in guidance issued by the Secretary of State (the Guidance), it was appropriate to make the plan (sub-paragraph (a)); and
 - ii) the making of the plan was in general conformity with the strategic policies contained in the development plan for the area (sub-paragraph (e)).
118. The basic conditions were not met because the draft plan failed to meet the housing requirement for Burwash, as set out in the Core Strategy and DSA 2019. The PC reversed its earlier decision and decided not to make any housing allocations, as a result of which there are no allocations for Burwash, which is contrary to the strategic policies in the Rother DLP 2006, the Core Strategy and the DSA 2019. The draft plan also fails to extend the 2006 development boundary for the village, which was necessary in order to facilitate future housing development.
119. The Examiner's recommended modifications did not resolve the problem. Policy OVE1 was only intended to be an interim policy for areas which had not yet made neighbourhood plans. Whilst Policy OVE1 introduces a policy of favourable treatment, that is no substitute for allocations. It provides no guidance to prospective developers as to whether any specific site in the village can be developed, or to identify how the boundary may be extended to allow for new development. This leaves a planning void in Burwash which undermines the strategic policies.
120. The 2006 allocation, followed by the grant of outline planning permission for 30 dwellings at the Site, was a clear commitment, and it was unreasonable and inconsistent with the Local Plan to fail to reflect this in the draft plan, by not allocating it, and by not extending the boundary to include the small portion currently outside the boundary. This treatment is not justified by the refusal of full planning permission, and the refusal of the reserved matters application on design grounds (which is subject to appeal, but the Examiner did not refer to that).
121. The draft plan does not comply with the Framework and the Guidance, and no adequate reasons were given for the failure to comply. It undermines the key objectives of government policy in Chapter 5 of the Framework to significantly boost the supply of homes, to establish housing requirement figures, and to identify specific deliverable sites (paragraphs 59, 65, 67, 68, 69). Therefore, contrary to paragraph 69 of the Guidance, it constrains the delivery of important national policy objectives.
122. The draft plan is not in general conformity with the strategic policies for housing development in the development plan for the area. The Local Plan effectively devolves the identification and allocation of sites to the neighbourhood plans. It defeats the strategic objective of such devolution if a neighbourhood plan fails to identify and allocate sites, and instead simply incorporates an interim policy which was not intended for this purpose. Paragraph 29 of the Framework provides that neighbourhood plans should not undermine strategic policies. It also creates ambiguity, contrary to the guidance in the Framework that plans should be clearly written and unambiguous (paragraph 16). The DSA 2019 clearly did not anticipate a situation such as this, where a qualifying body opts to include housing allocations, but subsequently reverses its decision.

123. The Claimant concluded that the Council failed to have proper regard to relevant considerations, and took into account irrelevant considerations.
124. In response, the Council submitted that there was no statutory requirement for the draft plan to make housing allocations. Nor was there any requirement to do so in the Framework or the Guidance. Indeed, there was no statutory or policy requirement for a community to adopt a neighbourhood plan at all.
125. In those circumstances, the Examiner reached a lawful planning judgment that the draft plan met the basic conditions, notwithstanding the fact that it did not contain housing allocations. Policy OVE1 of the DSA 2019 was the default position that would apply if there was no neighbourhood plan at all (i.e. if the qualifying body had chosen not to initiate the process, or if the plan had failed at referendum). By incorporating Policy OVE1 into the draft plan, which would give favourable consideration to suitable applications for planning permission within the settlement, the Examiner was providing a means whereby housing sites could come forward and contribute to the strategic housing requirement.
126. The Claimant's contention that the draft plan did not boost housing supply contrary to paragraph 59 of the Framework overstated the requirement of basic condition (a), which is not to assess consistency of the draft plan with national policy, but merely to determine whether it is appropriate that the draft plan should be made, having regard to national policy. The Examiner did have regard to national policy; he specifically referred to the core principle of "delivering a sufficient supply of homes" at paragraph 6.5 of his report. He also reached the express conclusion that the draft plan "has had regard to national planning policies and guidance in general terms" (paragraph 6.8) and recommended modifications to address areas where the draft plan did not fully accord with advice in paragraph 16(d) of the Framework (paragraphs 6.9 and 6.10). The Inspector's reasons for recommending that the draft plan should proceed clearly had regard to national policy and were rational. The draft plan contained many useful policies and did not detract from the current default position in relation to new housing.
127. Basic condition (e) only applies to the strategic policies in the development plan and the relevant strategies in this case are in the Core Strategy. The housing policies in the DSA 2019 are non-strategic policies. They post-date the Core Strategy, and therefore cannot be an aid to interpretation of the Core Strategy policies.
128. The Council's development plan does not include any express requirement that a neighbourhood plan must be made, or that it must make provision for housing and housing allocations. There is no legitimate basis to imply such a requirement into the Core Strategy.
129. It was reasonable for the Examiner and then the Council to conclude that the draft plan did meet the basic conditions since:
 - i) the draft plan does not seek to challenge the strategic need for new development in Burwash;
 - ii) the draft plan does not include any policies which would directly prevent the delivery of the residual amount of strategic growth in the event that an appropriate site could be identified;

- iii) the default mechanism of applying Policy OVE1 of the DSA 2019 will continue to ensure that new housing proposals are favourably considered if they contribute to meet the housing target for Burwash.
- 130. The draft plan does not create ambiguity in conflict with paragraph 16(d) or (f) of the Framework. New housing applications are to be treated favourably according to the same policy test as at present
- 131. The IP2's position was set out in its skeleton argument and Detailed Grounds; the draft Plan; the letter of 31 October 2020 to the Council; and the responses to the Examiner's requests for clarification, which are included in the report.

Conclusions

- 132. In order to succeed, the Claimant must establish that, in approving the Examiner's recommendations, the Council misdirected itself in law, or acted irrationally or failed to have regard to relevant considerations and had regard to irrelevant considerations.
- 133. The examination of a neighbourhood development plan is limited in scope by law. In contrast to an examination of a development plan document, the Examiner should not consider whether the plan is "sound" or "justified" in the sense of representing "the most appropriate strategy, when considered against reasonable alternatives" and based upon "proportionate evidence" (see *Crownhall Estates*, per Holgate J., at [29]). At times, in its wide-ranging criticism of the draft plan, and the Examiner's modifications, the Claimant made the mistake of addressing matters which could only be relevant if "soundness" and "justification" were in issue.

Basic condition (a)

- 134. The basic condition in paragraph 8(2)(a) confers a discretion on the Examiner to determine whether or not it is appropriate for the neighbourhood plan to proceed "having regard" to national policy and guidance. This test should not be confused with the more stringent test for soundness which requires "consistency" with national policy.
- 135. Neighbourhood plans are voluntary; there is no requirement to make a neighbourhood plan. In the absence of a neighbourhood plan, any housing allocations necessarily be made by the local planning authority. Where a neighbourhood does decide to make a plan, there is no statutory or policy requirement for it to include provision for housing, or to make housing allocations.
- 136. There are two relevant references in the Framework. Paragraph 28 states that non-strategic policies used by local planning authorities and communities can include allocating sites. Paragraph 69 states that neighbourhood planning groups should consider the opportunities for allocating small and medium-sized sites suitable for housing in their area.
- 137. The Guidance gives more detailed guidance on how neighbourhood planning bodies should address the issue of housing.

138. Paragraph 42 provides that a neighbourhood plan can allocate sites for development. However, paragraph 104 expressly provides that a neighbourhood planning body does not have to make specific provision for housing or seek to allocate sites to accommodate a housing requirement. It states:

“Are housing requirement figures for neighbourhood areas binding?”

The scope of neighbourhood plans is up to the neighbourhood planning body. Where strategic policies set out a housing requirement figure for a designated neighbourhood area, the neighbourhood planning body does not have to make specific provision for housing, or seek to allocate sites to accommodate the requirement (which may have already been done through the strategic policies or through non-strategic policies produced by the local planning authority). The strategic policies will, however, have established the scale of housing expected to take place in the neighbourhood area.

Housing requirement figures for neighbourhood plan areas are not binding as neighbourhood planning groups are not required to plan for housing. However, there is an expectation that housing requirement figures will be set in strategic policies, or an indicative figure provided on request. Where the figure is set in strategic policies, this figure will not need retesting at examination of the neighbourhood plan. Where it is set as an indicative figure, it will need to be tested at examination.”

139. Paragraph 103 confirms that it is up to neighbourhood planning bodies to decide whether or not they wish to make allocations. It provides:

“Where neighbourhood planning bodies have decided to make provision for housing in their plan, the housing requirement figure and its origin are expected to be set out in the neighbourhood plan as a basis for their housing policies and any allocations that they wish to make....”

140. Paragraph 44 gives guidance on the circumstances in which a neighbourhood plan allocate additional or alternative sites to those in a local plan.

141. In my judgment, it is clear that national policy or guidance does not require a neighbourhood plan to allocate any sites for housing to meet a strategic housing requirement in the development plan. The neighbourhood plan body has a choice whether or not to do so.

142. Therefore the absence of housing allocations in the draft plan was not of itself a basis upon which the Examiner and the Council ought to have concluded that the draft plan failed to meet basic condition (a).

143. It is clear from Chapter 6 of the Framework (“Delivering a sufficient supply of homes”) that it is an important national policy objective to significantly boost the supply of

homes (paragraph 59). To determine the minimum number of homes needed, local planning authorities' strategic policies should be informed by a local housing need assessment (paragraph 60) and establish a housing requirement figure for their whole area, as well as for designated neighbourhood areas (paragraph 65). Local planning authorities must identify land for homes, including a supply of specific deliverable sites at stages during the 15 year plan period (paragraph 67).

144. The Claimant submitted that the Framework's housing policies were undermined and constrained by the draft plan's failure to make housing allocations and extend the development boundary, and its reliance upon Policy OVE1 of the DSA 2019, and therefore it was not appropriate to make the plan.
145. In my view, the draft plan demonstrates its support for the Framework's objective of delivering a sufficient supply of homes. The Foreword to the draft plan includes the following passages:

"We consider the delivery of new housing as extremely important..."

"In the creation of this Plan, we have paid careful attention to everyone's housing needs. We know we need more housing and we want to meet these needs by providing suitable and sustainable homes. We have carried out a comprehensive review of the land available, including sites put forward during our Call for Sites and ensured that the community has been central to our extensive consultation."

"Our policies directly reflect the dual aspirations of meeting local housing needs and protecting this unique historical place."

"BPC resolved in May 2019 to proceed with the Plan including the target of 52 new homes without allocating sites since the two main sites on which the target was based had been tested and refused and no other suitable sites were identified during the Call for Sites."

146. The Executive Summary provides:

"6. BPC has undertaken a significant amount of work on identifying appropriate and deliverable housing sites in the parish in general and within and on the edge of Burwash Village in particular. This work is summarised in Appendix P. Taking account of a series of environmental and topographical issues the Parish Council has decided not to allocate sites in the Plan.

7. Nevertheless, the Parish Council recognises that the strategic housing need remains and the parish will need to respond to proposals which may come forward to accommodate that need. In this context the neighbourhood plan acknowledges that in these circumstances that Policy OVE1 of the DaSALP will be a key factor in the determination of planning applications in the

parish which seek to address this strategic requirement for new housing. In particular Policies OSS2 and OSS3 of the Rother Core Strategy would have particular importance.

8. The Parish Council remains committed to playing its part in delivering the strategic housing requirement for the parish as identified in the Core Strategy. It is also committed to exploring other similar proposals to the highly successful Morris Close development in order to provide affordable housing for the community. It will also look into the merits of setting up a vehicle such as a Community Land Trust to assist in the delivery of new homes.”

147. Policy GPO3 Development Boundaries provides that development proposals within the development boundaries will be supported subject to the criteria set out therein. Development proposals outside the development boundaries will be assessed against the approach set out in Policy DIM2 of the DSA 2019.
148. The supporting text explains that the parish has three well-defined development boundaries around the three settlements, separated by beautiful countryside. These boundaries were originally defined by the Rother DLP 2006 and they were retained by the DSA 2019. As the draft plan does not allocate sites for development, the boundaries have been retained. This matter will be reviewed in the event that development proposals are permitted adjacent to the existing development boundaries or once the emerging Local Plan is adopted.
149. The Examiner clearly had regard to the housing policies in the Framework, as he expressly referred to the core policy of “delivering a sufficient supply of homes” in paragraph 6.5 of his report, and concluded that the draft plan had had regard to national planning policies and guidance at paragraph 6.8. In my judgment, it was a reasonable exercise of judgment on the part of the Examiner, applying his specialist expertise, and then the Council, to determine that the draft plan does meet basic condition (a) since it does not challenge the strategic need for new development in Burwash and it expressly accepts the Core Strategy’s housing target of 52 dwellings. The adoption of Policy OVE1 of the DSA 2019, which has been the default policy for Burwash since 2019, offers continuity and will ensure that new housing proposals will be favourably considered if they contribute to the housing target. Its incorporation into the neighbourhood plan avoids any dispute over whether it continues to apply once the BNDP is made.
150. The modified development boundaries policy supports development within the settlements, and applies Policy DIM2 of the DSA 2019 to development outside the boundary. This is consistent with existing Council policies.
151. I do not consider that it is arguable that the draft plan creates ambiguity in conflict with paragraph 16(d) or (f) of the Framework.
152. The Claimant’s Site has an extant allocation from the Rother DLP 2006. Policy VL1 has been saved and will continue once the BNDP is adopted because no other allocations have been made. The Site already has outline planning permission for 30 dwellings. The draft plan will not have any effect on its outstanding reserved matters

applications. If the Claimant's appeal does not succeed, the Claimant can amend the proposed design of the development to address the Council's concerns, and the development can proceed. If the outline planning permission expires, the Claimant can make a fresh application for planning permission, which will have the benefit of the existing allocation.

153. For these reasons, I conclude that the Examiner and the Council were entitled to conclude that the draft plan meets the requirements of basic condition (a).

Basic condition (e)

154. In *DLA Delivery Ltd*, Lindblom LJ held, at [23]:

“The true sense of the expression “in general conformity with the strategic policies contained in the development plan” is simply that if there are relevant “strategic policies” contained in the adopted development plan for the local planning authority's area, or part of that area, the neighbourhood development plan must not be otherwise than in “general conformity” with those “strategic policies”. The degree of conformity required is “general” conformity with “strategic” policies. Whether there is or is not sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment (see the judgment of Laws L.J. in *Persimmon Homes and others v Stevenage Borough Council* [2006] 1 W.L.R. 334, at pp.344D-345D and pp.347F-348F).”

155. In determining whether the Council and the Examiner were entitled to find that the draft plan is in general conformity with the strategic policies for housing development contained in the development plan, the starting point must be to identify the strategic policies for housing development contained in the development plan. There is no statutory definition of the term “strategic policy”, nor is there any definition in the Framework. However, the Framework gives a helpful description of strategic policies and non-strategic policies:

“The plan-making framework

17. The development plan must include strategic policies to address each local planning authority's priorities for the development and use of land in its area [FN11: Section 19(1B-1E) of the Planning and Compulsory Purchase Act 2004.].....

18. Policies to address non-strategic matters should be included in local plans that contain both strategic and non-strategic policies, and/or in local or neighbourhood plans that contain just non-strategic policies.

19. The development plan for an area comprises the combination of strategic and nonstrategic policies which are in force at a particular time.

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;

.....

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 nonstrategic 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.

22. Strategic policies should look ahead over a minimum 15 year period from adoption, to anticipate and respond to long-term requirements and opportunities, such as those arising from major improvements in infrastructure.”

“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 [FN16: Neighbourhood plans must be in general conformity with the strategic policies contained in any development plan that covers their area.].

30. Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by

strategic or non-strategic policies that are adopted subsequently.”

156. The Guidance also gives guidance on identifying strategic policies in paragraph 76.
157. The Basic Conditions Statement, dated August 2020, prepared by the Burwash BDP steering group, on behalf of the Burwash Parish Council, listed the policies in the Core Strategy as the strategic policies for the purposes of compliance with basic condition (e). This was submitted to the Examiner.
158. It was common ground that all the policies in the Core Strategy are strategic policies. Paragraph 1.4 of the Core Strategy explains that the Core Strategy “lies at the heart of the plan-making system. It is where the strategic direction for development and change across the district is established”. Both parties agreed that Policies OSS1, OSS2, OSS3 and RA1(v) were the relevant strategic policies in the Core Strategy.
159. However, the Claimant also contended that Policy LV1 of Rother DLP 2006 which allocated the Site is a strategic policy. In my judgment, that is not correct. Prior to the adoption of the Core Strategy, both strategic and non-strategic policies were contained within the Rother DLP 2006. As it pre-dated the Framework, it did not comply with the requirement to identify the strategic policies. In 2014, the Core Strategy policies superseded the strategic policies of the Rother DLP 2006. The superseded strategic policies are listed in Appendix 1 of the Core Strategy, and Policy LV1 is not among them. Furthermore, Policy LV1 meets the test for a non-strategic policy in paragraph 28 of the Framework as it sets out specific details for a housing allocation at a single site.
160. The Claimant also contended that Policy DIM2 and Policy OVE1 in the DSA 2019 are strategic policies. In my judgment, that is not correct. Paragraph 1.9 of the Core Strategy stated that the DSA 2019 would “identify the sites required to meet the development provisions of the Core Strategy as well as set out more detailed development management policies”. As the Framework makes clear at paragraphs 21 and 28, detailed policies which implement strategic policies are treated as non-strategic. The Introduction to the DSA 2019 states:

“Strategic and non-strategic policies

1.29 Essentially, it is the Core Strategy that sets the strategic policies of the Local Plan, while those of this Plan are generally viewed as “non-strategic” – but still important and warranting statutory expression.”

Paragraph 1.29 goes on to identify a small number of policies in the DSA 2019 which are to be regarded as strategic. Neither Policy DIM 2 nor Policy OVE1 are among those.

161. Policy DIM2 meets the description of a non-strategic policy in paragraph 28 of the Framework. It merely implements the strategic policy on development boundaries in Policy OSS2 of the Core Strategy.

162. Policy OVE1 also meets the description of a non-strategic policy in paragraph 28 of the Framework as it relates to specific areas (those with a neighbourhood plan not yet made) and it does not change the strategy for the pattern, scale and quality of development (paragraph 20 of the Framework). It is essentially a default mechanism aimed to ensure that, in those areas, planning permissions continue to come forward and are implemented, so as to deliver homes in accordance with the Core Strategy policies.
163. In the alternative, the Claimant submitted that, even if the Court found that Policy VL1 of the Rother DLP 2001, and Policy DIM2 and Policy OVE1 of the DSA 2019, were non-strategic policies, they were nonetheless relevant to the interpretation and application of Policy RA1(v) of the Core Strategy. Therefore the BNDP could not be regarded as being in general conformity with the strategic policies of the development plan if it was contrary to the relevant policies in the development plan, considered as a whole.
164. In my judgment, this submission was inconsistent with both the wording and the purpose of basic condition (e). The conformity requirement is expressly limited to the strategic policies, leaving scope for the neighbourhood plan to adopt its own non-strategic policies, as envisaged by the Framework at paragraphs 28 to 30. The Framework envisages that the neighbourhood plan may depart from non-strategic policies in the local plan, and supersede them. In *R (Swan Quay LLP) v Swale BC* [2017] EWHC 420 (Admin), Dove J. corrected an inaccurate description of the statutory requirement by Supperstone J. in *BDW Trading Ltd (t/a Barrett Homes) v Cheshire West & Chester Borough Council* [2014] EWHC 1470 (Admin), stating:
- “29. I entirely agree with Supperstone J that the basic conditions cannot be equated with soundness as understood from paragraph 182 of the Framework. I would, however, with respect, differ from the suggestion that “the only statutory requirement imposed by Condition (e) is that the Neighbourhood Plan as a whole should be in general conformity with the adopted development plan as a whole”. That observation does not reflect the clear statutory language of paragraph 8(2)(e). First, this basic condition relates to the strategic policies of the development plan, not the development plan as a whole. Those strategic policies which are identified will have to be considered as a whole in addressing the question of whether or not the neighbourhood plan is in general conformity with them. This underlines the point made by Supperstone J in paragraph 82 that tension or conflict between one policy of the neighbourhood plan and one policy of the local plan is not the matter at stake. Where there are no strategic policies in a local plan, then paragraph 8(2)(e) is not engaged, as Lewis J concluded in *R (on the application of Gladman Developments Ltd) v Aylesbury Vale District Council* [2014] EWHC 4323, and the absence of strategic policies does not preclude as a matter of law a neighbourhood plan being produced.”
165. The Council’s strategic policies do not include any express or implied requirement that a neighbourhood plan must be made, or that if a plan is made, it must make provision for housing and housing allocations, and extend the development boundary

accordingly. The supporting text to Policy OSS1 and Policy RA1 of the Core Strategy refers to allocation of sites in due course through a Development and Site Allocations Plan. It is doubtful whether the Council could lawfully impose such obligations as that would be contrary to policy and guidance. As the Council rightly observed, section 38B PCPA 2004 empowers the Secretary of State to make regulations concerning the required and prohibited contents of neighbourhood plans which strongly indicates that local planning authorities may not indirectly do the same through their development plans, especially as neighbourhood plans need only be in “general conformity” with the strategic policies of the development plan.

166. The Claimant’s case rested on the DSA 2019 which did not make allocations for villages where a neighbourhood plan with allocations had already been adopted, or a neighbourhood plan was in preparation (which included Burwash). The DSA 2019 is a non-strategic policy to which basic condition (e) does not apply. It post-dates the Core Strategy, and therefore it cannot be an aid to interpretation of the Core Strategy policies. The Claimant has mistakenly elevated what was anticipated or hoped for when the DSA 2019 was prepared to an implicit requirement of the Core Strategy.
167. The only explanation for the exclusion of certain villages from specific allocations in the DSA 2019, was in the supporting text at paragraphs 8.9 and 8.10. It did not include any indication as to what would happen if villages such as Burwash did not succeed in making a plan or made a plan without allocations. Supporting text is relevant to the interpretation of a policy to which it relates but it is not itself a policy and it does not have the force of policy (*R (Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567, per Richards LJ at [16] and [21]).
168. It is apparent from the correspondence, including the PC’s Steering Group’s letter of 31 October 2020, that, at least by November 2018, Council officers were made aware that sites would probably not be allocated in the draft plan. Despite this, Council officers submitted the draft DSA 2019 for examination, and eventual adoption in December 2019, without making site allocations for Burwash. It seems that they expected that the PC Steering Group would change its mind, but if not, the default mechanism in Policy OVE1 would continue to apply (as the Council recommended to the Examiner in its representations dated 6 November 2020). I note that the Inspector examining the DSA 2019 recognised that the anticipated neighbourhood plans might not materialise as hoped for which is why he considered Policy OVE1 to be “an appropriate backstop mechanism should any of the outstanding neighbourhood plans not come forward in a timely manner” (at paragraph 109 of the examining Inspector’s report).
169. Turning now to the Examiner’s approach, the Claimant criticised him for including Policy OVE1 of the DSA 2019 because it is an interim policy which does not apply once a neighbourhood plan is made. As I have already said, the policy was incorporated into the draft plan, to avoid disputes over the correct interpretation of Policy OVE1. In any event, the Examiner’s approach did not erroneously treat an interim policy as applying indefinitely. The Examiner recognised that Policy OVE1 was a backstop, applicable until allocations were made by one of the available mechanisms. He recognised (at paragraph 7.50) that sites could be allocated in the future, by means of a review of the BNDP, or allocations through the Council’s forthcoming new Local Plan, or a partial review of the DSA 2019.

170. The development boundaries were originally defined by the Rother DLP 2006 and retained by the DSA 2019. The draft plan did not alter the boundaries because it did not allocate sites for development. However, the modified plan made provision for the boundary to be reviewed in the event that development proposals are permitted adjacent to the existing development boundaries or once the emerging Local Plan is adopted.
171. Against that background, it was reasonable for the Examiner and then the Council to conclude that the BNDP did meet the basic conditions. As the Examiner explained in his three reasons for recommending Outcome 1 (paragraph 7.24):
- i) the draft plan does not seek to challenge the strategic need for new development in Burwash village;
 - ii) the draft plan does not include any policies which would directly prevent the delivery of the residual amount of strategic growth in the event that an appropriate site could be identified; and
 - iii) the “default mechanism” of applying Policy OVE1 of the DSA 2019 will continue to ensure that new housing proposals are favourably considered if they contribute to meeting the housing target for Burwash, accord with the relevant spatial strategy and the site and development proposals are otherwise suitable when judged against relevant Core Strategy policies.
172. Collectively, those reasons expressed the Examiner’s judgment that the draft plan as modified would be in general conformity with the strategic policies because it would not result in planning applications for housing being treated any less favourably than currently under the “backstop” provided for in the adopted development plan.
173. In my judgment, the Examiner was entitled to conclude that the draft plan did not contradict the strategic need for new housing development in the settlement. By continuing the interim approach of Policy OVE1 of the DSA 2019, the draft plan preserves the “backstop” position and ensures that new housing applications are treated just as favourably as if there were no neighbourhood plan. Although, by not allocating housing sites, the draft plan does not do what the DSA 2019 anticipated it would, that does not amount to a lack of general conformity with the strategic policies in the development plan.
174. In my view, the Examiner was right to conclude that the BNDP does not contain any policy which would directly prevent the delivery of the residual amount of strategic growth. By continuing the “backstop” position that currently applies, the BNDP does not introduce any new policy hurdle for housing applications.
175. At paragraph 7.28 of his report, the Examiner identified the planning benefits of Outcome 1. He explained that it would:
- i) reflect the broader work which the community has undertaken on the draft plan;
 - ii) safeguard the other policies in the draft plan which meet the basic conditions (subject to recommended modifications);

- iii) provide a set of policies at a neighbourhood level to consolidate the other policies in the development plan; and
 - iv) provide a more bespoke set of policies to assist in future work to identify residential sites to meet the strategic housing requirements in the Core Strategy (or a future iteration of that Plan) for the neighbourhood area.
176. In my judgment, the Examiner, using his expertise as a specialist, made a series of planning judgments, which do not meet the high bar for a finding of irrationality. His careful and thorough report indicates that, contrary to the Claimant's submission, he did not fail to take into account relevant considerations, or take into account irrelevant considerations. In all the circumstances, the Council was entitled to accept his recommendations for the BNDP.
177. I do not accept that the BNDP, if adopted, would "cast doubt and discourage the development at Strand Meadow". The draft plan maintains the same favourable treatment of housing allocations as currently provided for in Policy OVE1 and the allocation of the Site under the Rother DLP 2006 continues. Despite the reservations about the development expressed in the draft plan, the Site has outline planning permission for 30 dwellings. As I have already said, the Claimant will be able to implement the planning permission if it wins his appeal or modifies the proposed design to address the Council's concerns. Alternatively, if the outline planning permission expires, a further application can be made, with the benefit of the extant allocation.
178. The Claimant submitted that the Examiner erred in referring to two refused reserved matters applications (paragraph 7.50) and in failing to record that the refused reserved matters application is the subject of a pending appeal. The letter from Mr Pickup dated 4 May 2021 notified the Examiner of factual errors in the report of 19 April 2021, in regard to the planning history of the Site, and the Examiner issued an amended version with the aim of correcting them. I accept the Council's submission that when the report is read fairly and as a whole, these criticisms did not demonstrate an error of law:
- i) The Examiner correctly referred to the planning history of the Site at paragraphs 7.18 and 7.22 where he identified that one reserved matters application had been refused by the Council and appealed and shortly afterwards another application had been made to the Council. He also identified the previous refusal of full planning permission and the extant outline planning permission;
 - ii) Paragraph 7.50 refers to the most recent refusal being in February 2021 which is the correct date for the refused reserved matters application;
 - iii) These matters did not infect the Examiner's three reasons for concluding that Outcome 1 should be preferred. None of those reasons depend on, or refer to, the planning history of the Site and they are free-standing reasons for concluding that the draft plan is in general conformity with the strategic policies of the adopted development plan.
179. Therefore, Ground 1 does not succeed.

Ground 2

Submissions

180. The Claimant's case may be summarised as follows:

- i) The officer's report to the Chief Executive made no reference to the Claimant's concerns, despite the extensive dialogue between Mr Pickup and the Council.
- ii) The Chief Executive's decision gives no indication that he grappled with, or addressed his mind to, the Claimant's concerns.
- iii) The Claimant was not given any indication as to whether the Examiner's recommendations would be accepted.
- iv) The Claimant was not given any opportunity to respond to the Examiner's report, or comment on the officer's report, before the Chief Executive made his decision.
- v) The entire process was carried out by a written representations procedure; however, the issues required a public hearing before the Examiner, or at least a meeting with the Council.
- vi) It was particularly important for the Claimant to have the opportunity to make oral representations because the Claimant was not made aware of the Cabinet's decision on 2 November 2020 not to adopt the recommendations in the officer's report, and to revise the representations drafted by officers, nor of the letter from the PC to the Council dated 31 October 2020. This was prejudicial to the Claimant.
- vii) The Decision Statement was not provided, or notified, to the Claimant.

181. In response, the Council submitted that the procedure followed was in accordance with the statutory scheme and fair because:

- i) The Chief Executive's Decision agreed with the revised Examiner's report which had been published and which had already taken the Claimant's objections and comments on the original draft of the Examiner's report into account.
- ii) The Claimant had ample opportunity to make representations during the examination process, which were taken into account by the Examiner. The Claimant had not identified any new points or objections that it would have raised if it had been aware of the officer's report of 6 July 2021.
- iii) The Council published the Examiner's report on its website in accordance with regulation 18 of the 2012 Regulations.
- iv) The Examiner's report gave adequate reasons in compliance with paragraph 10(6) of Schedule 4B TCPA 1990. The Examiner was not required to refer expressly to each and every one of the Claimant's representations.

- v) The Chief Executive's Decision gave adequate reasons in compliance with paragraph 12(11) of Schedule 4B TCPA 1990. The Council was entitled to adopt and agree with the Examiner's recommendations and main findings in its Decision.
- vi) There was no statutory requirement for the Council to notify the Claimant of the officer's report to the Chief Executive prior to the Council making its decision.
- vii) The Chief Executive's Decision was published on the Council's website in accordance with regulation 19 of the 2012 Regulations;
- viii) Paragraph 9 of Schedule 4B to the TCPA 1990 provides that the general rule is that the examination of a neighbourhood plan is to take the form of the consideration of written representations. The Examiner noted the default position under the statutory scheme that examinations proceed by written representations and concluded that the plan could be examined fairly in the usual written process. The Claimant had not demonstrated that it was unreasonable for the Examiner to conclude that oral representations were unnecessary to ensure adequate examination of the issue and for the Claimant to have a fair chance to put its case. The Claimant's written representations were prepared by its planning consultant and set out its case fully and the Examiner had regard to them and recommended modifications to the BNDP in light of them;
- ix) The Examiner amended his initial 19 April 2021 report specifically to address the comments that the Claimant had made *inter alia* about the planning history of the Site.

Conclusions

(1) The history

- 182. At pre-submission stage, the PC complied with regulation 14 of the 2012 Regulations by extensively publicising details of the proposals and the procedure for making representations, and undertaking a public consultation. The pre-submission public consultation was launched on 30 May 2019 and ran until 18 July 2019.
- 183. The Claimant was on the list of named consultees, and it made detailed written representations objecting to the pre-submission draft plan in July 2019, on the grounds that it did not meet the basic conditions because of the lack of allocations or proposals for housing, in particular the failure to allocate the Site for housing, and the failure to clarify whether or not the development boundary would need to be extended to accommodate the new dwellings required by the Core Strategy.
- 184. The PC, through its Steering Group, considered all the representations made, including those from the Claimant, and made amendments to the draft plan. However, it did not accept the Claimant's views.
- 185. The PC then submitted the submission version of the draft plan to the Council. In accordance with regulation 16 of the 2012 Regulations, the Council publicised the draft

plan, and held a public consultation between 11 September 2020 and 6 November 2020, giving persons an opportunity to make representations upon it.

186. On 19 October 2020, the Claimant responded to the consultation, and again made detailed representations, objecting to the proposed plan. The primary objection was that it did not meet the basic conditions because it failed to identify or allocate any housing sites (including the Claimant's Site) in accordance with the strategic policies in the development plan, and failed to expand the development boundary to allow for new housing. It was therefore contrary to the Framework and the Guidance.
187. On 6 November 2020, the Council sent its own written representations on the proposed plan to the Examiner. In the course of drawing up those representations, the Council's Cabinet considered draft representations in the officer's report to the effect that the draft plan did not meet the basic conditions because it did not include any allocations. However, after debate at the meeting and consideration of a response from the PC's Steering Group, Cabinet members decided not to adopt draft representation no. 1 in the officer's report. A revised representation was adopted which stated that, as the Burwash Neighbourhood Plan did not allocate sites, applications within Burwash Parish would continue to be considered in the context of Policy OVE1 of the DSA 2019. However, it considered that the development boundary needed to be revised in the draft plan, to accommodate the new housing required by the Core Strategy.
188. 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. Those requirements do not include an assessment as to whether the basic conditions are met - that exercise takes place at a later stage under the statutory scheme.
189. The Council sent the Claimant's representations to the Examiner, in accordance with regulation 17(d) of the 2012 Regulations. The Examiner considered the Claimant's representations, among others: see paragraphs 3.1, 4.8 and 4.10 of the report dated 19 April 2021. References are also made to the substance of the Claimant's representations in the report.
190. The Examiner considered whether to hold a hearing. He concluded, at paragraph 3.3 of the report of 19 April 2021:

“It is a general rule that neighbourhood plan examinations should be held by written representations only. Having considered all the information before me, including the representations made to the submitted plan, I was satisfied that the Plan could be examined without the need for a public hearing. I advised RDC of this decision once I had received the responses to the clarification note.”
191. The Examiner requested information on two issues. First, what was the current progress on the replacement Local Plan? Second, he asked the Council to inform him if it determined the current reserved matters planning application at the Site during the examination period.

192. In March 2021, the Council responded to the Examiner informing him of the projected timetable for the replacement Local Plan. If successful at examination, it will be adopted in the Autumn of 2023. The Council also notified the Examiner that the reserved matters application for the Site was refused by the Planning Committee on 18 February 2021.
193. The Examiner's report mentions that on several occasions that he sought clarification from the PC on specific matters (e.g. paragraphs 7.34; 7.41; 7.60).
194. The initial version of the Examiner's report was published on the Council's website on 19 April 2021. The Examiner concluded that the draft plan met the basic conditions. He recommended a number of modifications to the draft plan. Subject to the incorporation of those modifications, he recommended that the draft plan should proceed to a referendum.
195. On 4 May 2021, the Claimant's consultant, Mr Pickup, sent by email a lengthy and detailed letter to the Council contending that the Examiner's report was factually inaccurate in certain respects, and legally flawed. He complained that the Examiner had not held a public hearing. Also, that although the Examiner had approached the Council and the PC on certain matters, the Examiner had not responded to the Claimant's email of 8 April 2021 to the Council, which was copied to the Examiner. (The Claimant's email of 8 April 2021 sought to correct factual details given by the Council about the reserved matters applications for the Site, and the expiry of the outline planning permission). The Claimant also complained it had not had an opportunity to make representations since submission stage.
196. On 5 May 2021, Ms Edwards, Senior Planning Officer at the Council, sent the Claimant's letter to the Examiner. The Examiner replied to her on 6 May 2021. He considered the Claimant's representations along with some other points, asked for further checks from the Council on the interpretation of Policy OVE1 in the DSA 2019, and agreed to revise his report. In this email, the Examiner set out his initial response to the Claimant's request for a public hearing as follows:
- “...hearings should be held only in specific cases and it would not be normal for examiners to seek detailed comments from third parties. In this case the issue is reinforced by the detail of the initial representations from the development industry.”
197. Ms Edwards replied to the Examiner on 6 May 2021, setting out the Council's interpretation of Policy OVE1, namely, that it would continue in force after the BNDP was made, because there were no allocations in the BNDP. The Examiner asked to see the Inspector's report on the DSA 2019 which was sent by Ms Watters, Planning Policy Manager, on 11 May 2021.
198. On 14 May 2021, Ms Edwards sent an email to the Claimant stating:
- “..... RDC has discussed at length the issues you raised with the examiner, resulting in the examiner's report being amended to address the factual errors that were highlighted. Please find a copy of the report attached; this has been published to the relevant page on the RDC website.”

199. The revised version of the Examiner's report was published on the Council's website on 13 May 2021. It explains at paragraph 3.4:

“This report replaces the original report of 19 April 2021. It clarifies details on planning applications which have been determined on the allocated housing site off Strand Meadow in the Rother Local Plan 2006. It also comments on the relationship between the application history on this site, the delivery of strategic housing growth in Burwash village and the outcome of the examination of the neighbourhood plan.”

These were matters raised by the Claimant in the email of 4 May 2021, which the Examiner responded to constructively.

200. The Examiner made a further determination that a public hearing was not required. He said at paragraph 3.3 of the report of 13 May 2021:

“It is a general rule that neighbourhood plan examinations should be held by written representations only. Having considered all the information before me, including the representations made to the submitted plan, I was satisfied that the Plan could be examined without the need for a public hearing. This decision was assisted by the level of detail available to me on the Plan, including the various representations and the responses to the clarification note. I advised RDC of this decision once I had received the responses to the clarification note.” (*emphasis added*)

I have underlined the new text which was not in the initial report. It corresponds with the Examiner's thinking as expressed in the email of 6 May 2021.

201. The Examiner again confirmed, at paragraphs 3.1; 4.8; and 4.10, that he had considered and taken into account, the representations made to him, including from the Claimant. References are also made to the substance of the Claimant's representations in the report.
202. On 18 May 2021, Mr Pickup sent an email to Ms Edwards, raising queries about the revised report, in particular, whether the Site was retained within the development boundary, given the absence of a development boundary map in the report.
203. On 19 May 2021, Ms Edwards replied explaining that the Examiner was referring to the existing boundary in the Rother DLP 2006, which had been retained in the BNDP. The Examiner had not included a map in his report as he had not recommended modifications to the boundary. Therefore the map located in the appendix of the BNDP, published for the regulation 16 consultation, was the map that will be going forward to the referendum.
204. On 19 May 2021, Mr Pickup again emailed asking for confirmation that the Site would be within the development boundary.

205. In response, in an email dated 19 May 2021, Ms Edwards explained that the development boundary had not changed since it was set out in the Rother DLP 2006. Therefore the Site sat largely within the development boundary, with the exception of the south-west corner which was still located outside the boundary.
206. On 7 June 2021, Mr Pickup emailed the Council with queries concerning the application of Policy OVE1 in the DSA 2019, as it is only applicable until such time as a neighbourhood plan is in force. Mr Pickup also asked which Committee would be deciding whether to move the BNDP to a referendum, and when would the Committee meet.
207. On 7 June 2021, Ms Edwards replied by email stating that the Council's interpretation was that Policy OVE1 will remain in force if a neighbourhood plan fails to allocate sites for housing. The decision whether to take the BNDP forward to a referendum was a decision that had been delegated to the Chief Executive, and it would be confirmed in the decision statement which was due to be published by 18 June 2021.
208. On 16 June 2021, Mr Pickup sent an email to Ms Edwards asking for a copy of the officer's report for the delegated decision and an opportunity to make representations before the decision was made. He also asked for confirmation of the date of the decision.
209. On 17 June 2021, Ms Edwards replied as follows:
- “As the recommendations made [by] the examiner have been accepted by both the parish and district councils, there will be no further consultation on the Plan. All documents will be published on the RDC website, and most likely on the Parish Council website, once they have been issued. I do not yet have a date for this, as the Parish Council has requested a short extension.”
210. Mr Pickup replied on 17 June 2021 stating the officer's report should be a public document, available for inspection prior to the decision.
211. On 18 June 2021, Ms Edwards replied and said:
- “The Neighbourhood Planning (General) Regulations 2021 do not stipulate that the internal report accepting/declining the recommendations of the examiner must be made available for public comment prior to the Decision Statement being published, and further to this, this report has not been published in advance of the DS for previous NPs in Rother which have been through examination.
- The Town and Country Planning Act 1990, Schedule 4B, para 13 sets out that if the LPA proposes to make a decision which differs from the examiner's recommendations, then the authority must notify 'prescribed persons' and invite representations. As I mentioned in my previous email, we are proposing to accept the examiner's recommendations therefore this stage of consultation is not relevant in this case. There will be a short extension to the

5 weeks normally allowed for the Decision Statement to be published requested by Burwash PC.

...”

212. Mr Pickup’s attendance note dated 21 June 2021 refers to a telephone conversation with Ms Edwards in which she explained that the next stage was for the PC to amend the draft plan to take account of the Examiner’s recommendations, which was delayed because some key members were off sick. Once the amended draft plan was received, a decision will be made by the Chief Executive whether to take the Plan forward, but no provisional date was in place yet. Ms Edwards said he would be notified when a decision was made. In this conversation Mr Pickup “mentioned the potential for a judicial review” and Ms Edwards discussed the Claimant’s concerns with Mr Pickup, and briefly explained the Council’s views.
213. On 6 July 2021, the officer’s report was sent to the Chief Executive. It referred back to the earlier officer’s report for the meeting of Cabinet on 2 November 2020, and the detailed representations which the Council sent to the Examiner on 6 November 2021. It set out the Examiner’s proposed modifications, and his conclusion that the BNDP did meet the necessary basic conditions. The report advised that the Council’s planning officers and the PC accepted the Examiner’s conclusions, and therefore the recommendation to the Chief Executive was that he endorse the Examiner’s recommendations, and put the modified version of the BNDP forward for referendum.
214. On 9 July 2021, the Council’s Chief Executive, exercising delegated authority, made the Decision that the Examiner’s recommended modifications should be accepted, and that the BNDP should proceed to a Neighbourhood Planning Referendum on 16 September 2021. The Decision was published on the Council’s website, together with the officer’s report.
215. On 21 July 2021, Mr Pickup sent an email to Ms Edwards as follows:
- “The last time we spoke you confirmed that you would keep me informed about the progress on the Burwash Neighbourhood Plan ...As I have not heard from you I have checked on the Council website and now note that the Council has now decided to proceed to a Referendum and a date has been set for this on 16th September. Please can you confirm the date the decision was made by the District Council to proceed to a Referendum?”
216. Ms Edwards replied on 21 July 2021, stating:
- “The last time we spoke I also mentioned that we are extremely busy with the Local Plan review, and I’m afraid I’m not always able to able to keep individual landowners/agents up to date with NP progress. All the information you require is on the RDC NP page, including the report supporting the Chief Executive decision that the Burwash NP proceeds to referendum, which is dated 6th July 2021.”

217. Mr Pickup sent three further emails to Ms Edwards on 27 and 28 July 2021 asking on what day in July 2021 the decision was made, as it was dated “July 2021”, and the date it was uploaded on to the website. A substantive reply was not received.

(2) Analysis

218. The Claimant relied upon the principles of fairness summarised by Jackson LJ in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145, at [62]:

“(1) Any party to a planning inquiry is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. (2) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the inspector’s decision.”

219. The requirements of fairness depend in part upon the statutory context, and the nature of the decisions which are being made. *Hopkins* concerned an appeal by a developer against a refusal of planning permission by the local planning authority, under section 78 TCPA 1990, in which the appellant claimed the inspector had acted unfairly in not warning the parties that she was minded to base her decision upon considerations which had not initially been identified as main issues. The Court of Appeal held that the inspector had not acted unfairly.
220. In contrast, this claim concerns the making of a neighbourhood development plan by a local planning authority and a qualifying body in which the Claimant is but one of a number of organisations and individuals who are potentially affected by the proposals. Parliament has laid down an elaborate statutory scheme for the making of a neighbourhood plan, which is presumably intended to ensure that a fair and effective procedure is followed. For example, the scheme expressly provides for publication and consultation at some stages, but not others. It is possible that common law requirements of fairness may require some additional safeguards to be adopted in a particular case, but in my view, that will be rare where such a detailed statutory scheme exists. Generally, it is in the interests of good administration that plan-making procedures are transparent and consistent.
221. The PC and the Council complied with the procedures for consultation and the making of representations in the statutory scheme. The Examiner and the Council also received additional communications from the Claimant which they considered. In my view, on the facts of this case, procedural fairness did not require the Council to afford to the Claimant any additional opportunities to be consulted and/or to make representations.
222. The Claimant had ample opportunity to make representations during the examination process, which were taken into account by the Examiner. The statutory scheme does not provide for further consultation and representations once the Examiner’s report is published, unless the Council proposes to make a decision which differs from that recommended by the examiner (paragraph 13 of Schedule 4B TCPA 1990). In particular, there is no provision in the scheme for a meeting with the Council and a meeting was not required here in order to discharge any common law requirements of

fairness. In this case, the Claimant did write to the Council with comments on the Examiner's initial report, and those comments were carefully considered by the Council and the Examiner. The Examiner amended his report to take account of them.

223. In my view, there was no impropriety or unfairness in the Examiner seeking and obtaining further information or clarification from the Council or the PC to assist him with the examination, without involving the Claimant.
224. I consider that the attention which Mr Pickup demanded between 18 May and 28 July 2021, was unreasonable, and went well beyond what was required under the statutory scheme. It would be physically impossible for a Council's planning department to provide that level of service to everyone who was potentially affected by an emerging plan. Ms Edwards explained to Mr Pickup that she was heavily engaged in working on the review of the Local Plan. The fact that Ms Edwards failed to notify Mr Pickup personally that the Chief Executive's decision had been made, and that Mr Pickup had to find this out from the website, could not conceivably amount to procedural unfairness, and did not prejudice the Claimant.
225. As to the Cabinet meeting of 2 November 2020, the Council was not under any obligation to notify the Claimant of its deliberations in respect of its own representations to the Examiner, nor to give the Claimant an opportunity to comment on the letter from the PC's Steering Group. However, in drawing up its own representations on the draft plan, both officers and Cabinet members were well aware of, and took into account, the Claimant's views. Those views had been recently set out in detail in the Claimant's representations dated 19 October 2020. The issue of the Claimant's Site was expressly considered in the officer's report, the PC's letter, and in the final version of the representations which was sent to the Examiner. The final version referred to the extant allocation for housing, and the extant grant of outline planning permission, and stated that the Site must be accepted as contributing to the overall target of 52 dwellings as "the principle of development is established here".
226. Clearly it would not have been appropriate to send to the Examiner the officer's draft representation which the Council had rejected. The officer's report was published on the Council's website and the minutes of Cabinet meetings are available for perusal by the public.
227. The Council published the Examiner's revised report on its website in accordance with regulation 18 of the 2012 Regulations. The Examiner gave adequate and sufficient reasons, in compliance with paragraph 10(6) of Schedule 4B TCPA 1990, which only requires the report to give a summary of its main findings and reasons for its recommendations. In my view, an Examiner who may well have to consider multiple representations on a neighbourhood plan, is not required to respond to each and every representation made, in turn. He 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.
228. A local planning authority is required to give reasons for its decision under paragraph 12(11) of Schedule 4B TCPA 1990. 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.

229. As confirmed by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, the reasons are generally 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].

230. 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 matters 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.”

231. The Claimant submits that the officer’s report and the Chief Executive’s Decision were inadequate, and failed to address the Claimant’s concerns and representations. However, both the officer and the Chief Executive agreed with the revised Examiner’s report which had been published and which had already taken the Claimant’s objections and comments on the initial version of the Examiner’s report into account. The officer was well aware of the issues raised by the Claimant as he wrote the officer’s report for the Cabinet meeting of 2 November 2020, and he cross-referred to that report and the representations which the Council sent to the Examiner on 6 November 2020. The Chief Executive was well aware of the issues raised and it can reasonably be inferred that he gave due consideration to the Claimant’s views and the position regarding the Claimant’s Site. The Claimant has not identified any new points or objections that it would have raised had it been aware of the officer’s report of 6 July 2021. I conclude that the Chief Executive’s Decision gave adequate reasons in compliance with paragraph 12(11) of Schedule 4B TCPA 1990

232. The statutory scheme does not require the Council to publish the officer’s report, and to invite written or oral representations upon it, before the Council can proceed to making its decision under paragraph 12(2) of Schedule 4B TCPA 1990. I do not consider that it was unfair to the Claimant not to do so, nor that the Claimant was prejudiced by not having advance sight of the report. Essentially, it agreed with the Examiner’s conclusions and recommendations, which the Claimant had already seen.

233. The Claimant submits that the Examiner should have held an oral hearing. However, a neighbourhood plan examination is normally an entirely written process. Paragraph 9 of Schedule 4B TCPA 1990 provides:

“(1) The general rule is that the examination of the issues by the examiner is to take the form of the consideration of written representations.

(2) But the examiner must cause a hearing to be held for the purpose of receiving oral representations about a particular issue at the hearing—

(a) in any case where the examiner considers that the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case, or

(b) in such other cases as may be prescribed.

.....”

234. The Guidance confirms at paragraph 56:

“.....It is expected that the examination of a draft neighbourhood plan. will not include a public hearing. Rather the examiner should reach a view by considering written representations. Where the independent examiner considers it necessary to ensure adequate examination of an issue or to give a person a fair chance to put a case, they must hold a hearing to listen to oral representations about a particular issue. The subject of a hearing is determined by the independent examiner based on their initial views of the draft plan.... and any other supporting documents submitted by the qualifying body and the representations received from interested parties.”

235. In my judgment, the reasons given by the Examiner for not holding a public hearing do not disclose any arguable error of law. The statutory test in paragraph 9(2)(a) of Schedule 4B requires an exercise of judgment by an Examiner. The Examiner correctly applied the statutory test. He explained that he was satisfied that there was no need for a hearing, in the light of the representations and information which he had received. In my view, the Claimant’s detailed written representations, which were professionally drafted, covered all the relevant points. The Examiner was entitled to conclude that a hearing was not necessary, in the exercise of his discretion, and having regard to all the circumstances of this particular plan.

236. Therefore Ground 2 does not succeed.

Final conclusions

237. For the reasons set out above, the claim for judicial review is dismissed.

Appendix 1

Relevant policies in the National Planning Policy Framework (February 2019)

Chapter 3: Plan-making

“The plan-making framework

15. The planning system should be genuinely plan-led. Succinct and up-to-date plans should address a positive vision for the future of each area; a framework for addressing housing needs and other economic, social and environmental priorities; and a platform for local people to shape their surroundings.

16. Plans should:

a) be prepared with the objective of contributing to the achievement of sustainable development;

b) be prepared positively, in a way that is aspirational but deliverable;

.....

d) contain policies that are clearly written and unambiguous, so it is evident how a decision maker should react to development proposals;

.....

f) serve a clear purpose, avoiding unnecessary duplication of policies that apply to a particular area”

17. The development plan must include strategic policies to address each local planning authority’s priorities for the development and use of land in its area [FN11: Section 19(1B-1E) of the Planning and Compulsory Purchase Act 2004.]. These strategic policies can be produced in different ways, depending on the issues and opportunities facing each area. They can be contained in:

a) joint or individual local plans, produced by authorities working together or independently (and which may also contain non-strategic policies); and/or

b) a spatial development strategy produced by an elected Mayor or combined authority, where plan-making powers have been conferred.

18. Policies to address non-strategic matters should be included in local plans that contain both strategic and non-strategic policies, and/or in local or neighbourhood plans that contain just non-strategic policies.

19. The development plan for an area comprises the combination of strategic and nonstrategic policies which are in force at a particular time.

Strategic policies

20. Strategic policies should set out an overall strategy for the pattern, scale and quality of development, and make sufficient provision [FN12: In line with the presumption in favour of sustainable development.] 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 [FN13: Where a single local plan is prepared the non-strategic policies should be clearly distinguished from the 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 nonstrategic 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.

22. Strategic policies should look ahead over a minimum 15 year period from adoption, to anticipate and respond to long-term requirements and opportunities, such as those arising from major improvements in infrastructure.

23. Broad locations for development should be indicated on a key diagram, and land use designations and allocations identified on a policies map. Strategic policies should provide a

clear strategy for bringing sufficient land forward, and at a sufficient rate, to address objectively assessed needs over the plan period, in line with the presumption in favour of sustainable development. This should include planning for and allocating sufficient sites to deliver the strategic priorities of the area (except insofar as these needs can be demonstrated to be met more appropriately through other mechanisms, such as brownfield registers or nonstrategic policies) [FN15: For spatial development strategies, allocations, land use designations and a policies map are needed only where the power to make allocations has been conferred.]”

.....

“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 [FN16: Neighbourhood plans must be in general conformity with the strategic policies contained in any development plan that covers their area.]

30. Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by strategic or non-strategic policies that are adopted subsequently.”

.....

“37. Neighbourhood plans must meet certain ‘basic conditions’ and other legal requirements [FN21: As set out in paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended).] before they can come into force. These are tested through an independent examination before the neighbourhood plan may proceed to referendum.”

Chapter 5: Delivering a sufficient supply of homes

“59. To support the Government’s objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing requirements are addressed and that land with permission is developed without unnecessary delay.

60. To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals.....”

“65. Strategic policy-making authorities should establish a housing requirement figure for their whole area, which shows the extent to which their identified housing need can be met over the plan period. Within this overall requirement, strategic policies should also set out a housing requirement for designated neighbourhood areas which reflects the overall strategy for the pattern and scale of development and any relevant allocations. Once the strategic policies have been adopted, these figures should not need re-testing at the neighbourhood plan examination, unless there has been a significant change in circumstances that affects the requirement.”

.....

“Identifying land for homes

67. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of strategic housing land availability assessment. From this planning policies should identify a sufficient supply and mix of site, taking into account their availability, suitability and likely economic viability. Planning policies should identify a supply of:

- a) specific, deliverable sites for years one to five of the plan period; and
- b) specific, deliverable sites or broad locations for growth, for years 6 – 10 and, where possible, years 11-15 of the plan.

68. Small and medium sized sites can make an important contribution to meeting the housing requirement of an area, and are often built-out relatively quickly. To promote the development of a good mix of sites local planning authorities should:

a) identify, through the development plan and brownfield registers, land to accommodate at least 10% of their housing requirement on sites no larger than one hectare; unless it can be shown, through the preparation of relevant plan policies, that there are strong reasons why this 10% target cannot be achieved.

.....

69. Neighbourhood planning groups should also consider the opportunities for allocating small and medium-sized sites (of a size consistent with paragraph 68a) suitable for housing in their area.”

Chapter 15: Conserving and enhancing the natural environment

“172. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas..... The scale and extent of development within these designated areas should be limited. Planning permission should be refused for major development other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:

- a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy.
- b) The cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
- c) Any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.”

Relevant extracts from the Planning Practice Guidance

“Can a neighbourhood plan allocate sites for development?”

A neighbourhood plan can allocate sites for development, including housing. A qualifying body should carry out an appraisal of options and an assessment of individual sites against clearly identified criteria. Guidance on assessing sites and on viability is available.

Paragraph: 042 Reference ID: 41-042-20170728

Revision date: 28 07 2017 ...”

“Can a neighbourhood plan allocate additional or alternative sites to those in a local plan?”

A neighbourhood plan can allocate additional sites to those in a local plan (or spatial development strategy) where this is supported by evidence to demonstrate need above that identified in the local plan or spatial development strategy. Neighbourhood plans should not re-allocate sites that are already allocated through these strategic plans.

A neighbourhood plan can also propose allocating alternative sites to those in a local plan (or spatial development strategy), where alternative proposals for inclusion in the neighbourhood plan are not strategic, but a qualifying body should discuss with the local planning authority why it considers the allocations set out in the strategic policies are no longer appropriate.

The resulting draft neighbourhood plan must meet the basic conditions if it is to proceed. National planning policy states that it should support the strategic development needs set out in strategic policies for the area, plan positively to support local development and should not promote less development than set out in the strategic policies (see paragraph 13 and paragraph 29 of the National Planning Policy Framework). Nor should it be used to constrain the delivery of a strategic site allocated for development in the local plan or spatial development strategy.

Should there be a conflict between a policy in a neighbourhood plan and a policy in a local plan or spatial development strategy, section 38(5) of the Planning and Compulsory Purchase Act 2004 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.

Paragraph: 044 Reference ID: 41-044-20190509

Revision date: 09 05 2019 ...”

“How is a neighbourhood plan or Order examined?”

Neighbourhood plans and Orders should be examined fairly and transparently. Examiners should ensure that qualifying bodies remain well briefed on all matters relating to the independent examination. If the examiner requires any additional information, such requests and responses should be made publicly available by local planning authorities in a timely fashion to ensure the fairness and transparency of the examination process.

It is expected that the examination of a draft neighbourhood plan or Order will not include a public hearing. Rather the examiner should reach a view by considering written representations (see paragraph 9(1) of Schedule 4B to the Town and Country Planning Act 1990 (as amended)). As a consequence the basic conditions statement is likely to be the main way that a qualifying body can seek to demonstrate to the independent examiner that its draft neighbourhood plan or Order meets the basic conditions.

Where the independent examiner considers it necessary to ensure adequate examination of an issue or to give a person a fair chance to put a case, they must hold a hearing to listen to oral representations about a particular issue.

The subject of a hearing is determined by the independent examiner based on their initial views of the draft plan or Order proposals and any other supporting documents submitted by the qualifying body and the representations received from interested parties.

Paragraph: 056 Reference ID: 41-056-20180222

Revision date: 22 02 2018 ...”

“How can the public make their views known to the independent examiner?”

Those wishing to make their views known to the independent examiner, or who wish to submit evidence for the examiner to consider, will do this by submitting written representations to the local planning authority during the statutory publicity period on the submitted draft neighbourhood plan or Order, which must be at least 6 weeks.

Representations should address whether or not the draft neighbourhood plan or Order proposal meets the basic conditions and other matters that the independent examiner is required to consider under paragraph 8 of Schedule 4B to the Town and Country Planning Act 1990 (as amended). Representations may also address whether the referendum area should be extended beyond the neighbourhood area. Anyone wishing to make a case for an oral hearing should do so as part of a written representation.

Paragraph: 057 Reference ID: 41-057-20140306

Revision date: 06 03 2014”

“What are the basic conditions that a draft neighbourhood plan or Order must meet if it is to proceed to referendum?”

Only a draft neighbourhood Plan or Order that meets each of a set of basic conditions can be put to a referendum and be made. The basic conditions are set out in paragraph 8(2) of Schedule 4B to the Town and Country Planning Act 1990 as applied to neighbourhood plans by section 38A of the Planning and Compulsory Purchase Act 2004. The basic conditions are:

a. having regard to national policies and advice contained in guidance issued by the Secretary of State it is appropriate to make the order (or neighbourhood plan). Read more details.

b. having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order. This applies only to Orders. Read more details.

c. having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order. This applies only to Orders. Read more details.

d. the making of the order (or neighbourhood plan) contributes to the achievement of sustainable development. Read more details.

e. the making of the order (or neighbourhood 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). Read more details.

f. the making of the order (or neighbourhood plan) does not breach, and is otherwise compatible with, EU obligations. Read more details.

g. prescribed conditions are met in relation to the Order (or plan) and prescribed matters have been complied with in connection with the proposal for the order (or neighbourhood plan). Read more details.

Paragraph: 065 Reference ID: 41-065-20140306

Revision date: 06 03 2014”

“National policy and advice

What does having regard to national policy mean?

A neighbourhood plan or Order must not constrain the delivery of important national policy objectives. The National Planning Policy Framework is the main document setting out the

government's planning policies for England and how these are expected to be applied.

Paragraph: 069 Reference ID: 41-069-20140306

Revision date: 06 03 2014”

“Which national policies are relevant to a neighbourhood plan or Order?”

Paragraph 13 of the National Planning Policy Framework is clear that neighbourhood plans should support the delivery of strategic policies contained in local plans and spatial development strategies. Qualifying bodies should plan positively to support local development, shaping and directing development in their area that is outside these strategic policies. More specifically paragraph 29 of the National Planning Policy Framework states that neighbourhood plans should not promote less development than set out in the strategic policies for the area, or undermine those strategic policies.

Beyond this, the content of a draft neighbourhood plan or Order will determine which other aspects of national policy are or are not a relevant consideration to take into account. The basic condition allows qualifying bodies, the independent examiner and local planning authority to reach a view in those cases where different parts of national policy need to be balanced.

A qualifying body is advised to set out in its basic conditions statement how they have had regard to national policy and considered whether a particular policy is or is not relevant. A qualifying body is encouraged to set out the particular national policies that it has considered, and how the policies in a draft neighbourhood plan or the development proposals in an Order take account of national policy and advice.

Paragraph: 070 Reference ID: 41-070-20190509

Revision date: 09 05 2019 ...”

“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

Paragraph: 074 Reference ID: 41-074-20140306

Revision date: 06 03 2014”

“What is meant by strategic policies?”

Paragraph 20 of the National Planning Policy Framework sets out the strategic matters about which are expected to be addressed through policies in local plans or spatial development strategies. The basic condition addresses strategic policies no matter where they appear in the development plan. Paragraph 21 sets an expectation that plans should make explicit which policies are strategic policies.

Paragraph: 075 Reference ID: 41-075-20190509

Revision date: 09 05 2019 ...”

“How is a strategic policy determined?”

Strategic policies will be different in each area. When reaching a view on whether a policy is a strategic policy the following are useful considerations:

- whether the policy sets out an overarching direction or objective
- whether the policy seeks to shape the broad characteristics of development
- the scale at which the policy is intended to operate
- whether the policy sets a framework for decisions on how competing priorities should be balanced
- whether the policy sets a standard or other requirement that is essential to achieving the wider vision and aspirations in the local plan or spatial development strategy

- in the case of site allocations, whether bringing the site forward is central to achieving the vision and aspirations of the local plan or spatial development strategy
- whether the local plan or spatial development strategy identifies the policy as being strategic

Planning practice guidance on plan-making provides further advice on strategic policies.

Paragraph: 076 Reference ID: 41-076-20190509

Revision date: 09 05 2019 ...”

“How does a qualifying body know what is a strategic policy?”

A local planning authority (or, where relevant, elected Mayor or combined authority) should set out clearly its strategic policies in accordance with paragraph 21 of the National Planning Policy Framework and provide details of these to a qualifying body and to the independent examiner.

Paragraph: 077 Reference ID: 41-077-20190509

Revision date: 09 05 2019 ...”

“How should neighbourhood planning bodies use a housing requirement figure that has been provided to them?”

Where neighbourhood planning bodies have decided to make provision for housing in their plan, the housing requirement figure and its origin are expected to be set out in the neighbourhood plan as a basis for their housing policies and any allocations that they wish to make.

Neighbourhood planning bodies are encouraged to plan to meet their housing requirement, and where possible to exceed it.....

Paragraph: 103 Reference ID: 41-103-20190509

Revision date: 09 05 2019”

“Are housing requirement figures for neighbourhood areas binding?”

The scope of neighbourhood plans is up to the neighbourhood planning body. Where strategic policies set out a housing requirement figure for a designated neighbourhood area, the neighbourhood planning body does not have to make specific provision for housing, or seek to allocate sites to accommodate the requirement (which may have already been done through the strategic policies or through non-strategic policies produced by

the local planning authority). The strategic policies will, however, have established the scale of housing expected to take place in the neighbourhood area.

Housing requirement figures for neighbourhood plan areas are not binding as neighbourhood planning groups are not required to plan for housing. However, there is an expectation that housing requirement figures will be set in strategic policies, or an indicative figure provided on request. Where the figure is set in strategic policies, this figure will not need retesting at examination of the neighbourhood plan. Where it is set as an indicative figure, it will need to be tested at examination.

Paragraph: 104 Reference ID: 41-104-20190509

Revision date: 09 05 2019”