

TOWN AND COUNTRY PLANNING ACT 1990

IN THE MATTER OF

**THE THORP ARCH ESTATE
AND
THE THORP ARCH NEIGHBOURHOOD
PLAN
SUBMISSION VERSION**

OPINION

No5
CHAMBERS

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Introduction

1. In this matter, we are instructed by Pegasus Group on behalf of the Rockspring Hanover Property Trust (hereinafter “Rockspring”) in respect of the Pre-Submission Version of the Thorp Arch Neighbourhood Plan (“the Neighbourhood Plan”/ “the TANP”) (published 20 August 2016), which is currently at Regulation 14 consultation from 20 August to 2 October 2016.

Factual Background

2. The factual background to this case has been set out very fully within earlier Instructions and Conference. A further summary is provided in the Pegasus Group representations to which this Opinion is attached. Therefore only a brief summary is necessary, with a focus on the text of the Pre-Submission Neighbourhood Plan and the documents which have been provided as its ‘Evidence Base’ on the Steering Group’s website.

The Thorp Arch Estate and the Rudgate Village Planning Application

3. The Thorp Arch Trading Estate (“TATE”) includes 159 hectares of brownfield land, part of which Rock Spring seek to develop for residential development. The site is now known simply as Thorp Arch Estate (TAE), the reference to TATE in the TANP is historic, but both refer to the same site.
4. On 22 August 2016, a planning application for a mixed use development known as ‘Rudgate Village’ comprising 874 dwellings, 66-bed care home, a primary school, local centre, 5-unit retail parade, onsite open space and associated highway and other infrastructure was submitted (Application Reference 16/05226/06).
5. The boundary of the site is located [0.7] km from the nearest edge of the built-up area of Thorp Arch. The site also extends into the neighbouring Parish.
6. In short, it is not physically related to Thorp Arch Village. It falls to be assessed within the immediate context of the TATE and within the broader strategic context of Wetherby, Tadcaster and the Outer North East HMCA of Leeds City.

7. Thorp Arch Village is itself a settlement of a regular population of 778 people (excluding HMP Whealstun) occupying 332 dwellings. However, the fact that the boundary extends to include part of the TATE is a function of the historic parish boundary, rather than any contemporary planning considerations: as exemplified by the way in which the TATE is bisected by the boundary.

The Pre-Submission Neighbourhood Plan

8. The Neighbourhood Plan expresses local concerns about applications for new residential development (Section 3.4). The text at the base of page 31-32 notably records: *“there is acceptance of small scale residential development within the Parish. This would allow organic growth of the village which should avoid degrading the existing built environment, and the natural/farmland environment”*.
9. The Neighbourhood Plan further seeks to preserve the TATE site in employment use, recording at page 37 and then at page 38:

“There have been a series of proposals for the whole or part of the Estate to be used for new homes. However, if used for residential purposes, the site would require substantial decontamination. There is a further consideration that much of this land has either reverted back to uncultivated land, or never been developed at all and large areas are ecologically sensitive, including one of the most extensive areas of limestone grassland in West Yorkshire...

...

The location has shown resilience as an employment site during recessions and continues to significantly invest in providing both individual and speculative new and refurbished buildings to meet demand. The location, parkland setting and versatility that TATE can offer could be said to be unique, making it an ideal location for carrying out local, national and international business.

The local population of the parish have had many opportunities to express their opinions about the use of the land at TATE. A local group (TAG) has been formed and for a number of years has been working to oppose the use of the land for housing and to retain its current use for employment. This is also the view of the Parish Council and at the Annual Parish meetings, TAG are invited to present the status of any activity regarding housing proposals for TATE.

At the Parish Meeting held 25th April 2016, TAG had 100% support from the 60 residents who attended, to continue in their role to represent the community in supporting TATE as a location for employment use only.”

10. The Neighbourhood Plan consequently seeks to restrict where development can go through the following draft policies:

(a) Policy CNE1: Protecting countryside character (page 26): the text seeks to control the design of development outside existing built up areas by reference to protected views.

(b) Policy H1: Site Allocations (page 33): a single allocation is made for “a minimum of 25 new homes” on Site 4079: Former Social Club, Walton Road, Thorp Arch.

(c) Policy LE1: Thorp Arch Trading Estate (page 38): which states that the Thorp Arch Trading Estate is “designated” as an employment site and does not make reference to any further uses.

Supporting Documents and Evidence Base

11. On the Steering Group website, there are a number of documents labelled as “Evidence”. The majority are Consultation documents, either advertising consultations or recording the results.

12. There is no draft Basic Conditions Statement, nor other draft statement to explain how the Neighbourhood Plan has had regard to the Local Plan’s strategic context.

13. The only document which directly addresses housing need is a document labelled “*Thorp Arch Housing Market and Needs Assessment*” by Ruralis (dated 25 May 2016). Its contents include:

Pages 2-6: General information on the current composition of the village;

Pages 7-8: Summary of the Leeds SHMA

Page 9: “Local Demand and Needs” are expressed as a bar chart percentages on the basis of a 2012 survey

Page 10-13: Site Assessment: a tabular critique of the SHLAA sites.

14. The entry in respect of the Thorp Arch Estate records that the area identified has the capacity for 1000 houses but then records:

“Not appropriate for residential development. Residential development of TAE has been subject of a previous Planning Inquiry for the UDP and was not found to be a sustainable site for housing.

An earlier planning application for 2000 dwellings, some retail development, a school, and medical facilities with a relief road, was withdrawn in 2015 following extensive and valid local objections lead by TAG and the Parish Council.

The new proposed scheme ‘Rudgate Village’ comprises c1000 dwellings, a school and community facilities, with no relief road. The scale of the development is not appropriate and would overpower Thorp Arch and surrounding villages.

The additional traffic generated would have serious detrimental effect on the character of the village and would lead to congestion, particularly at the single track bridge to Boston Spa.

The site is a former ROF munitions factory and will require extensive investigation and decontamination. Removal of many tons of potentially contaminated materials through residential villages is not acceptable.

Large areas of the proposed site are ecologically sensitive and include one of the most extensive areas of limestone grassland in West Yorkshire. There are four areas within TAE which are designated as Sites of Ecological and Geological Importance (SEGI). West Yorkshire Ecology considers that there are several other areas that would qualify under the new ‘Local Wildlife Site Selection’ criteria.”

15. The conclusion then summarises both the suitability of Thorp Arch for development and opposition to development before concluding:

“The analysis of sites undertaken by the Neighbourhood Plan group revealed support for 2 sites that will provide in the region of 40 new homes over the next couple of years – at the front end of the plan period. It will be important for the developers of those sites to recognise the potential demand for smaller accommodation as expressed through surveys for downsizers and for younger people and families.

The previous and current proposals for large scale housing development on the Thorp Arch Estate may clearly serve a strategic purpose in relation to housing land supply for the One North East and Leeds as a whole. However, the restrictions on the site and on the parish as a whole as described above make it difficult to justify when considering the demand from within the parish and the

negative impacts upon the parish as a whole and its resident population in terms of traffic movements, loss of habitats and loss of employment land.”

16. The Neighbourhood Plan is not supported by any further viability evidence, most notably in respect of the Thorp Arch Estate’s proposed “designation” as Employment land.
17. Policy H1 has had no regard to the allocation of site HG2-227 (5300) in the Site Allocations Plan Revised Publication Draft Section 3: Area Proposals: 6. Outer North East (page 22-23) (September 2016), allocating 6.3ha of land at Land to the north of HMP Wealstun Prison for 142 units.

Strategic Environmental Assessment

18. The Neighbourhood Plan has not been the subject of screening for the purposes of the Environmental Assessment of Plans and Programmes Regulations 2004 (“the SEA Regulations”).
19. That much is clear from the Leeds City Council website which records screening for the draft Linton, Collingham and Clifford Neighbourhood Plans, but excludes Thorp Arch: <http://www.leeds.gov.uk/council/Pages/Neighbourhood-planning.aspx>
20. There is no Screening Opinion on the Steering Group’s website either, nor any reference to such an exercise in the Minutes provided online.

The Local Plan Context

21. The Local Plan context has been set out fully within the Pegasus submissions and is not repeated at length here. In essence:
 - (a) Policy SP6 of the Core Strategy identifies a housing requirement of 70,000 new dwellings over the plan period, with a preference for brownfield sites, including consideration of sites outside the settlement hierarchy;
 - (b) Policy SP7 makes clear that the ONE area should provide 5,000 new dwellings towards that total;

(c) The Site Allocations Plan (June 2013) identified the TATE site as having the greatest potential for housing in the ONE area;

(d) The current Draft SAP allocates 142 units at the HG2-227 site, and retains the allocation of TATE site in employment use. This has not been the subject of any independent examination.

22. Put simply, Leeds has a huge housing need which is going to be unmet, at a time when the Part 2 Plan has a number of unresolved matters.

Linton Neighbourhood Plan Examiner's Report

23. In the Linton Neighbourhood Plan, the Examiner expressly recommended that text in respect of Policy B2 be deleted wholesale with all associated text:

“Policy B2 seeks to protect a site named in Leeds City Council's Strategic Housing Land Availability Assessment (SHLAA), The Ridge, from development, until its longer term allocation has been determined via the Local Plan Sites Allocation Plan and following a Green Belt review.

Policy B2 clearly relates to matters under the consideration of Leeds City Council. The Local Plan Sites Allocation Plan does not form part of the Neighbourhood Plan and Green Belt Review is a strategic matter, rather than a neighbourhood planning matter. In addition, the Ridge is already subject to Leeds UDP saved policy N34. It is not the role of neighbourhood plans to simply repeat existing policy.

I recommend:

- Delete Policy B2 and all associated text.”*

24. Leeds City Council's decision to send the Linton Neighbourhood Plan to referendum has been the subject of a judicial review challenge (see further below).

Legal Framework

25. The legal framework governing neighbourhood plans is set out across section 38A of the Planning and Compulsory Purchase Act 2004 (as amended by the Localism Act 2011) and section 61G-N and Schedule 4B of the Town and Country Planning Act 1990.
26. The core “basic conditions”, against which the Examiner will assess the Neighbourhood Plan, once appointed following completion of the current consultation are set out in paragraph 8(2) of Schedule 4B:

“(2) A draft order meets the basic conditions if—

(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,

...

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

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

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

27. Principles formulated in the initial main four cases: (1) *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin), (2) *R(Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin), (3) *R (Larkfleet Homes Ltd) v Rutland CC* [2015] EWCA Civ 597 and (4) *R(DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin) (now on appeal to the Court of Appeal, to be heard in November 2016), have now been consolidated by Holgate J in three judgments: (5) *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) and (6) *R (Maynard) v Chiltern DC* [2015] EWHC 3817 (Admin) (QBD (Admin)) and (7) *Crownhall Estates v Chichester BC* [2016] EWHC 73 (Admin). The case of *R(Kebbell Developments) v Leeds City Council*, concerning the Linton Neighbourhood Plan, is due to be heard this week in the Administrative Court sitting in Leeds. We are instructed in *Kebbell* and *DLA Delivery*, and were involved in or closely followed the others.
28. In *Crown Hall* at [29], Holgate J summarised:

“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.”

29. However, it is important to appreciate that (a) the above formulation will be explored by the Court of Appeal in the forthcoming *DLA Delivery* case (to be heard in November 2016); and (b) pre-dates and thus took no account of the re-publication of the Planning Practice Guidance on Neighbourhood Planning:

“Paragraph: 040 Reference ID: 41-040-20160211

What evidence is needed to support a neighbourhood plan or Order?

While there are prescribed documents that must be submitted with a neighbourhood plan or Order there is no ‘tick box’ list of evidence required for neighbourhood planning. Proportionate, robust evidence should support the choices made and the approach taken. The evidence should be drawn upon to explain succinctly the intention and rationale of the policies in the draft neighbourhood plan or the proposals in an Order.

A local planning authority should share relevant evidence, including that gathered to support its own plan-making, with a qualifying body. Further details of the type of evidence supporting a Local Plan can be found here Local Plan.

Neighbourhood plans are not obliged to contain policies addressing all types of development. However, where they do contain policies relevant to housing supply, these policies should take account of latest and up-to-date evidence of housing need.

In particular, where a qualifying body is attempting to identify and meet housing need, a local planning authority should share relevant evidence on housing need gathered to support its own plan-making.”

30. A further section was also amended with effect from 19 May 2016:

“Paragraph: 044 Reference ID: 41-044-20160519

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 where this is supported by evidence to demonstrate need above that identified in the Local Plan.

A neighbourhood plan can propose allocating alternative sites to those in a Local Plan, but a qualifying body should discuss with the local planning authority why it considers the Local Plan allocations no longer appropriate. In rural areas, all settlements can play a role in delivering sustainable development.

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 the Local Plan, plan positively to support local development and should not promote less development than set out in the Local Plan or undermine its strategic policies (see paragraph 16 and paragraph 184 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.

Should there be a conflict between a policy in a neighbourhood plan and a policy in a Local Plan, 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.

Guidance on how local authorities should support sustainable rural communities states that blanket policies restricting housing development in some settlements and preventing other settlements from expanding should be avoided unless their use can be supported by robust evidence.

31. Finally, the following paragraphs demonstrates the centrality of the evidence base underlying the Neighbourhood Plan (again from 11 February 2016, post-dating Crown Hall):

“Paragraph: 082 Reference ID: 41-082-20160211

How should planning applications be decided where there is an emerging neighbourhood plan but the local planning authority cannot demonstrate a five-year supply of deliverable housing sites?

Where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites, decision makers may still give weight to relevant policies in the emerging neighbourhood plan, even though these policies should not be considered up-to-date.

Paragraph 216 of the National Planning Policy Framework sets out the weight that may be given to relevant policies in emerging plans in decision taking.

Further assistance to decision makers in these circumstances can be found in guidance on the relationship between a neighbourhood plan and a local plan.

Documentation produced in support of or in response to emerging neighbourhood plans, such as basic conditions statements, consultation statements, representations made during the pre-examination publicity period and independent examiners’ reports, may also be of assistance to decision makers in their deliberations.

Planning Practice Guidance also addresses the question of prematurity in relation to neighbourhood plans.

...

Paragraph: 009 Reference ID: 41-009-20160211

Can a Neighbourhood Plan come forward before an up-to-date Local Plan is in place?

Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.

A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. Although a draft Neighbourhood Plan or Order is not tested against the policies in an emerging Local Plan the reasoning and evidence informing the Local Plan process is likely to be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested. For example, up-to-date housing needs evidence is relevant to the question of whether a housing supply policy in a neighbourhood plan or Order contributes to the achievement of sustainable development.

Where a neighbourhood plan is brought forward before an up-to-date Local Plan is in place the qualifying body and the local planning authority should discuss and aim to agree the relationship between policies in:

*the emerging neighbourhood plan
the emerging Local Plan
the adopted development plan*

with appropriate regard to national policy and guidance.

The local planning authority should take a proactive and positive approach, working collaboratively with a qualifying body particularly sharing evidence and seeking to resolve any issues to ensure the draft neighbourhood plan has the greatest chance of success at independent examination.

The local planning authority should work with the qualifying body to produce complementary neighbourhood and Local Plans. It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging Local Plan, including housing supply policies. This is because section 38(5) of the Planning and Compulsory Purchase Act 2004 requires that the conflict must be resolved by the decision maker favouring the policy which is contained in the last document to become part of the development plan. Neighbourhood plans should consider providing indicative delivery timetables, and allocating reserve sites to ensure that emerging evidence of housing need is addressed. This can help minimise potential conflicts and ensure that policies in the neighbourhood plan are not overridden by a new Local Plan.”

32. In summary, although some Neighbourhood Plan Examiners historically embraced the light-touch approach to examination, and the courts have (to date) interpreted the

requirements of the basic conditions in a broad, and essentially highly permissive way, the Government now appears to have recognised that the light-touch approach is anathema to the acknowledged policy imperative of boosting the supply of housing.

Analysis of the Policies

Policy H1

33. Policy H1 and its supporting text fail to meet the basic conditions, and should be re-drafted with a proper recognition of the strategic context set by Policies SP6 and SP7.
34. The Pegasus submissions have set out the detailed planning objections to Policy H1 within the context of the strategic development plan context.
35. The Neighbourhood Plan is attempting to pre-determine or frustrate strategic matters which are presently being determined in the Part 2 Plan, which has some way to go (as in the case of Linton). The Neighbourhood Plan is not the place to determine the future of a large strategically important PDL site and determine its future until that process has been concluded.
36. In the Linton case, the Examiner accepted the submission that strategic matters are outside the scope of the Neighbourhood Plan (NPPF 16, 184 and 185) and a failure by the Council to follow that recommendation, has left that Council in High Court litigation as far as the Court of Appeal. The TATE site is a City-wide resource, a large PDL site in a sea of Green Belt and it is not appropriate to have its future determined for 12 years by a NDP.
37. The Regulation 14 consultation has failed even to have regard to the proposed allocation of 142 units at the HG2-227 site in the in the Site Allocations Plan Revised Publication Draft Section 3: Area Proposals: 6. Outer North East (page 22-23) (September 2016).
38. Framed within a legal perspective, first, for the purposes of basic condition 8(2)(a), the making of Policy H1 does not have regard to national policy promoting the delivery of housing (NPPF 14, 16, 47, 49 and 184) and appears to have been produced with

disregard to the PPG paragraphs set out above: 040, 044 and 082, each of which make clear the essential requirement for checking the policy against the Local Plan evidence base on housing needs and to avoid the constraint/frustration of strategic requirements in the Local Plan. Related to that, for the purposes of basic condition 8(2)(e), the making of the Neighbourhood Plan would not be in conformity (general or otherwise) with the strategic policies in the adopted development plan document, namely Policies SP6 and SP7.

39. It would be unlawful (erroneous interpretation of the statutory framework and incorrect policy interpretation) to suggest that this can be the only housing allocation for the plan period, extending as far as 2028.
40. Policy H1 should therefore be accompanied by an explanatory note making clear that Policy H1 cannot and does not intend to set any form of limit on housing development within the Neighbourhood Plan Area.

Policy LE1

41. Policy LE1 seeks to “designate” the TATE as an employment site.
42. For the reasons set out in the Pegasus submissions, the “designation” simply records part of the existing lawful planning uses on the site. There has no attempt to identify or assess the significance of the site as a brownfield or PDL site, in national policy terms or local strategic policy terms (notably SP6).
43. There has been no attempt to consider NPPF 22:

“22. Planning policies should avoid the long term protection of sites allocated for employment use where there is no reasonable prospect of a site being used for that purpose. Land allocations should be regularly reviewed. Where there is no reasonable prospect of a site being used for the allocated employment use, applications for alternative uses of land or buildings should be treated on their merits having regard to market signals and the relative need for different land uses to support sustainable local communities.”

44. There has been no proper analysis of the emerging development plan context, beyond the rudimentary assessment of the SHLAA exercise in the Ruralis Report.
45. Critically, there has been absolutely no assessment of the viability of the site for employment development or the market demand for present uses and increasing employment. The NPPF is unequivocal that plan-making must be deliverable:

“Ensuring viability and deliverability

173. Pursuing sustainable development requires careful attention to viability and costs in plan-making and decision-taking. Plans should be deliverable. Therefore, the sites and the scale of development identified in the plan should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.”

46. Viability assessment is thus a mandatory requirement for plans that allocate, under PPG 042:

“Paragraph: 042 Reference ID: 41-042-20140306

*Can a neighbourhood plan allocate sites for development?
A neighbourhood plan can allocate sites for development. 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 can be found here and here.”*

47. That directly imports the Viability PPG Chapter and the following sections: Paragraph: 025 Reference ID: 10-025-20140306; Paragraph: 011 Reference ID: 10-011-20140306 to Paragraph: 015 Reference ID: 10-015-20140306, all of which set out a structured analysis pathway for viability considerations.
48. Beyond the text at the top of page 38 on the local attachment to the site as a “business incubator”, there has been no attempt to identify whether the site is actually viable in employment use only. As the Pegasus submissions make clear, there has been very little attempt to develop a constructive discussion with Rockspring even to investigate viability. That is itself a breach of PPG 048 of the Neighbourhood Planning Chapter:

“Paragraph: 048 Reference ID: 41-048-20140306

Should other public bodies, landowners and the development industry be involved in preparing a draft neighbourhood plan or Order?

A qualifying body must consult any of the consultation bodies whose interest it considers may be affected by the draft neighbourhood plan or Order proposal. The consultation bodies are set out in Schedule 1 to the Neighbourhood Planning (General) Regulations 2012 (as amended). Other public bodies, landowners and the development industry should be involved in preparing a draft neighbourhood plan or Order. By doing this qualifying bodies will be better placed to produce plans that provide for sustainable development which benefits the local community whilst avoiding placing unrealistic pressures on the cost and deliverability of that development.”

49. In summary, again expressed in legal terms, first, for the purposes of basic condition 8(2)(a), the making of Policy LE1 does not have regard to national policy promoting the delivery of housing (NPPF 14, 16, 47, 49 and 184) or covering employment allocations (NPPF 22) and viability (NPPF 173) and appears to have been produced with disregard to the PPG paragraphs set out above: 040, 044 and 082, and also those covering viability: PPG Neighbourhood Planning 042 and PPG Viability 011-015.
50. All of these policies makes clear the essential requirement for checking the policy against the Local Plan evidence base on housing needs and the importance of avoiding the constraint/frustration of strategic requirements in the Local Plan. Related to that, for the purposes of basic condition 8(2)(e), the making of the Neighbourhood Plan with Policy LE1 would not be in conformity (general or otherwise) with the strategic policies in the adopted development plan document, namely Policies SP6 and SP7.
51. Policy LE1 should be deleted from the Plan. In the alternative, it can only be included in the Plan with specific text making clear that mixed uses will be permitted within TATE, such that housing can be permitted within the area within Thorp Arch NDP area.
52. More than anything, this further reinforces the need for the emerging Neighbourhood Plan not to progress to examination, referendum and being made until at the very least the outcome of the site selection process for housing in Outer North East Leeds has been resolved through the SAP process. The strategic planning position has not yet been resolved, and so general conformity with it is simply not possible. Large scale housing

must be accommodated in Outer North East Leeds. The newly proposed new settlement in the Green Belt at Parlington has still not been subject to any independent scrutiny. This is in addition to the pressing need to address the Council's serious shortfall in its five-year supply of housing land. The attempt to use the TANP to close off the potential for this site to meeting the housing needs of Leeds (either in terms of the plan or the state of the five-year supply) is inappropriate because it runs contrary to the legislation.

Strategic Environmental Assessment

53. The emerging Neighbourhood Plan has been published for a six-week consultation in purported compliance with Regulation 14 of the Neighbourhood Planning (General) Regulations 2012.
54. There has been no Screening Determination (or "opinion") for the purposes of Regulation 9 of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA Regulations") as to whether the proposed Neighbourhood Plan is likely to have significant environmental effects. Certainly no such determination has been published in accordance with Regulation 11 of the SEA Regulations.
55. This has deprived Rockspring and Pegasus of the ability to comment on the SEA position.

The Legislative Framework

56. Neighbourhood plans such as the TANP are prepared for town and country planning or land use and set the framework for future development consent of projects and therefore fall within Regulation 5(4) of the SEA Regulations.
57. Regulation 9 provides:

“(1) The responsible authority shall determine whether or not a plan, programme or modification of a description referred to in–

(a) paragraph (4)(a) and (b) of regulation 5;
(b) paragraph (6)(a) of that regulation; or
(c) paragraph (6)(b) of that regulation,

is likely to have significant environmental effects.

(2) Before making a determination under paragraph (1) the responsible authority shall—

(a) take into account the criteria specified in Schedule 1 to these Regulations; and

(b) consult the consultation bodies.

(3) Where the responsible authority determines that the plan, programme or modification is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination.

58. Under Regulation 11, an authority is required to make public its determination under Regulation 9(3) within 28 days.

59. Under Regulation 8, there are restrictions on adoption where screening has not been completed:

“(1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted or submitted to the legislative procedure for the purpose of its adoption—

(a) where an environmental assessment is required in consequence of the determination or of a direction under regulation 10(3), before the requirements of paragraph (3) below have been met;

(b) in any other case, before the determination has been made under regulation 9(1).”

60. Under Regulation 15 of the Neighbourhood Planning (General) Regulations 2012, a statement of reasons for determination must be submitted with the Submission version of the Plan (see also PPG, Paragraph: 031 Reference ID: 11-031-20150209):

“(1) Where a qualifying body submits a plan proposal to the local planning authority, it must include—

...

(e)(i) an environmental report prepared in accordance with paragraphs (2) and (3) of regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004; or

(ii) where it has been determined under regulation 9(1) of those Regulations that the plan proposal is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), a statement of reasons for the determination.

61. The basic conditions under paragraph 8(2) of Schedule 4B of the Town and Country Planning Act 1990 specify that:

“(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,...

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

62. The Planning Practice Guidance is qualifying “*advice*” under paragraph 8(2)(a) and thus a mandatory consideration (see below).

Case Law

63. There is, as yet, no case law on the specific question of when a screening determination should be issued.
64. However an earlier challenge by Crownhall Developments to the Loxwood Neighbourhood Plan in Chichester District Council was the subject of a consent to judgment where no screening opinion had been issued.

Planning Practice Guidance

65. The PPG *Strategic Environmental Assessment*, and PPG *Neighbourhood Planning* both make expressly clear that an LPA and qualifying body must screen a neighbourhood plan at an early stage before commencing any Regulation 14 pre-submission consultation:

- (a) PPG SEA, Paragraph: 028 Reference ID: 11-028-20150209: “it must be assessed (screened) at an early stage of the plan’s preparation”;
- (b) PPG SEA, Paragraph: 029 Reference ID: 11-029-20150209: “Where it is determined that a neighbourhood plan is likely to have significant effects on the environment and that a strategic environmental assessment must be carried out, work on this should start at the earliest opportunity,”
- (c) PPG SEA, Paragraph: 047 Reference ID: 11-047-20150209: “Strategic environmental assessment is a process for evaluating, at the earliest appropriate stage, the environmental effects of a plan before it is made.”
- (d) PPG SEA, Paragraph 033, Reference ID: 11-033-20150209: Column 1’s Stage A Screening is placed at the outset, well prior to Column 2’s Pre-submission publicity.
- (e) PPG NP, Paragraph: 080 Reference ID: 41-080-20150209: A summary of the key stages in neighbourhood planning:

“Step 2: Preparing a draft neighbourhood plan or Order: ... “determine whether a plan or an Order is likely to have significant environmental effect; ...

Step 3: Pre-submission publicity & consultation: ... • where European Obligations apply, complies with relevant publicity and consultation requirements”

66. It is therefore clear from the above that that statement must have been already published prior to Regulation 14 consultation.

Summary

67. A strategic environmental assessment is a central component of the evidence base and therefore must be made available prior to the commencement of any Regulation 14 consultation to ensure an informed response if SEA is actually undertaken.

68. The Supreme Court has now endorsed the second *Sedley/Coughlan* requirement for lawful consultation *R(Moseley) v Haringey LBC* [2014] UKSC 56, [25]: “*sufficient reasons for any proposal to permit of intelligent consideration*”.
69. A negative screening opinion is of a similar status. It explains, at an early stage, why the SEA is not going to be produced. Unless it is made public in advance of Regulation 14 consultation, then consultees are plainly disadvantaged.
70. Such a Regulation 14 consultation will have proceeded without the production of the correct documentation to explain (a) whether SEA is required; (b) how SEA will be conducted. It is also likely that it will have prevented other development industry representatives and members of the public from participating as well.
71. Where a Regulation 14 consultation is commenced without such a document, then the consultation is unfair and consequently unlawful and not a qualifying Regulation 14 consultation.
72. There is also breach of a legitimate expectation that the screening and subsequent SEA will be undertaken at the earliest stage.

The Need for Screening Opinion

73. Although no screening opinion has been provided, it is clear that this Plan should be positively screened and the subject of a full SEA.

The Legislative Framework

74. Regulation 9(2) of the Environmental Assessment of Plans and Programmes Regulations 2004, requires an LPA to have regard to the criteria in Schedule 1 in any determination.
75. Schedule 1, paragraph 1 provides:

“The characteristics of plans and programmes, having regard, in particular, to–

(a) the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources;

(b) the degree to which the plan or programme influences other plans and programmes including those in a hierarchy;

(c) the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development;

(d) environmental problems relevant to the plan or programme; and

(e) the relevance of the plan or programme for the implementation of EU legislation on the environment (for example, plans and programmes linked to waste management or water protection).

76. Schedule 1, paragraph 2 provides:

“Characteristics of the effects and of the area likely to be affected, having regard, in particular, to—

(a) the probability, duration, frequency and reversibility of the effects;

(b) the cumulative nature of the effects;

(c) the transboundary nature of the effects;

(d) the risks to human health or the environment (for example, due to accidents);

(e) the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected);

(f) the value and vulnerability of the area likely to be affected due to—

(i) special natural characteristics or cultural heritage;

*(ii) exceeded environmental quality standards or limit values;
or*

(iii) intensive land-use; and

(g) the effects on areas or landscapes which have a recognised national, Community or international protection status.”

Case Law

77. There have been two main cases on the interpretation of Schedule 1 and the SEA Regulations 2004 generally: *R(Larkfleet) v Rutland CC* [2014] EWHC 4095 (Admin); EWCA Civ 597 and *R(DLA Delivery) v Lewes DC* [2015] EWHC 2311 (Admin), which now has permission to proceed on SEA grounds as well.
78. Both turn on the specific wording of the screening determination under challenge and the specific scale of the plan and the local environmental issues. Both challenges were further dismissed on the basis that (a) the reasons read as a whole were adequate; (b) planning judgement had been exercised on the specific circumstances of those cases.
79. This case must be approached on its specific facts.

PPG

80. The PPG provides:

Paragraph: 046 Reference ID: 11-046-20150209

What do you do if a neighbourhood plan is likely to have a significant environmental effect?

Where a neighbourhood plan is likely to have a significant effect on the environment a strategic environmental assessment must be carried out and an environmental report prepared in accordance with paragraphs (2) and (3) of regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004.

Whether a neighbourhood plan proposal requires a strategic environmental assessment, and (if so) the level of detail needed, will depend on what is proposed. A strategic environmental assessment may be required, for example, where:

- a neighbourhood plan allocates sites for development*
- the neighbourhood area contains sensitive natural or heritage assets that may be affected by the proposals in the plan*
- the neighbourhood plan is likely to have significant environmental effects that have not already been considered and dealt with through a sustainability appraisal of the Local Plan.*

81. Here the Plan seeks to allocate through Policy LE1 an extensive area for employment use and a housing site under H1 (whilst excluding the larger site proposed under the draft SAP).
82. In this case, criteria 1(a) and 1(b) are both directly engaged by the attempt to steer the allocations process:

(a) the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources;

(b) the degree to which the plan or programme influences other plans and programmes including those in a hierarchy;

83. The proposed development at Rudgate Villages is of a significant size, seeking to develop more than 150 houses or land in excess of the 1 hectare threshold where EIA is required (following the 2015 amendment to the EIA Regulations).
84. The respective Neighbourhood Plan is intended to form the statutory development plan for the parish/neighbourhood area a period of 12 years up to 2028.
85. There is currently no statutory provision for the 'review' of a neighbourhood plan, only its wholesale replacement. The LPA therefore have to assess the plan as it is presented to them with that end-date.
86. As the plan expressly seeks to "limit" or "control" growth, or makes allocations, then criterion 1(a) above: "*the degree to which it sets a framework for projects*" (these are not confined to EIA projects, although their inclusion in plans of a sufficient scale is a strong indicator of likely significant effects) is engaged.
87. Furthermore the neighbourhood plan has been intended to run in advance of the LP to influence that higher-level document.

88. Indeed Leeds City Council's own document Leeds Neighbourhood Planning Guidance appears to encourage this very approach (<http://www.leeds.gov.uk/docs/Leeds%20Neighbourhood%20Planning%20Guidance.pdf>) page 10:

"How does a Neighbourhood Plan relate to the Core Strategy and the Site Allocations Plan?"

A Neighbourhood Plan must be in general conformity with both the Core Strategy and Site Allocations Plan. However, it can influence which sites come forward in the Site Allocations Plan, as well as identify new sites the community want to see developed. Once adopted, a Neighbourhood Plan will be a statutory consideration and will carry the same weight as the Core Strategy in determining planning applications."

89. In such circumstances, the neighbourhood plan seeks to control the location and rate of housing growth at a time of acknowledged shortage/need, which must impact upon criteria 2(d) and (e), by perpetuating under-supply of identified need and reducing the scale of the population that can be housed within a given settlement:

(d) the risks to human health or the environment (for example, due to accidents);

(e) the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected);

90. In conclusion, a screening determination should have been produced long ago, at the earliest opportunity, and determined positively. In due course, a full strategic environmental assessment should have been produced, that could have been assessed as part of any Regulation 14 consultation. This has not been done to date, which is a serious flaw and invalidates the current consultation exercise.

Conclusion

91. We trust that we have dealt with all the matters concerning our instructing consultants, but needless to say if there are any other matters arising please do not hesitate to contact us, upon the telephone if necessary.

1 October 2016

CHRISTOPHER YOUNG

JAMES CORBET BURCHER

No5 Chambers

Birmingham - Bristol - East Midlands - London



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**TOWN AND COUNTRY PLANNING
ACT 1990**

IN THE MATTER OF

**LAND WITHIN THE THORP ARCH
ESTATE
AND
THE THORP ARCH
NEIGHBOURHOOD PLAN
PRE-SUBMISSION VERSION**

OPINION

Pegasus Group

4 The Courtyard

Church Street

Lockington

Derbyshire DE74 2SL