Neutral Citation Number: [2015] EWHC 2311 (Admin)

Case No: CO/818/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2015

Before:

MR JUSTICE FOSKETT

- -

Between:

THE QUEEN **on the application of DLA DELIVERY LIMITED**	**Claimant**
- and –	
LEWES DISTRICT COUNCIL	**Defendant**
- and –	
NEWICK PARISH COUNCIL	**Interested Party**

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- -

Christopher Young and James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Clare Parry (instructed by **Sharpe Pritchard**) for the **Defendant**
The Interested Party was not present or represented

Hearing dates: 13-14 July 2015

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Judgment

Mr Justice Foskett:

Introduction

1. The concept of the Neighbourhood Development Plan ('NDP') was introduced by the Localism Act 2011 (which received Royal Assent on 15 November 2011), the main governing provisions concerning which are contained in Schedule 4B to the Town and Country Planning Act 1990 ('TCPA 1990'). It constituted a new level in the hierarchy of development plans, somewhat different from that which had existed hitherto and the process was plainly designed to enable local communities to have a greater say in the planning process that affects them.

2. As will appear (see paragraphs 57-60 below), ultimately a local referendum on the proposed NDP takes place provided certain procedures have been adhered to. If approved in the referendum the NDP will come into force and will be a significant feature in determining the outcome of planning applications in the locality.

3. The Planning Portal website says this of NDPs:

> "Neighbourhood development plans … do not take effect unless there is a majority of support in a referendum of the neighbourhood.
>
> They also have to meet a number of conditions before they can be put to a community referendum and legally come into force. These conditions are to ensure plans are legally compliant and take account of wider policy considerations (e.g. national policy).
>
> Conditions are:
>
> 1. they must have regard to national planning policy
> 2. they must be in general conformity with strategic policies in the development plan for the local area (i.e. such as in a core strategy)
> 3. they must be compatible with EU obligations and human rights requirements.
>
> An independent qualified person then checks that a neighbourhood development plan or order appropriately meets the conditions before it can be voted on in a local referendum. This is to make sure that referendums only take place when proposals are workable and of a decent quality.
>
> Proposed neighbourhood development plans … need to gain the approval of a majority of voters of the neighbourhood to come into force. If proposals pass the referendum, the local planning authority is under a legal duty to bring them into force."

4. The NPPF (see paragraphs 20-24 below) contains the following passages concerning NDPs:

> "183. Neighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need. Parishes and neighbourhood forums can use neighbourhood planning to:
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> ● set planning policies through neighbourhood plans to determine decisions on planning applications; and

> ● grant planning permission through Neighbourhood Development Orders and Community Right to Build Orders for specific development which complies with the order.
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> 184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.
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> 185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains take precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation.
>
> …
>
> 198. Where a Neighbourhood Development Order has been made, a planning application is not required for development that is within the terms of the order. Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."

5. It is not disputed that an NDP is a "land use" plan for the purposes of the relevant European legislation and the Conservation of Habitats and Species Regulations 2010 (see paragraph 28 below).

6. In this case, the relevant NDP was approved by a sufficient majority in a referendum (see paragraph 59 below) and has subsequently been "made". It will, accordingly, be given the relevant weight in any future planning application unless the result of this application for judicial review is the quashing of the decision of the Defendant to allow the NDP to proceed to a local referendum. Supperstone J directed that the application be listed as a "rolled up hearing". It raises arguable issues in respect of most of the grounds (to which I will refer in due course), though not in respect of Ground 8 for which I do not grant permission to apply for judicial review. Otherwise,

I grant permission and indeed the hearing was treated effectively as the substantive hearing.

7. This case concerns an NDP promoted by a Parish Council. The Government has estimated that there is scope for around 8,000 NDPs to be made in England. There has already been litigation about NDPs at this relatively early stage of their existence: see, e.g., *R (BDW Trading and Ors) v Cheshire West and Chester Borough Council and Ors* [2014] EWHC 1470 (Admin) and *R (Gladman Developments Limited) v Aylesbury Vale District Council and another* [2014] EWHC 4323 (Admin). In passing I should note that I have been told that Sullivan LJ granted permission to appeal in *Gladman* on the "some other compelling reason" basis, but the appeal was not pursued. The provisions concerning NDPs were also considered in *Woodcock Holdings v SSCLG* [2015] EWHC 1173 (Admin) where Holgate J, incidentally, also noted the position in relation to *Gladman* at [64].

The local area concerned

8. The Parish Council concerned is Newick Parish Council (the 'Interested Party') which is in the District of Lewes in East Sussex. The Defendant is the Local Planning Authority (the 'LPA').

9. In the Neighbourhood Plan that went to referendum, the Parish was described as follows:

> "[It] is a largely rural area of just under eight square kilometres (three square miles) in the North of Lewes District. It lies on the Greenwich Meridian and in the Low Weald of East Sussex. At its centre is the Village of Newick, this being the only settlement of any size in the Parish. The nearest towns are Haywards Heath, seven miles to the west, Uckfield, five miles to the east, Burgess Hill, eight miles to the southwest and Lewes, the county town of East Sussex and base of Lewes District Council, eight miles to the south."

10. Its location is shown on the extract from the Ordnance Survey map copied in Appendix 1 to this judgment. The main A272 road runs through the northerly part of the village. The more southerly (and less major) road shown on the map is Allington Road.

11. The population of the village of Newick and the current housing provision is described as follows:

> "The population of the Village was about 1000 in the mid 1800's and remained at that level until the 1960s. Then as a result of housing developments on what had been the main fruit growing area, between the main road (the A272) and Allington Road, the numbers increased to almost 2,500 by 1981. The population has remained a little below 2,500 for the past thirty years ….

> Census results show that in 2001 over half of Newick's residents were under 45 years old, whereas by 2011 over half were over 45 years old. This is consistent with the fact that many young families came to Newick during its rapid expansion of the 1960s and 1970s. Since then the parents of those families have remained but their children have moved away, and in the subsequent decades, there was a lack of housing at prices that would attract further young families. Lewes District Council figures show that the total number of households in the Parish as at February 2014 was 1,047. Included in this figure are 99 units of Social Housing managed by Lewes District Council and 28 units of Social and Affordable Housing managed by Housing Associations. The remainder of the housing is either owner occupied or privately rented."

12. A fact of some significance to the issues in this case is that Newick is about 7 kms to the south of Ashdown Forest. In European terms Ashdown Forest is a Special Protection Area ('SPA') under the EC Birds Directive (Directive 2009/147/EC) and a Special Area of Conservation ('SAC') under the 1992 EC Habitats Directive (Directive 92/43/EEC) primarily because of the need to protect two significantly threatened ground-nesting birds and their habitat, namely, the European nightjar and the Dartford Warbler, both of which are European Protected Species. It is one of the largest single continuous blocks of lowland heath in South East England and comprises European dry heath and wet heath. It is also a Site of Special Scientific Interest ('SSSI'). Ashdown Forest is situated within the local authority jurisdiction of Wealden District Council.

13. Natural England ('NE') is responsible for all SAC, SPA and SSSI sites in England. I will return to the planning constraints arising from the status of Ashdown Forest and to their relevance to the issues before the court in due course (see paragraphs 26-40 below). In the broadest sense the main concern in relation to the protected ground-nesting birds arises from the recreational use of the forest and particularly the presence of dogs being walked in the area.

14. In the circumstances to which I will return, the approach of those responsible for drawing up the draft NDP was to provide for the building of about 100 houses in Newick during the plan period (2015-2030).

The Claimant and its interest in the Newick NDP

15. The Claimant is a development company that has promoted land for housing development on land at Mitchelswood Farm, the general location of which can be seen on the two plans attached as Appendix 1 and Appendix 2 (this latter plan showing the planning boundary of the village prior to the adoption of the NDP). The land forming Mitchelswood Farm is on the south-western edge of the village just to the south of Allington Road and overall comprises 3.05 hectares.

16. Part of the land was promoted for development through the strategic Local Plan process and had been identified as a suitable reserve housing site for 85 new houses in the emerging Local Plan. The site was also identified as suitable and available in the

Defendant's Strategic Housing Land Availability Assessment ('SHLAA') in June 2014. It was also promoted through the Neighbourhood Plan process with which this application is concerned. Furthermore, a planning application for outline permission for 63 new houses on the site (comprising 2.72 hectares) was made in September 2014.

17. David Lock Associates ('DLA') acted initially solely as planning consultants to one of the principal landowners of the land, but from June 2014 its allied property development company (the Claimant) entered into a promotion agreement in respect of part of the land and in September 2014 then took over full responsibility for the promotion of the development of the site by entering into a promotion and option agreement on the remainder of the site with one of the principal landowners of the land, DLA continuing to act as planning consultants.

18. The evidence submitted on behalf of the Claimant has come through witness statements provided by Mr Nicholas Stafford, an Associate Planner at DLA.

19. It has not been disputed that the Claimant has sufficient standing to bring this application. Equally, it has not been disputed that the Claimant launched this application at an appropriate time.

National policies concerning the provision of housing

20. As is well known, in March 2012 the Government introduced a single new national policy document known as the National Planning Policy Framework (the 'NPPF'). An essential purpose of the planning policy enshrined within it is to "achieve sustainable development". There are many features of the NPPF, but one is that local planning authorities ('LPAs') are required to "use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs[1] for market and affordable housing in the housing market area" and another is to "identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements" (see paragraph 47 of the NPPF). An additional buffer of 5% (moved forward from later in the plan period) "should be incorporated to ensure choice and competition in the market for land."

21. Paragraph 49 provides that "relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

22. In paragraph 17 of the NPPF it is said that "a set of core land-use planning principles should underpin both plan-making and decision-taking", one of the 12 of which is that planning should "proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs."

23. Paragraph 47 speaks of the need to "boost significantly the supply of housing."

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1 Usually translated into the acronym 'OAN'.

24. The relevant provisions of the NPPF are more fully set out in the judgment of Holgate J in *Woodcock Holdings v SSCLG* (see paragraph 7 above) at [18]-[25] and I need not repeat them here.

25. For the record, on 1 October 2014 the Defendant published its housing land supply position document which demonstrated, on the basis of an assessed need of 9,800 units, there was a 1.6 year housing land supply. 6 months later, on 1 April 2015, the Defendant published a document concluding that it had a 5.34 year housing land supply against the emerging core strategy requirements (see further at paragraph 119 below).

The EU protections and their effect on Ashdown Forest

26. It is common ground that SPAs and SACs are European sites afforded strict protection under the Habitats Directive (Directive 92/43/EC), the effect of Article 6(3) of which is transposed into UK law by the Conservation of Habitats and Species Regulations 2010 (the "Habitats Regulations"). Ashdown Forest plainly falls to be considered within these provisions.

27. Article 6(2) and (3) of the Habitats Directive provide as follows:

> "(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> (3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public."

28. Regulation 102 of the Habitats Regulations is the principal provision in this context and provides as follows:

> "102. (1) Where a land use plan -
>
> (a) is likely to have a significant effect on a European site … (either alone or in combination with other plans or projects), and

> (b) is not directly connected with or necessary to the management of the site, the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives …
>
> (4) In light of the conclusion of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority … must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site."

29. It is agreed between the parties that this provision requires that where a land use plan is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and it is not directly connected with or necessary to the management of the site, the plan-making authority for that plan must, before the plan is given effect, make an Appropriate Assessment (an 'AA') of the implications for the site in view of that site's conservation objectives.

30. The background to the kind of assessment required appeared in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (7 September 2004) C-127/02, a decision of the Grand Chamber of the ECJ, which was considered by Owen J in *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin). There is no need to extend this judgment with lengthy citations from the ECJ judgment. Suffice it to say that it is clear from [19] of Owen J's judgment that -

> "The discharge of its duties under the Habitats Directives and the Habitats Regulations by a competent authority is a two stage process. First the authority must consider whether there is a risk of significant adverse effects on a protected site. It is only if satisfied that there is no such risk that it may take no further step. But if there is such a risk, then the requirement for an appropriate assessment is triggered; and the authority must not give consent to authorisation of a plan or project unless satisfied that the risk of significant adverse effects can be excluded (subject only to the provisions of Article 6(4) in circumstances in which the plan or project must be carried out for imperative reasons overriding public interest). For the purposes of the appropriate assessment the competent authority shall consult the appropriate nature conservation body, in this case Natural England, and shall have regard to any representations made by it, see regulation 48(4)."

31. In *Ashdown Forest Economic Development LLP v Wealden District Council & Anor* [2015] EWCA Civ 681, Richards LJ said this at [12] in relation to Regulation 102:

> "This gives rise in practice to a two-stage process: (1) a screening stage, to determine whether there is a likelihood of significant effects on the relevant site(s) so as to require an appropriate assessment, and (2) unless ruled out at the

> screening stage, an appropriate assessment to determine in detail whether the plan will cause harm to the integrity of the relevant site(s). At the first stage, "likelihood" is equivalent to "possibility". Advocate General Sharpston described the process as follows in her opinion in Case C-258/11, *Sweetman v An Bord Pleanala* [2013] 3 CMRL 16:
>
> > "47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of art. 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is … merely necessary to determine that there *may be* such an effect.
> >
> > 48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold ….
> >
> > 49. The threshold at the first stage of art. 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the Court has termed 'the best scientific knowledge in the field' ….
> >
> > 50. The test which that expert assessment must determine is whether the plan or project in question has 'an adverse effect on the integrity of the site', since that is the basis on which the competent authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage …."”

32. There is a well-established principle that a decision-maker should give the views of a statutory consultee considerable weight which, of course, for this purpose includes NE in the Habitats Regulation Assessment (‘HRA’) process: see, e.g., *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin) [72]; *R (Akester) v Department for Environment, Food and Rural Affairs*, above, at [112]; *Ashdown Forest Economic Development LLP v SSCLG, Wealden District Council* [2014] EWHC 406 (Admin) at [110].

33. The position of NE in relation to any proposed housing development in the broad vicinity of Ashdown Forest is that it will object to such development anywhere within a 7 kilometre zone of the forest (called the ‘Zone of Influence’) unless it is accompanied by the provision of Suitable Alternative Natural Greenspace (‘SANG’) and the payment of money to fund a Suitable Access and Management and Monitoring Strategy (‘SAMMS’) for the management of the forest.

34. The reason for this position is explained in the first witness statement of Mr Edward Sheath, the Head of Strategic Policy at Lewes District Council, where he said this:

> "The need for the 7km zone around Ashdown Forest arose from evidence commissioned in 2009 by Mid Sussex District Council and Wealden District Council … looking at visitor access patterns at the Forest. This was supplemented in 2010 by research by Natural England … and established that most visitors came from the local area, including Crowborough, East Grinstead and Uckfield. As a result a zone of influence for the Ashdown Forest was created, similar to the approach taken at Thames Basin Heaths. The 7km zone around Ashdown Forest represents the area in which a majority of visitors reside and was first defined in the Wealden District Core Strategy HRA, in consultation with Natural England."

35. As foreshadowed in that passage in Mr Sheath's witness statement, relying on the advice of Natural England, the Wealden District Council's Core Strategy Local Plan, adopted on 19 February 2013, contained the following policy:

> "In order to avoid the adverse effect on the integrity of the Ashdown Forest Special Protection Area and Special Area of Conservation it is the Council's intention to reduce the recreational impact of visitors resulting from new housing development within 7 kilometres of Ashdown Forest by creating an exclusion zone of 400 metres for net increases in dwellings in the Delivery and Site Allocations Development Plan Document and requiring provision of Suitable Alternative Natural Green Space and contributions to on-site visitor management measures as part of policies required as a result of development at SD1, SD8, SD9 and SD10 in the Strategic Sites Development Plan Document. Mitigation measures within 7 kilometres of Ashdown Forest for windfall development, including provision of Suitable Alternative Natural Green Space and on-site visitor management measures will be contained within the Delivery and Sites Allocations Development Plan Document and will be associated with the implementation of the integrated green network strategy. In the meantime the Council will work with appropriate partners to identify Suitable Alternative Natural Green Space and on-site management measures at Ashdown Forest so that otherwise acceptable development is not prevented from coming forward by the absence of acceptable mitigation."

36. In the *Ashdown Forest Economic Development* case (see paragraph 31 above) this policy was challenged in so far as it related to new housing development within 7 km of Ashdown Forest, the contention being that it was adopted in breach of the Council's duty to assess reasonable alternatives to a 7 km zone. The 400 metre exclusion zone was not challenged. That challenge was upheld by the Court of Appeal on the basis that no reasonable alternatives had been considered by the Wealden District Council. Nonetheless, Natural England's position remains and, of course, Wealden District

Council will have to re-consider the position and examine alternatives. In the meantime, protection for the forest may be achieved by one or other of the methods referred to in [58] of the judgment of Richards LJ.

37. The position remains that no residential development will be permitted within the 7km zone unless there is provision of SANG and SAMMS.

38. As will appear (see paragraphs 61-96 below), the alleged lack of SANG lies at the heart of the criticisms made by the Claimant about the housing provision made in the NDP.

39. It is also important to appreciate that the Claimant's site is just beyond the 7km zone of influence (with the result that NE could not object to the development of the site on the grounds previously identified) whereas the sites allocated in the NDP are all within the 7 km zone (see paragraph 62 below). If any of those sites (other, perhaps, than the smallest, HO5) were to be developed, appropriate SANG would undoubtedly have to be found. Indeed a planning application by Thakeham Homes made in December 2014 for planning permission for 31 houses on the Cricketfield Site (identified as HO2 within the NDP: see paragraph 61 below) was approved in May 2015 by the Defendant's planning committee subject to a Grampian Condition preventing work being carried out until SANG provision has been out in place.

40. So that the issue of SANG can be put into perspective it is agreed that 8 hectares of SANG is required per 1,000 additional population. For small developments the size of SANG required is small, but each SANG must be a minimum size which needs to be large enough to accommodate a minimum of a 2.3-2.5 km circular walk (without doubling back) and ideally with a choice of routes extending up to 5km in length. The purpose is to attract dog walkers. Because of the need to accommodate distances such as these, SANGs need to be large in scale covering many hectares in size. In the context of developments near to Ashdown Forest the SANG must relate well to the location of the new housing, either on the edge of the new housing proposal or in close proximity to it, because its primary purpose is to be sufficiently attractive to divert people (especially dog walkers) from the housing development away from the forest to the new SANG.

The legal and practical framework for the making of an NDP

41. An NDP is defined as "a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan": section 38A(2) of the Planning and Compulsory Purchase Act 2004. It becomes part of the development plan for an area once made: section 38(3)(c).

42. Since most plans of this nature will be promoted by a Parish Council, which will have very limited professional resources (if any) at its disposal, statutory provision is made that requires the LPA (here the Defendant) to give advice and assistance to facilitate the making of proposals for an NDP. That occurred in this case. Much of the work in developing the plan was carried out by a steering group from the Parish (the 'SG') which was assisted and guided by officers of the Defendant.

43. The first step in the process is that the "qualifying body" (here the Parish Council) must make an application to the LPA for designation as a "neighbourhood area" and have it approved in accordance with Part 2 of the Neighbourhood Planning (General) Regulations 2012. On 1 October 2012 the Defendant designated Newick Parish as a "neighbourhood area" to facilitate the preparation of an NDP.

44. Steps are then taken to prepare the NDP.

45. Once the NDP has been prepared it must, before being submitted to the LPA, be published for consultation in accordance with Regulation 14 of the Neighbourhood Planning (General) Regulations 2012. This procedure involves an invitation to those who wish to do so to make representations about the plan proposal.

46. The next stage, once the representations have been considered and acted upon (if they are) is for the proposed plan to be submitted to the LPA. Regulation 15 of the 2012 Regulations provides as follows:

> "15. - Plan proposals
>
> (1) Where a qualifying body submits a plan proposal to the local planning authority, it must include -
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> (a) a map or statement which identifies the area to which the proposed neighbourhood development plan relates;
>
> (b) a consultation statement;
>
> (c) the proposed neighbourhood development plan;
>
> (d) a statement explaining how the proposed neighbourhood development plan meets the requirements of paragraph 8 of Schedule 4B to the 1990 Act ; and
>
> (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.
>
> (2) In this regulation "consultation statement" means a document which—
>
> (a) contains details of the persons and bodies who were consulted about the proposed neighbourhood development plan;

> (b) explains how they were consulted;
>
> (c) summarises the main issues and concerns raised by the persons consulted; and
>
> (d) describes how these issues and concerns have been considered and, where relevant, addressed in the proposed neighbourhood development plan."

47. When the LPA receives a plan in accordance with Regulation 15 it must publicise it in accordance with Regulation 16. The publicity must invite representations from those who wish to make representations on the plan proposal.

48. Once the period for representations is over, the plan proposal and supporting documentation must be submitted by the LPA for "independent examination". The provisions relating to the appointment of a person to conduct such examination are set out in Schedule 4B to the 1990 Act. Certain of the relevant provisions were collected conveniently by Supperstone J in the *BDW* case (see paragraph 7 above) and I gratefully adopt his recitation of those provisions here:

> "46. The process for the making of Neighbourhood Development Orders is set out in Schedule 4B to the 1990 Act. Section 38A(3) of the 2004 Act provides that the references in Schedule 4B to the 1990 Act to "Neighbourhood Development Orders" are to be read as if they were references to "Neighbourhood Development Plans".
>
> 47. If a local planning authority receives a proper proposal for a neighbourhood development order (see para 6), then the authority must submit for independent examination the draft neighbourhood development order, and such other documents as may be prescribed (para 7(2)). By para 7(6) the person appointed by the authority to carry out the examination
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> "… must be someone who, in the opinion of the person making the appointment—
>
> (a) is independent of the qualifying body and the authority,
>
> (b) does not have an interest in any land that may be affected by the draft order, and
>
> (c) has appropriate qualifications and experience."
>
> 48. By paragraph 8(1) the examiner must consider whether the proposal meets the "basic conditions" set out in paragraph 8(2) and "such other matters as may be prescribed". Paragraph 8(2) provides, so far as relevant:
>
> "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…"
>
> 49. Paragraph 8(6) provides that "the examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights)".”

49. Paragraph 9 relates to the question whether the examiner should receive oral representations, the general rule being that issues are raised in written form. Although Mr Young was critical of the decision of the examiner not to provide the Claimant with the opportunity to make oral representations in this case, he recognised that this was a decision within the examiner’s discretion and thus not, certainly in this case, capable of challenge.

50. Paragraph 10 provides as follows:

> “10(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 mentioned in paragraph 8(2),
>
> (b) modifications that the examiner considers need to be made to secure that the draft order is compatible with the Convention rights,

> (c) modifications that the examiner considers 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) modifications specifying a period under section 61L(2)(b) or (5), and
>
> (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) If the report recommends that an order (with or without modifications) is submitted to a referendum, the report must also make—
>
> (a) a recommendation as to whether the area for the referendum should extend beyond the neighbourhood area to which the order relates, and
>
> (b) if a recommendation is made for an extended area, a recommendation as to what the extended area should be.
>
> (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."

51. Paragraph 11 is not relevant. Paragraph 12 provides as follows in relation to the LPA's role upon receipt of the examiner's report:

> "12(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) The authority must also consider such other matters as may be prescribed.

(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 (or referendums are) 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 consider need to be made to secure that the draft order is compatible with the 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) modifications specifying a period under section 61L(2)(b) or (5), and

(e) modifications for the purpose of correcting errors.

(7) The area in which the referendum is (or referendums are) to take place must, as a minimum, be the neighbourhood area to which the proposed order relates.

(8) If the authority consider it appropriate to do so, they may extend the area in which the referendum is (or referendums are)

> to take place to include other areas (whether or not those areas fall wholly or partly outside the authority's area).
>
> (9) If the authority decide to extend the area in which the referendum is (or referendums are) to take place, they must publish a map of that area.
>
> (10) In any case where the authority are not satisfied as mentioned in sub-paragraph (4), they must refuse the proposal."

52. Paragraph 13 deals with the position if the LPA differs from the examiner's recommendations. That issue does not arise in this case.

53. Once these steps have been performed and the draft NDP is in its final form, then a referendum must be held: paragraph 12(4).

54. The LPA "must make a neighbourhood development plan to which the proposal relates" if more than half of those voting in the referendum have voted in favour of the plan: section 38A(4)(a) of the 2004 Act.

55. This is a convenient point at which to note the position of the examiner. The role is more closely confined than the role of an Inspector undertaking the examination of a local plan and is focused on whether the "basic conditions" are met. In the *BDW* case, Supperstone J referred to the "limited role" of the examiner (see [81]), something echoed by Holgate J in *Woodcock* at [61-62]. That said, there must be a report with reasons for its recommendations (see paragraph 50) and it has not been suggested that the reasons given by an examiner should be tested by reference to any more or less stringent test than within the well-known parameters set in *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953. This was the approach adopted by Lewis J in *Gladman* at [94]-[95].

56. I will return later to the weight to be given in the planning process to an NDP once it has been made (see paragraphs 136-138 below), but this is an appropriate point at which to note the provisions of section 38(5) of the Planning and Compulsory Purchase Act 2004 which provide as follows:

> "If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to be adopted, approved or published (as the case may be)."

The result of the referendum in this case

57. The examiner made recommendations for the modification of the NDP, but essentially approved it as meeting the "basic conditions" (see paragraph 48 above). The recommendations were adopted by the Defendant and the proposed NDP put out to a referendum which took place on 26 February 2015.

58. The statutory question for the referendum under Regulation 3 and paragraph 2 of Schedule 1 of the Neighbourhood Planning (Referendums) Regulations 2012 was as follows:

> "Do you want Lewes District Council to use the Neighbourhood Plan for Newick Parish to help it decide planning applications in the neighbourhood area?"

59. The votes were 846 for "Yes", 102 for "No", with 1 spoilt ballot, comprising a 49% turnout of total eligible voters.

60. Accordingly, the result achieved comfortably the majority vote required for its eventual adoption (see paragraph 3 above).

The housing allocation within the NDP

61. It will be clear that the Claimant's site is not included in the NDP. The allocated sites are designated as HO2, HO3, HO4 and HO5. HO2 is the site to the north of the A272 (called the Cricketfields site) and adjacent to other residential development. On the assumption that the existing house on the site is demolished, it is said that 31 homes (with a genuine mix of sizes mostly of smaller units and none having more than four bedrooms) can be built there. HO3 and HO4 are effectively adjoining sites just on the south side of the A272 at the eastern end of the village. These two sites are said to be capable of providing between 68 and 69 units in total of a suitable mix (including some elements of "affordable housing"). HO5 is a much smaller site to the south of the A272 and effectively in the middle of the existing conurbation that forms Newick. This land is within the current planning boundary whereas each of the other sites was outside the planning boundary which had to be extended to accommodate them.

62. All the sites, including the larger sites HO2 – HO4, are all within the 7 km zone of Ashford Forest.

The grounds of challenge

63. The decision of the Defendant made on 9 January 2015 to put the proposed NDP out to a referendum is challenged on a number of grounds, some of which overlap. Aspects of the approach to drawing up the proposed NDP are challenged, as is the adequacy of the examiner's appraisal of what was put before him. (There is a proposed challenge to the examiner's report on the basis of alleged "apparent bias" which I do not consider arguable for reasons I will give later: see paragraphs 140-150 below).

64. The grounds advanced were advanced in a different order from the order in which the Grounds accompanying the application were advanced. I will address them as argued before me.

Grounds 1 and 3

65. Mr Young contends that there has been a failure to observe the Habitats Regulations (see paragraph 28 above) and a failure to have regard to the national policy (set out in the NPPF) demanding the deliverability of the housing allocated in the NDP. The

process relating to the Habitats Regulations is envisaged as set in paragraphs 29-32 above. His essential argument is that the housing allocated in the NDP is undeliverable because of the absence of SANG provision which itself reflects a breach of the Regulations.

66. It is not disputed that the conclusion adopted in respect of the proposed NDP was that it would not have a significant effect on Ashdown Forest. This resulted in no AA being carried out. What occurred was that the HRA for the NDP relied upon the conclusions of the HRA in the emerging Local Plan. The Newick NDP "Habitat Regulations Screening Report" was prepared by officers of the Defendant on behalf of the Parish Council. It was prepared in July 2013 though not, it seems, signed off finally until February 2014. Because of the emphasis laid upon it by Mr Young, I should set out the material passages in full:

> **"4. Screening the Protected Site**
>
> 4.1 When producing a neighbourhood plan, one of the basic conditions is for it to be in general conformity with the strategic policies of the development plan. The Newick NDP is being produced in order to be in conformity with the Lewes District Core Strategy. At the time of writing this report, the Core Strategy is at an advanced stage of production and has recently undergone a period of representation on the proposed submission version of the document.
>
> **HRA on the Lewes District Core Strategy**
>
> 4.2 Thus, when undertaking the screening assessment for the Newick NDP, consideration is made to the findings of the HRA on the Lewes District Core Strategy. That HRA assumed that 100 homes would be built in Newick by 2030.
>
> 4.3 Transport work was undertaken by East Sussex County Council for the Core Strategy's HRA. Such work revealed that development in the district, including development in Newick, was unlikely to lead to many additional trips on roads near the Ashdown Forest and consequently unlikely to increase significantly nitrogen deposition at the forest. Thus, the HRA noted that **"…it has been determined, in consultation with Natural England, that the Core Strategy would not have a significant negative effect on the Ashdown Forest SAC/SPA in terms of nitrogen deposition either alone or in combination with other plans. Therefore mitigation or avoidance measures are not required."**
>
> 4.4 The HRA also found that development within 7km of the Ashdown (within which most of Newick Parish lies) was likely to have a significant negative effect on the Ashdown Forest SAC/SPA in terms of recreational disturbance, unless mitigated against. Mitigation measures were introduced and thus the HRA noted that **"as a result, the Core Strategy complies with**

> **the Habitats Regulations and does not require further assessment."**
>
> 4.5 It is assumed that the Newick NDP will plan for the same amount of housing (100 homes) as tested in the HRA on the Core Strategy. It will also introduce a number of policies, covering a range of issues to deliver the vision of the community.
>
> **The Screening Assessment**
>
> 4.6 As can be seen in Table 1 below, a screening assessment has been undertaken. From the findings of the screening assessment, it has been determined that the Newick NDP would not cause a likely significant effect to the Ashdown Forest SAC/SPA, either alone or in combination with other plans. As such, we have screened out the site from further stages of the HRA process." (All emphasis as in original.)

67. Table 1 contained the following paragraph under the heading in bold:

> **"LIKELY SIGNIFICANT EFFECTS TO SITE (INCLUDING POTENTIAL 'IN-COMBINATION' IMPACTS)?**
>
> The HRA for the Lewes District Core Strategy considered whether nitrogen deposition on the site, caused by traffic, would be significant. It found that it would not. As the Newick NDP will plan for the same amount of development as the Core Strategy, it is assumed that it would also not have a significant effect.
>
> The HRA for the Lewes District Core Strategy considered whether recreational disturbance caused by residents from new development would have a significant effect on the site. It found that development within 7km of the Forest would need to be mitigated against. The Core Strategy introduces the necessary mitigation and therefore the HRA found that development would not have a significant effect on the site. As the Newick NDP will plan for the same amount of development as the Core Strategy, it is assumed that it would also not have a significant effect."

68. The conclusion was that no further stages in the HRA process were required. In other words, the "protected site" of Ashdown Forest was "screened out" from further work and no AA was carried out.

69. Although the Screening Report did not refer expressly to the views of NE, it was consistent with a view expressed in May 2013 in an e-mail exchange between Mr Tal Kleiman, a planning officer with the Defendant, and Ms Francesca Barker, an Adviser-Land Use options with NE. Mr Kleiman had sent her an e-mail on 29 April 2013 referring to three NDPs that the Defendant was working on of which the Newick NDP was one. He said that it was "very unlikely that any of the [NDPs] will be very ambitious and exceed their stated targets" and on that basis he had been able to "screen out" the protected sites (which included Ashdown Forest) from future work. He invited her to consider the position and "hopefully agree these findings". She replied a few weeks later saying that "[as] the amount of development proposed in the Newick NP is in accordance with the Lewes DC Local Plan, Natural England agrees with your opinion of the HRA screening of no likely significant effect."

70. In order to put this into context it is necessary to refer to the emerging Core Strategy at the date of the HRA for the NDP. The 'Habitat Regulations Assessment Report' was published on 11 January 2013. The overall conclusion in respect of Ashdown Forest was reflected in the following paragraph:

> "4.5 Having undertaken the screening, based on the information available to the District Council … at this point in time, it was not possible to determine that the Core Strategy would not cause a likely significant effect on … Ashdown Forest …. Thus, using the precautionary principle, it was necessary to continue the AA process for the [site]."

71. One of the potential effects of the Core Strategy was identified as "increasing recreational pressures on the site, negatively affecting the population of ground nesting birds found at the site as a result of increased recreational disturbance." The "likely significant impacts" were identified in the following manner:

> "Whilst there is no evidence to show that recreational disturbance is currently having an adverse impact on the integrity of the Ashdown Forest, it would need to be proved that visitor numbers would not increase unduly as a result of new development within 7km from Ashdown Forest so as to have a negative impact on ground nesting birds and its habitat.
>
> Within Lewes District, only the Village of Newick and the northern part of Chailey Parish lie within 7km from Ashdown Forest. In this area, it is not anticipated that much development would occur as a result of the Core Strategy and thus, when looking solely at development in Lewes District, it is not thought that a significant effect to the site would occur. However, when considering the large amount of housing planned within 7km of the forest by neighbouring authorities (Wealden and Mid-Sussex District Councils), it may be that the combined or 'in combination' effect would be significant.
>
> Thus, using the precautionary principle, the effect of increasing recreational pressure on the site would need to be examined on an individual basis and in combination with plans being

> produced (particularly Wealden District and Mid Sussex District Councils) through the next stage of the AA. This is as there is no current evidence available to prove that there would not be a negative effect."

72. Against that background, the need for an AA was recognised. The AA in respect of Ashdown Forest appeared later in the report. The general conclusion, having analysed the potential impact on the ground-nesting birds, in particular, was that "taking into account the precautionary principle and looking at the combined effect of planned housing in neighbouring authorities, mitigation is required to remove and reduce potential negative impacts of the Spatial Policy 2 in the Core Strategy." The focus was then on the 7 km zone and the report's conclusions were as follows:

> "6.1 The previous section of this report identified that mitigation of new residential development within 7km of the Ashdown Forest was required as there was no evidence to suggest that there would not be significant negative effect alone and in combination, on the protected site by increasing recreational disturbance. Given that the Proposed Submission Core Strategy includes a figure of 100 residential units to be provided in Newick (**Spatial Policy 2**), it meant that the effect needed to be mitigated or alternative solutions found.
>
> 6.2 As a result of this finding, it was felt that a consistent approach across affected authorities affected by the 7km zone was appropriate. Given the EIP Inspector's acceptance of the evidence base and of Wealden District Council's approach to mitigate impacts, as well as the desire of local planning authorities in the area to have a collective approach, it is considered that some of the recommendations from Wealden District Council's Habitat Regulations Assessment were considered to be relevant to development in Lewes District too. Relevant recommendations are listed in table 5."

73. Table 5 reflected the HRA recommendations for the Wealden District.

74. The conclusions reached for the Lewes Core Strategy were as follows:

> 7.17 A number of measures were proposed to mitigate against the potential negative affects of development on the Ashdown Forest. To ensure that a consistent approach was applied across the 7km zone, the following measures align closely with the proposed by Wealden District Council:
>
> 1. Residential development within 7km of the Ashdown Forest that results in a net increase of one or more dwellings will be required to contribute to:
>
> (a) the provision of Suitable Alternative Natural Greenspace (SANG) at the level of 8 hectares per additional 1,000 residents,

> (b) the implementation of an Ashdown Forest Access Management Strategy,
>
> (c) a programme of monitoring and research at Ashdown Forest
>
> 2. Any development leading to an increase of one or more dwellings within the 7km zone will be required to make a financial contribution to deliver SANG provision and to fund its long-term maintenance and management in order to offset the impact of new residential development on the Ashdown Forest.
>
> 3. SANG(s) will be provided at an appropriate scale, design and location in accordance with advice from Natural England. The delivery of a SANG or SANGs is in order to successfully offset the impact of residential development in the 7km zone around the Ashdown Forest. Therefore, until such a time that appropriate SANG provision is delivered, development resulting in a net increase of one or more dwellings within the 7km zone will be resisted.
>
> 4. Any development leading to an increase of one or more dwellings within 7km of Ashdown Forest will be required to provide a financial contribution towards the implementation of an Ashdown Forest Access Management Strategy. Such a strategy will be progressed by the four affected authorities (Wealden District Council, Mid Sussex District Council, Tunbridge Wells Borough Council and Lewes District Council), Natural England and the Conservators of Ashdown Forest …."

75. It is to be noted that no specific SANG is identified and the following paragraph indicates the approach being adopted:

> "That work on identifying suitable SANG provision is progressed by Lewes District Council so that a site or sites can be allocated in a Development Management Policies Development Plan Document or a Neighbourhood Development Plan."

76. An addendum report was prepared in March 2014 which indicated that paragraph 3 under paragraph 7.17 (see paragraph 74 above) would be amended by the addition of the underlined words to the following:

> "SANG(s) will be provided at an appropriate scale, design and location in accordance with advice from Natural England. The delivery of a SANG or SANGs is in order to successfully offset the impact of residential development in the 7km zone around the Ashdown Forest. Therefore, until such a time that appropriate SANG provision is delivered <u>or site specific mitigation</u> is provided that is agreed to be suitable by the

> District Council and Natural England, development resulting in a net increase of one or more dwellings within the 7km zone will be resisted."

77. This change was made simply to "make clear that site specific mitigation can be provided instead of SANGs, in certain circumstances."

78. No SANG(s) had been identified in the addendum report. That reflects the position of the Defendant. Mr Sheath says that the reason that this is unnecessary is as follows:

> "… it is the 'in-combination' effects that have been assessed, and in light of this, it was not deemed necessary for the [NDP] HRA Screening Report to consider individual sites. Furthermore, Core Policy 10 of the Core Strategy and Policy HO1.7 of the [NDP] ensure that any new development proposed within the Ashdown Forest 7km zone in Newick Parish contributes to the provision of SANGS (and SAMMS) thus mitigating any potential for 'in combination' adverse effects on the Ashdown Forest SAC/SPA from recreational pressure. Therefore it was not necessary to know the exact location of the sites where growth will be allocated in order to carry out the [NDP] HRA. This position is consistent with the HRA assessment carried out for the Core Strategy, which is itself consistent with the HRAs carried out for neighbouring authorities with development potential within the Ashdown Forest 7km zone."

79. As to the identification of SANG(s) he said this:

> "Officers continue to work to identity a SANG that will have capacity to mitigate all proposed development in Newick. This includes working with neighbouring authorities to explore options for SANGS that will not only mitigate all proposed development in Newick, but also proposed development within the neighbouring district(s). Natural England has been involved in viewing and approving the appropriateness of candidate sites and work is progressing to bring forward the necessary site. It is not appropriate at this stage to disclose the candidate sites as this may affect any ongoing commercial negotiations. The Council is confident of the ability to identify a SANG within a reasonable period of time to mitigate all development in Newick, as per the Council's commitment in the Core Strategy …. The District Council do not accept the allegation that there is no prospect of delivery of the [NDP] residential allocations HO2 to HO5 within the plan period for the Core Strategy (up to 2030). In fact, the District Council will be seeking to identify and deliver a SANG that will allow for residential schemes within the 7km area to be delivered within the first five years of the plan period, from the point of adoption (due for early 2016)."

80. Mr Young draws attention to the fact that the evidence suggests that the Defendant is no further forward in securing appropriate SANG from when the issue was raised at the SG meeting on 20 August 2012 attended by planning officers from the Defendant. The Minutes of the meeting record that it was stated "that it was unknown how long a SANG would take to be delivered, but it was not unreasonable to think that it could take 2-3 years."

81. If one leaves to one side for the moment Mr Young's argument that it is premature for any valid NDP for Newick to exist given that there is no adopted local plan with which it can conform (see paragraphs 115-139 below), his contentions arising from the SANG issue can be summarised thus:

(i) there can be no guarantee of the deliverability of the housing specified in the NDP because there is no SANG identified in the NDP or the emerging local plan and none in prospect;

(ii) the NDP (and the material underlying it) does not address whether the appropriate mitigation for the protected site (namely, SANG) can be "achieved in practice" and, accordingly, there is a breach of the 2010 Regulations.

82. It seems to me, though expressed as separate propositions, the foregoing contentions really amount to the same thing: what is being said is that reliance upon an assertion by the Defendant that SANG can and will be provided is an insufficient basis upon which to permit the proposed NDP (which itself is based upon that reliance) to go to a referendum and then to be adopted. I will, however, address the two propositions separately. I will deal with the second first.

83. This proposition is based upon what Mr Young says is the authoritative effect of *No Adastral New Town v Suffolk Coastal District Council and Anor* [2015] EWCA Civ 88 (called '*NANT*' for short), a decision that he describes as "critical" in relation to this ground of challenge, the judgments in which were handed down on 9 July. The case involved a challenge to part of the Core Strategy adopted by Suffolk Coastal District Council, namely, in respect of a particular area allocated for housing under the strategy. The Deben Estuary is an SSSI and an SPA and at its closest, the area allocated for housing was just over 1 km from the edge of the Deben Estuary SPA. The claimant's particular concern was that a large housing development so close to the SPA may result in significant disturbance to the birds on the SPA through an increase in visitor numbers and in dog walking on the site. A number of issues were raised about the procedure adopted, but when addressing the substance of the argument about what the LPA needed to assess in relation to the effect on the SPA, Richards LJ (with whom Underhill and Briggs LJJ agreed) said this:

> "In my judgment, the important question in a case such as this is not whether mitigation measures were considered at the stage of [Core Strategy] in as much detail as the available information permitted, but whether there was sufficient information at that stage to enable the Council to be duly satisfied that the proposed mitigation could be achieved in practice. The mitigation formed an integral part of the assessment that the allocation of 2000 dwellings on [the relevant area] would have no adverse effect on the integrity of

> the SPA. The Council therefore needed to be satisfied as to the achievability of the mitigation in order to be satisfied that the proposed development would have no such adverse effect. As Sullivan J expressed the point in *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), [2008] P&CR 16, at paragraph 76, "the competent authority is required to consider whether the project, as a whole, including [mitigation] measures, if they are part of the project, is likely to have a significant effect on the SPA"[2]."

84. Mr Young argues that, if addressed by reference to the question whether SANG in the present case "could be achieved in practice", the answer was that it could not be so concluded to "the requisite degree of certainty". In the *NANT* case the Court of Appeal held that the judge had been entitled to conclude that the SANG could be provided in that case: it consisted of "the provision of a country park or similar to the south and east of Adastral Park" and reference to Patterson J's judgment (at paragraphs 48-90 and 148-155) shows the detail available in that case.

85. Mr Young also contends that the examiner's approach to the question of the deliverability of SANG is superficial. What the examiner said was this:

> "I note that the Neighbourhood Plan recognises the need to provide SANGs. As a consequence of the location of the Neighbourhood Area in relation to the Ashdown Forest SPA, relevant development proposals must provide mitigation measures to be delivered prior to occupation and in perpetuity. Any such measures should include the provision of Suitable Alternative Natural Greenspace (SANGS)."
>
> It is not the role of a neighbourhood plan to set policy requirements for matters that need to be considered on a more strategic basis. The Neighbourhood Plan does not, in itself, seek to allocate SANGS but it does highlight the need for them. I consider that, in the interests of clarity, it would be appropriate to set this out within Policy HO1.
>
> - **Policy HO1, add "H01.7 Due to the Neighbourhood Area's location, relevant development proposals must provide mitigation measures to be delivered prior to occupation of the development and in perpetuity. Measures should include the provision of Suitable Alternative Natural Green Space (SANGS)"**
>
> I note that there is no substantive evidence to demonstrate that it would not be possible to meet the proposed requirements resulting from the above. I also note in this specific regard that

[2] In *Smyth v SSCLG and ors* [2015] EWCA Civ 174, the Court of Appeal expressly approved the approach of Sullivan J.

> Lewes District Council is working towards the provision of SANGs and that this is recognised within the Neighbourhood Plan." (Emphasis as in original.)

86. Mr Young submits that the suggestion that the examiner had no substantive evidence that it would not be possible to meet the SANG requirement is contradicted by the very detailed objection letter submitted by the Claimant dated 13 October 2014 and sent in response to the Regulation 16 stage (see paragraph 47 above). Mr Young describes the letter as being "explicit in highlighting the absence of any available SANG, the practical difficulties of its provision and the failure to agree on its provision or even the agreed formulae for the SAMMS payment" and that it "makes clear that these represent an absolute barrier to the delivery of proposed allocated NDP housing sites." (This forms the basis of Ground 7.)

87. I will not extend this judgment by a lengthy citation of the relevant passage from a very lengthy letter raising a number of planning issues. However, my reading of the letter is that it contains a well-articulated argument that there was "uncertainty of SANGS provision" and that it was "reasonable to conclude that there will be no SANGS secured and available by March 2015, and a strong chance that this will remain the case in January 2018", but that it did not provide substantive evidence to support the proposition that SANG could not be delivered. It seems to me that the examiner was perfectly entitled to express the view that he did based upon the assertion of the Defendant that work was continuing to identify SANG(s) for the purposes of ensuring that the contemplated housing development could proceed. Although more detail of the actions being taken could have been given (and, perhaps, sought by the examiner) at the time, the details would doubtless have been along the lines of those given in Mr Sheath's first witness statement (see paragraph 79 above) and in his second witness statement where he says this:

> "6. The Council is currently considering a number of options for SANG provision, including sites that lie within its administrative area as well as options outside which could act as suitable SANG to offset development within Lewes District along with development within other district(s) that lie within the 7km radius of the Ashdown Forest. In this regard, the Council has written confirmation from Wealden District Council that it is willing to explore such an option within its district. I exhibit to this witness statement Wealden DC's letter dated 2 July 2015 …. Furthermore, the Council is continuing to explore options within its own area, in particular those that would be delivered by private developers and/or landowners. However, due to the stage of potential purchase of such sites, both within and outside of Lewes District, and in turn issues around commercial sensitivity; the Council is currently not in a position to disclose where such sites are located."

88. The letter from Wealden District Council does afford the confirmation indicated.

89. Miss Parry has contended that there is nothing in *NANT* that requires a decision-maker to be able to know the exact place where SANG will be provided or exactly how it will be provided: it is sufficient that the delivery of SANG/SAMMs is

practicable. The mitigation relied on in *NANT* was the provision of a country park and it was sufficient that the details of the provision of that park could be left to a "lower order plan, in circumstances where the Inspector was satisfied a country park was in principle deliverable." In this case the Defendant and the examiner were both satisfied that a SANG (and SAMMs) would be deliverable. She also draws attention to the way the issue of SANG was considered in the case of *Smyth v SSCLG and ors* [2015] EWCA Civ 174, a decision of the Court of Appeal in which the judgments were handed down on 5 March 2015.

90. In that case the decision of a Planning Inspector to grant planning permission on an appeal to him was challenged on the principal ground that granting planning permission would result in a breach of the requirements in Article 6(3) of the Habitats Directive (see paragraph 27 above) since the SANG necessary to mitigate the effects of the increased recreational use that the proposed development would have on the Exe Estuary SPA for birds (which incorporated the Dawlish Warren SAC) had not been sufficiently identified. The Inspector decided that "the proposed development, even when combined with other development, would not be likely to give rise to any significant effects on either the SPA or the SAC". What was being advanced in the three relevant emerging Local Development Frameworks (LDFs) in relation to the proposed SANG(s) in that case (namely, three substantial green parklands dedicated to public use) was described in this way at [29] of the judgment of Sales LJ (with which Richards and Kitchin LJJ agreed):

> "The three major SANGs represent a proposed strategic approach across the three local planning authority areas to meet the overall combined effects of increased recreational pressures associated with the population which will eventually come to live in the substantial new housing to be built in those areas as the LDFs come to be adopted and then implemented. The substantial residential developments contemplated by the draft LDFs lie in the future. Similarly, the creation of the three parkland SANGs lies in the future. Relevant land for them will have to be acquired, including as necessary by use of compulsory purchase orders. Funding will have to be found to acquire the land for the SANGs. At present, there is uncertainty about how and when both the substantial residential developments contemplated by the draft LDFs and the setting up of the SANGs will take place."

91. It was obviously a future scenario with associated uncertainties. However, upholding the decision of Patterson J, the Court of Appeal considered that the Inspector was entitled to reach the decision that he did as appears in [77] of the judgment of Sales LJ:

> "… The Inspector was lawfully entitled to take into account the proposed preventive safeguarding measures in respect of the SPA and SAC under the first limb of Article 6(3), for the purposes of giving a screening opinion to the effect that no "appropriate assessment" would be required under the second limb of Article 6(3), in the course of his consideration whether to grant planning permission."

92. The context in that case is, of course, different from that involved in the present case, but it offers support for the proposition that plans for the provision of SANG in the future (even those with uncertainties attached) may be sufficient to comply with the Directive and the Regulations.

93. I agree with the implicit suggestion of Miss Parry's argument that the focus of the issue is on what the relevant LPA in such a situation considers to be the position at the time it is required to address the issue and what the independent examiner assesses of that stance. The court can, of course, declare either or both positions to be unsustainable on the usual public law grounds, but the threshold for sustaining such a challenge is high even where the principle being applied is the strict precautionary principle: see [78]-[80] in *Smyth*.

94. Against this background I can see no basis upon which the position of either the Defendant or the examiner can be challenged if the issue is considered in isolation from the more general challenge that the NDP must await the adoption of the Local Plan (see paragraphs 115-139 below below). As I have said (see paragraph 93), the issue for the court is not to decide whether SANG will be deliverable as required, but whether the Defendant was entitled to rely upon its belief that it will be delivered within the plan period and whether the examiner was justified in accepting that as a sufficient basis for the proposed NDP to meet the "basic conditions" referred to above. As Richards LJ said in the *NANT* case, the issue when addressed within the context of an HRA is whether there was sufficient information available at the time to satisfy the LPA that the proposed mitigation could be achieved in practice. Given the factual situation in *Smyth*, it might be said that a less stringent test can be applied, but, as it seems to me, the resolution of the issue must inevitably be fact and context specific. Adopting for this purpose the formulation in the *NANT* case, whilst it is quite possible for those (like the Claimant) observing from the "outside" to be sceptical about the belief of the LPA in the deliverability of SANG, the bona fides of the confidence expressed by the LPA is plainly something upon which reliance should be placed. If that confidence should prove to have been misplaced and no appropriate SANG is forthcoming, that is something that will doubtless emerge as an increasingly material consideration in decisions concerning any planning application for development outside the NDP or Local Plan (once made) that is put forward. Furthermore, Miss Parry drew my attention to what had been conceded by the Defendant in its response to the pre-action protocol letter where the following was said:

> "The Claimants contend that as the proposed allocations lie within the 7 kilometre zone they will not come forward as there is no SANG in place or a solution to the provision of the SANG. As has been stated earlier, District Council is committed to identifying a SANG as part of local plan part 2. District Council is of the view that such an allocation is achievable and thus there will not be a long term embargo on development within the zone.
>
> With this context it is therefore believed that the allocations are achievable and will come forward within the identified plan period of the [NDP]. However, local authorities are required to monitor the delivery of allocations and of housing numbers.

> Thus, if the [NDP] does not allocate enough sites to meet a housing target for Newick or if the District Council has evidence to show that the allocations will not be achieved in the planned period, District Council has the ability to allocate additional sites."

95. It follows that if the anticipated SANG does not materialise in a way that permits the necessary housing development, the LPA will see itself as obliged to consider alternative sites.

96. As it seems to me, the deliverability of housing was addressed in the context of the deliverability of SANG: the two go hand-in-hand. On that basis I am unable to see any flaw in the process by which the NDP was formulated or in the approach of the examiner when he gave his approval to that approach.

97. For all these reasons, I do not consider that Grounds 1 and 3 are made out.

Ground 2

98. It is contended that the Strategic Environmental Assessment ('SEA') required by the SEA Directive and Regulation 5 of the Environmental Assessment of Plans and Programmes Regulations 2004 (the 'SEA Regulations') was not carried out and was wrongly "screened out" on the basis that the proposals in the NDP were not "likely to have significant environmental effects".

99. I do not think it necessary to do other than to refer to the relevant parts of the SEA Regulations into which the requirements of the Directive are transposed.

100. Regulation 5 is as follows:

> 5.—(1) Subject to paragraphs (5) and (6) and regulation 7, where—
>
> (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
>
> (b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3),
>
> the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.
>
> (2) The description is a plan or programme which—
>
> (a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

> (b) sets the framework for future development consent of projects listed in Annex I or II to Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.
>
> …
>
> (6) An environmental assessment need not be carried out—
>
> (a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or
>
> (b) for a minor modification to a plan or programme of the description set out in either of those paragraphs,
>
> unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, or it is the subject of a direction under regulation 10(3)."

101. Regulation 9 provides as follows:

> "9(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."

102. The focus of the substantive criticisms made by the Claimant is the Sustainability Appraisal Scoping Report for the NDP. The version to which my attention was drawn

specifically was finalised on or around 8 May 2013 which, as already indicated, contained the conclusion that there were no likely significant environmental effects on the environment from the NDP such that an SEA was not required. It should, however, be noted that this version pre-dated the consultation exercise, the final ("Post-consultation Issue") version being signed off on 9 November 2013. Both versions were signed off by "Linda Farmer, Admin Support, on behalf of the Newick Neighbourhood Development Plan Steering Group". Appendix 1 to that document contains a table that sets out the criteria detailed in the Directive and the Regulations that need to be addressed. For convenience that table is reproduced in Appendix 3 to this judgment because Mr Young made some specific criticisms of it in his oral submissions. I will turn to an issue he raises about the authorship of this document below (see paragraphs 108-112 below), but will consider first the substantive criticisms made. In their Skeleton Argument Mr Young and Mr Corbet Burcher had identified a number of matters upon which they relied by way of substantive criticism which can be summarised as follows:

(i) the screening out of the need for an SEA relied upon the emerging Local Plan process (including the mitigation mentioned in the emerging Local Plan process) which has not yet been completed and the Local Plan is not yet adopted;

(ii) the content of the screening opinion is "opaque, unclear and irrational" and not sufficiently clear to understand why the conclusion that no SEA was required has been reached;

(iii) the conclusion that there will not be a significant effect on the environment when all of the housing proposed in the NDP is in the 'Zone of Influence' (see paragraph 33 above) with the potential for a significant negative effect on Ashdown Forest without mitigation (the delivery of which "has not been considered and is uncertain") is *Wednesbury* unreasonable.

103. Criticism (i) is a fundamental matter that I will address separately below. Criticism (iii) seems to me to be another way of advancing the same argument as that advanced in relation to what, for shorthand purposes, I will describe as "the SANG issue" that I have dealt with above. I see no need to add to that analysis.

104. So far as (ii) is concerned, Mr Young identifies some of the propositions advanced in the "Notes" column in Appendix 3 as, he submits, meeting the description referred to above. In relation to criteria 1(a) and (b) he submits that it is wrong to suggest, as the Notes do, that the NDP "does not set the framework for other projects or plans" or is "not intended to influence other plans or programmes". He submits it is wrong to suggest, in relation to criterion 1(e), that "Community legislation on the environment" is "not applicable" to the NDP and, in relation to criterion 2(g), that it is wrong to suggest that it would "not have a significant negative effect on [Ashdown Forest]" which is, of course, an area with an "EC … protected status".

105. First of all, I do not accept that the Sustainability Appraisal Scoping Report for the NDP is "not sufficiently clear to understand why the conclusion that no SEA was required has been reached". It is plain from the following paragraph that the drafters of the report attached significance to the work being done by the Defendant towards the provision of SANG in the event of the proposed housing allocations within the NDP being utilised:

> "Newick has no European Protected Sites within it, but it is close to Ashdown Forest. In terms of EU site protection designations, Ashdown Forest is both a Special Protection Area and a Special Area of Conversation. As a result, a protected zone has been set around it, encompassing all land within 7km of its boundary. Much of Newick lies within that zone and it has been agreed that Sustainable Alternative Natural Green Spaces (SANGS) must be developed before any new housing is permitted in the zone. It is understood that Lewes District Council is working towards provision of such SANGS and will recoup their cost by charging the developers of all new housing."

106. The Notes relating to criterion 2(g) refer to the HRA for the Core Strategy (which, of course, is relied upon for the purposes of the NDP: see paragraph 66 and following above) which itself is reliant upon the continuing work relating to SANG. It does not seem to me that, assessed by reference to that background, it can be said that the reasoning for the lack of need for an SEA was unclear. As Miss Parry submits, it is obvious that the HRA (which is also referred to in the Notes to 1(d), 2(b) and (c)) was relevant to the reasoning which itself recognised that the NDP was the lowest in the hierarchy of plans.

107. The other criticisms made are a yet further reflection of the argument that it was wrong (in the "*Wednesbury* unreasonable" sense) for the NDP to be permitted to go forward to a referendum based upon the assertion that further work relating to the provision of SANG was ongoing and thought likely to produce fruit. These criticisms are met by my conclusions set out in paragraph 94 above. Bearing in mind that the statutory consultees (including NE) raised no objections to this conclusion, the suggestion that it was *Wednesbury* unreasonable is quite impossible to sustain in the circumstances.

108. Returning to the issue of the authorship of the report, Mr Young says that there is clear evidence in the body of the report that it was put together by the SG and not the Defendant's officers contrary to regulation 9 (see paragraph 101 above). The screening opinion should be produced by the LPA, but the language used, he argues, makes it clear that it was done by the SG which had no delegated authority to act in this way.

109. The argument is based on a number of paragraphs in which the word "we" or "ours" appears (replicated in some respects in the Appendix reproduced as Appendix 3 below). Some examples are as follows (the words or expressions being highlighted):

> 2.2 On 1st October 2012, Lewes District Council designated the Civil Parish of Newick as a Neighbourhood Area in order to allow <u>us, the Parish Councillors of Newick,</u> to lead the production of a Neighbourhood Development Plan with the support and input of the residents of the Parish.
>
> 2.3 The Neighbourhood Development Plan will conform with the Lewes District Joint Core Strategy, due for adoption in 2014, which sets out the strategic planning policy for the

> district until 2030. It is intended that our Neighbourhood Development Plan will supplement the Core Strategy, covering a number of different aspects relating to land use in the Parish including new housing, business development, recreation and protection of open spaces.
>
> 2.5 For their Joint Core Strategy, Lewes District Council and the South Downs National Park Authority carried out a full sustainability appraisal on the contents of their plan. That sustainability appraisal incorporated the requirements of the Strategic Environmental Assessment Directive.
>
> 2.6 As reported in Appendix 1, we have considered whether or not there is a need for our sustainability appraisal also to incorporate the requirements of the Strategic Environmental Assessment Directive. We have concluded that our Neighbourhood Development Plan would not have any significant environmental effect that has not been considered already in Lewes District Council's sustainability appraisal. As a result, we proposed to the statutory consultees that our sustainability appraisal be simple and appropriate for a local-level plan. None of the statutory consultees objected to this proposal.

110. It was signed off in the manner indicated in paragraph 102 above.

111. Miss Parry agrees that the wording is odd, but draws attention to what Mr Sheath says in his witness statement at [20] where he said that it was "prepared by the District Council on behalf of the Parish Council". Indeed at the foot of the Appendix it carried the following note: "The above analysis was undertaken by Lewes District Council on behalf of the Parish Council." That, in my view, puts the matter beyond doubt for the purposes of a judicial review application. However, I would add two observations: first, the version of the report to which reference was made during the argument before me was the version prepared prior to consultation and was framed in a way designed to raise questions for the consultees to answer. Bearing in mind that it would largely be addressed to the local residents of Newick, it is not unnatural for the word "we", as well as possessive pronouns, to be used. The language was retained in the post-consultation version. Second, the language has all the hallmarks of language ordinarily used by planning officers generally and, in my view, it seems very much of a piece with other written material prepared by the defendant's officers.

112. For those reasons, I do not consider that there is anything in this point.

Grounds 4 and 5

113. Grounds 4 and 5 amount to the same thing. Ground 4 asserts that the choice of site selection (see paragraphs 61-62) was irrational because of the failure to identify the 7 km Zone of Influence as a relevant criterion for considering the choice. Ground 5 asserts that the allocation of undeliverable sites (as they are said to be) was a breach of the requirement of the NPPF to provide for deliverable housing. The suggestion is

made that neither the SG nor the examiner considered these matters adequately or at all.

114. Again, this seems to me to be nothing more than a repetition of matters already dealt with and, accordingly, I do not deal with them separately.

Ground 6

115. The argument concerning this Ground is developed as follows: (i) although the NDP is required to be in general conformity with the strategic policies of the Local Plan (see paragraphs 2,4 and 48 above), this was not possible in this case because the adopted Local Plan (which was adopted in 2003 and addressed development needs for the period 1991 to 2011) does not contain any relevant strategic content as regards the contemporary housing needs for the area; (ii) all of the available evidence demonstrates that the NDP was never intended to be in conformity with the adopted Local Plan, but to be in conformity with the emerging Local Plan ((Part 1): Core Strategy); (iii) the housing requirement in the Local Plan has not yet been decided and the emerging Local Plan is still in the process of examination yet the NDP (and, it is said, the examiner in particular) relies upon the content of the emerging Local Plan for its strategic content, especially in terms of the delivery of SANG; (iv) there is no policy requiring a review of the NDP which will henceforth be the local development plan for Newick until 2030. It is argued that the NDP cannot be in conformity with the emerging Local Plan because the latter is not yet adopted.

116. Before addressing this argument in more detail, the factual position needs to be understood. It is correct that the currently adopted development plan is the Lewes District Council Local Plan 2003. Under this the District Council had a requirement to provide 4,600 new dwellings between 1991 and March 2011 in accordance with the East Sussex County Structure Plan. There were 2058 completions between 1991 and 2001 with the result that 2542 units were required for the residual development up to March 2011. However, the net effect is that the plan does not address current housing needs or the needs for the period from 2015 to 2030.

117. It will be apparent from this judgment that what the Defendant has been developing is an up-dated Core Strategy. The Defendant and South Downs National Park Authority (referred to below by the Inspector as "the Councils") submitted the "Joint Core Strategy, Part 1 of the Lewes District Local Plan" to the Secretary of State in September 2014 for it to undergo an Examination in Public ('EIP'). The Hearing Sessions took place over two weeks from 20 January 2015. The Inspector, Mr Nigel Payne, issued an Interim Findings letter on 10 February 2015. The material part for present purposes relates to housing land supply. He said this:

> "… I consider that, at the top of the range identified, the figures agreed by the Councils represent the full, objectively assessed, needs (OAN) of the district for the plan period, including taking account of the need for affordable housing and "market signals", in respect of the present state of the housing market locally etc, as required by the NPPF.
>
> Third, I accept that the agreed OAN figures in relation to new housing cannot be met in full in the district over the plan

> period. This is so, even at the lowest end of the range identified, without unacceptable consequences that would be contrary to the NPPF and PPG, taking into the account the National Park (NP), the flood risks locally and other significant constraints, including coastal erosion.
>
> This conclusion is reinforced by the essentially common ground between the Councils, the HBF, the CPRE and others, including numerous Parish Councils and major house builders active in the locality, as represented at the hearings, on this matter.
>
> I also acknowledge that, notwithstanding the overall compliance with the [Duty to Co-operate], there is no realistic prospect of any material help in achieving new housing delivery being received from adjoining or nearby Councils in the near future, pending further work on a sub-regional basis and a potential plan review.
>
> However, despite the foregoing, I am not at all convinced that "no stone has been left unturned" by the Councils, in terms of seeking as many suitable and appropriate sites for new housing as possible that are realistically deliverable in sustainable locations across the plan area. This is evidenced in the various iterations of the Strategic Housing Land Availability Assessment (SHLAA) and as put forward in representations to the examination in some cases.
>
> In the light of the above, I cannot find sound a plan that is so far short of even the lowest end of the agreed OAN range and does not provide even enough new dwellings on an annual average basis to maintain the present levels of employment in the district. As a consequence, my initial view is that the balance between the three elements of sustainable development, as set out in the NPPF, has not been properly struck in terms of the level of new housing in the plan in relation to the area's needs. This is particularly so for affordable housing, given the area's relatively strong housing market currently and the attractions of the district for in-migrants and retirees.
>
> My preliminary conclusion is that the new housing provision in the plan has to go up to a minimum of 6,900 in total (from 5,790 as now), or at least 345 dwellings a year on average over the plan period. This is still only equivalent to zero employment growth across the district, but at least not "planning for failure" in economic terms …."

118. As I understand it, the Inspector expressed the view that there was a strong case for the inclusion of a particular site (the Old Malling Farm site in Lewes) for the purposes of housing provision in the district generally and concluded as follows:

> "… if the Old Malling Farm site in Lewes is allocated, I do not anticipate any need to materially alter the minimum indicative figures for new housing in these or other villages in the district."

119. Mr Sheath confirmed in his first witness statement that a Draft Schedule of Modifications to the draft Core Strategy had been prepared and submitted to the Inspector. He has also said that he could confirm that the settlement target for Newick (namely, approximately 100 homes) in Spatial Policy 2 (see paragraphs 72 and 119 above) "will not be proposed to be increased through the modifications to the Core Strategy, subject to Council approval." It was also on the basis of the Inspector's preliminary conclusion that as at 1 April 2015 Mr Sheath says that the Defendant can now demonstrate a 5-year supply of deliverable housing land (see paragraph 25 above).

120. Mr Young, not unnaturally, says that this is all very speculative. The EIP process has not run its course and the final housing requirement in the final plan has not been decided. It could change in such a way that would render the figure of "approximately 100" in the Newick area as meaningless. He argues that there is simply no relevant Local Plan with which the proposed NDP (now indeed "made") can be "in general conformity": the existing adopted plan is out of date and the new Core Strategy is still emerging. It has not yet been adopted and the period for legal challenge has neither arisen nor expired.

121. Mr Young also draws attention to the fact that the draft NDP has plainly been drawn up to conform generally with the emerging Core Strategy. That is recognised in a number of documents. For example, the HRA screening for the purposes of the NDP relied upon the HRA for the emerging Core Strategy (see paragraph 66 and following above). Furthermore, the Sustainability Appraisal Scoping Report for the NDP (see paragraph 102 above) contained the following sentence:

> "2.3 The Neighbourhood Development Plan will conform with the Lewes District Joint Core Strategy, due for adoption in 2014, which sets out the strategic planning policy for the district until 2030 …."

122. It is fair to point out that the Wealden District Council raised concerns about this in a letter dated 13 October 2014:

> "Concern is raised with the approach of undertaking screening using information from a Local Plan, and its associated evidence base, which has yet to be independently examined."

123. The examiner refers to this issue in two particular places in his report on the draft NDP. Referring to the Foreword he says this:

> "The content of the Foreword and the Vision Statement is generally interesting and helpful.
>
> The second paragraph contains an error along with generally unnecessary information – it is not a requirement for

> neighbourhood plans to conform with emerging District-wide plans."

124. In relation to the 'Housing' section he said this:

> "The introduction, or supporting text, to this section is simply wrong. It states that the neighbourhood plan has to accord with the allocation of housing in the emerging local plan. This fails to reflect national legislation."

125. One of the basic conditions of an NDP is that it should be "in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area)" (see paragraph 48 above). Presumably, this is what the examiner had in mind. Mr Young does, however, observe that the examiner approves the policy in the draft NDP concerning SANG by reference to the emerging Core Strategy (see paragraph 85 above).

126. Leaving aside the observations he makes about the issues in this case, Mr Young would wish to submit that an NDP cannot be "made" lawfully until the plan with which it must be "in general conformity" has been adopted. He submits that the general conformity requirement is one of the few legal requirements of an NDP and that an NDP was obviously not intended to exist in a vacuum. The purpose of the legal requirement is to ensure that an NDP should not be made which has the effect of undermining the delivery of the strategic objectives of an up-to-date Local Plan or of planning for less housing than proposed in a Local Plan. He draws attention to paragraph 184 of the NPPF in this regard (see paragraph 4 above).

127. In the Planning Practice Guidance issued by the Government, it is recognised that a draft NDP should not be "tested against the policies in an emerging Local Plan", but there is also recognition that "the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which [an NDP] is tested." That it may not always be easy to distinguish between these two methods of thinking is, perhaps, demonstrated by the approach of the Defendant and of the examiner in the present case.

128. In the Planning Practice Guidance published and brought into force in March 2014 (having been available in substantially the same terms in draft format since August 2013) the following question is raised and the answer that follows given:

> **"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. A draft Neighbourhood Plan or Order is not tested against the policies

> in an emerging Local Plan although the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested.
>
> 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. 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."

129. This guidance cannot, of course, be an aid to statutory interpretation. The essential issue is whether in law it is permissible for an NDP to be "made" before the appropriate Local Plan has been adopted.

130. This issue was the subject of detailed argument in *Gladman* (see paragraph 7 above) and a considered decision by Lewis J. Although addressed in the context of the factual scenario in that case (which concerned the Winslow Neighbourhood Plan made by Aylesbury Vale District Council), the essence of the argument that is sought to be advanced in this case is the same as advanced in that case. The arguments of Mr Martin Kingston QC (leading Mr Corbet Burcher) are summarised by Lewis J in [53]-[57] of his judgment and his general conclusion is set out in [58]:

> "In my judgment, a neighbourhood development plan may include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there is at present no development plan document setting out strategic

> polices for housing. The examiner was therefore entitled in the present case to conclude that the Neighbourhood Plan satisfied basic condition 8(2)(e) of Schedule 4B to the 1990 Act as it was in conformity with such strategic policies as were contained in development plan documents notwithstanding the fact that the local planning authority had not yet adopted a development plan document containing strategic polices for housing …."

131. His reasoning is set out in [59]-[79]. I will not set it out in full, but suffice it to say that he concluded:

(i) that, referring specifically to paragraphs 8(2)(a), (d) and (e) of Schedule 4B to the 1990 Act, "there is nothing in the provisions of either Schedule 4B to the 1990 Act or the provisions of the 2004 Act governing neighbourhood development plans to support the contention that a neighbourhood development plan cannot include policies dealing with the use and development of land for housing in the absence of a development plan document setting out strategic policies on housing issues" ([59]);

(ii) that the foregoing interpretation of those paragraphs is consistent with the statutory framework ([61]-[67]);

(iii) that the interpretation is also consistent with the *BDW* decision (see paragraph 7 above) ([68]-[69]);

(iv) that, although the Governmental guidance cannot aid statutory interpretation, there is "no inconsistency between the interpretation adopted in this case of the requirements of the basic conditions in paragraph 8(2) of Schedule 4B to the 1990 Act and the guidance contained in the Framework, properly interpreted, and read against the statutory background" ([70]-[78]).

132. I have not had the benefit of the detailed argument that Lewis J had in that case, Miss Parry simply saying that the Defendant relied upon his conclusions in full and Mr Young putting the issue forward in the fairly broad way I have indicated. He made it plain that he was reserving the Claimant's position should I be against him.

133. To the extent that it was relevant to his decision in *Woodcock* (see paragraph 7 above), Holgate J reflected the approach in *Gladman* on this issue in [131] as follows:

> "Although a neighbourhood plan must be in general conformity with the strategic policies of the local plan and should not provide for less development than is promoted by the local plan (paragraph 184 of the NPPF), these principles do not apply where a neighbourhood plan is progressed in advance of the adoption of any local plan. The absence of a local plan does not preclude the preparation and formal approval of a neighbourhood plan. The body responsible for a neighbourhood plan does not have the function of preparing strategic policies to meet assessed housing needs …."

134. *Gladman* is, of course, strictly speaking, not binding upon me, but I would require strong persuasion that it is wrong before so concluding. Mr Young seeks to distinguish it on the basis that the Winslow NDP, whilst allocating sites for housing, was subject to an express policy requiring a review of the NDP within 5 years with the result, he contended, that the issue of "conformity" could be re-visited. Miss Parry submits that no part of Lewis J's reasoning depended on that factor and, accordingly, it has no relevance to the reasoning. I agree. Furthermore, she submits, in any event, that there is no need for a formal review to be provided for: if the Core Strategy is adopted and requires further housing than that identified in the NDP the SG can give consideration to the steps they should take in light of the effect of section 38(5) (see paragraph 56 above). If the Core Strategy does not require more housing then there will be no need for any further consideration.

135. First of all, to the extent that I have been able to analyse Lewis J's judgment without the benefit of sustained argument, I respectfully agree with it. I have certainly not been persuaded that it is wrong.

136. Second, I think that Miss Parry's answer to the practical situation thrown up by the current position concerning the Newick NDP and the emerging Core Strategy of the Defendant is correct. It does not answer fully the position that obtains between now and when the Core Strategy is adopted finally and, of course, it is impossible to know precisely when that might be. As to that, it seems to me that the legal position is as was conceded on behalf of the Secretary of State in *Woodcock* where, at [24], Holgate J recorded the following:

> "Mr. Honey [Counsel for the Secretary of State] emphasised those parts of the NPPF which attach importance to neighbourhood plans and planning (e.g. paragraphs 183 to 185). Paragraph 198 provides that "where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted". However, the Secretary of State accepts through Mr. Honey, that paragraph 198 neither (a) gives enhanced status to neighbourhood plans as compared with other statutory development plans, nor (b) modifies the application of section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Moreover, housing supply policies in neighbourhood plans are not exempted from the effect of paragraph 49 and the presumption in paragraph 14 of the NPPF …."

137. Section 38(6) provides as follows:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

138. In the broadest sense, the fact that in a particular area there is no up-to-date Local Plan with which a "made" NDP can be "in general conformity" (because the latter has been made in advance of the former) may, as it seems to me, arguably be a material

consideration in determining a planning application which conflicts with the made NDP. The weight to be attached to it will, of course, be a matter of planning judgment when the issue arises and will doubtless depend, at least in part, on the likely prospect of the emerging Local Plan being adopted and the extent to which there is a divergence between the made NDP and the emerging Local Plan. But this, in my view, offers some, albeit perhaps limited, prospect of unlocking for development a site that has general planning merit and otherwise meets the requirements of the NPPF, but which is currently not allocated for housing within the NDP. Whilst an express commitment to review an NDP within a finite period might be seen as offering a greater prospect, I do not see the existence of such an undertaking as essential for this purpose in a situation such as that with which this case is concerned

139. At all events, I do not consider that Ground 6 is made out for the reasons I have given.

Ground 8

140. This proposed ground relates to the appointment of the examiner which, it is said, would give rise to an appearance of bias such that the process that led to the making of the NDP is vitiated.

141. The examiner appointed was Mr Nigel McGurk, BSc (Hons), MCD, MBA, MRTPI. Mr Young makes it absolutely clear that no criticism is, or is sought to be, made of Mr McGurk personally. His Skeleton Argument reads as follows:

> "The Claimant wish (sic) to make very clear that the criticisms made below are not against Mr McGurk personally. He was appointed in accordance with the system set up by the Government, and it is the system which has been created which is the subject of the Claimant's criticism."

142. Equally, as I understand it, no criticism is made either of the Defendant or the Interested Party in selecting Mr McGurk. (Such a criticism was made of the LPA by the claimants in the BDW case, albeit unsuccessfully, where Mr McGurk had declared openly a non-Executive directorship in a strategic land company engaged in the promotion of development throughout the North of England which was a commercial rival to the claimants in the promotion of land for development. The claim on this ground was rejected.) In the present case the Defendant went through the Neighbourhood Planning Independent Examiner Referral Service ('NPIERS') which Mr Sheath has described as "an independent examiner referral service set up by RICS/RTPI/POS with support from the Department of Communities and Local Government (DCLG) to support local authorities and qualifying bodies in appointing suitably qualified and trained examiners to undergo neighbourhood plan examinations."

143. Since no criticism is made either of Mr McGurk or the Defendant or Parish Council in this case and the challenge is to "the system" effectively set up by the DCLG, there is an obvious difficulty facing any challenge by way of judicial review with only the LPA and the Parish Council as parties to the proceedings.

144. However, the way the argument is sought to be advanced is that the examiner is selected from a shortlist by the plan-making authority with the consequence that those who produce the draft NDP choose their own examiner which is what happened here. It is said that the perception of any fair-minded person would be that such a selection process does not give rise to a sense of independence. The Claimant's concerns are conveniently set out in Mr Young's Skeleton Argument which I quote:

> 1. Mr McGurk is one of twenty NDP examiners, but he has been selected to examine around one quarter of all NDPs in England.
>
> 2. Mr McGurk had at the time of his appointment as the Examiner of the NDP, only ever approved NDPs, having found each one met the basic conditions subject to minor modifications
>
> 3. That he had at the time of his appointment conducted far more examinations than anyone else, and as noted approved each.
>
> 4. The only examiner to have found an NDP failed the basic conditions (prior to appointment of Mr McGurk) was not appointed for any other NDPs, and publicly stated that she felt her rejection of the Slaugham NDP had led to her not being selected for other cases.
>
> 5. Examiners are able, as Mr McGurk has done, to put their track record of approving onto a website, which is of course readily available to anyone with internet access. In Mr McGurk's case he provides copies of each of his Examiners reports on his website.

145. The factual basis for these assertions is to be found in Mr Stafford's second witness statement.

146. The argument sought to be advanced on behalf of the Claimant is that there must be a strong incentive for an NDP steering group to select an examiner who has a proven track record of approving NDPs (albeit with minor modification) and reject those who may be willing to be more critical. Equally, it is said that for examiners there must be an incentive to approve an NDP, knowing that the individual's track record will become a matter of public record and that appointment is made solely by means of selection by the plan-making authority. The submission is that this is "not a healthy approach to instilling confidence in the examination process or indeed the NDP process."

147. As already foreshadowed, I do not consider that a root and branch attack on "the system" can be made unless the Secretary of State is a party to any proceedings. The arguments, as articulated, cannot thus be advanced successfully in the present proceedings.

148. If I were wrong about that then, on the merits of the points sought to be advanced, I will confine my observations as narrowly as possible. I do not see the points as arguable. I cannot see how "the system" could be assisted by the involvement of examiners who, without discrimination, simply approve draft NDPs. Their role, of course, is only to decide whether the basic conditions have been met (see paragraphs 50 and 55 above) and, to that extent, the role is comparatively superficial (see paragraph 55), but the process of judicial review (with all the delays to which it can give rise) is available to quash an NDP that has simply been "nodded through" by an examiner without addressing the issues properly and conscientiously. Such a process does not serve a local community well and, for my part, I am unable to see how a fair-minded observer, applying his or her mind to the issue with that factor in play, would see the fact that the choice of examiner is left to the LPA (in consultation with the Parish Council) as producing an unfair or non-independent result. It is in the interests of the local community to see its NDP in place without the risk of successful legal challenge.

149. Furthermore, the mere fact that a particular examiner has approved all (or a large proportion) of the draft NDPs put his or her way does not seem to me to be of any relevance. A bit like a judge, the examiner can only work with the material with which he is provided. In the examiner's case, he is likely to be provided (as occurred in this case) with a prepared draft NDP arising from a lengthy consultation process, the bulk of the drafting of which will have been undertaken by professional planning officers from the District Council. In that situation there is a good prospect that, even if not meeting entirely with the approval of the examiner (again, as occurred in this case), it is a document that will require only some modest modifications before it is capable of approval. It is not, therefore, difficult to see why many draft NDPs are approved, but equally the evidence indicates that some are not.

150. In my judgment, the material relied upon in this case to challenge "the system" is wholly insufficient and that is another basis upon which I decline to grant permission to apply for judicial review.

Conclusion

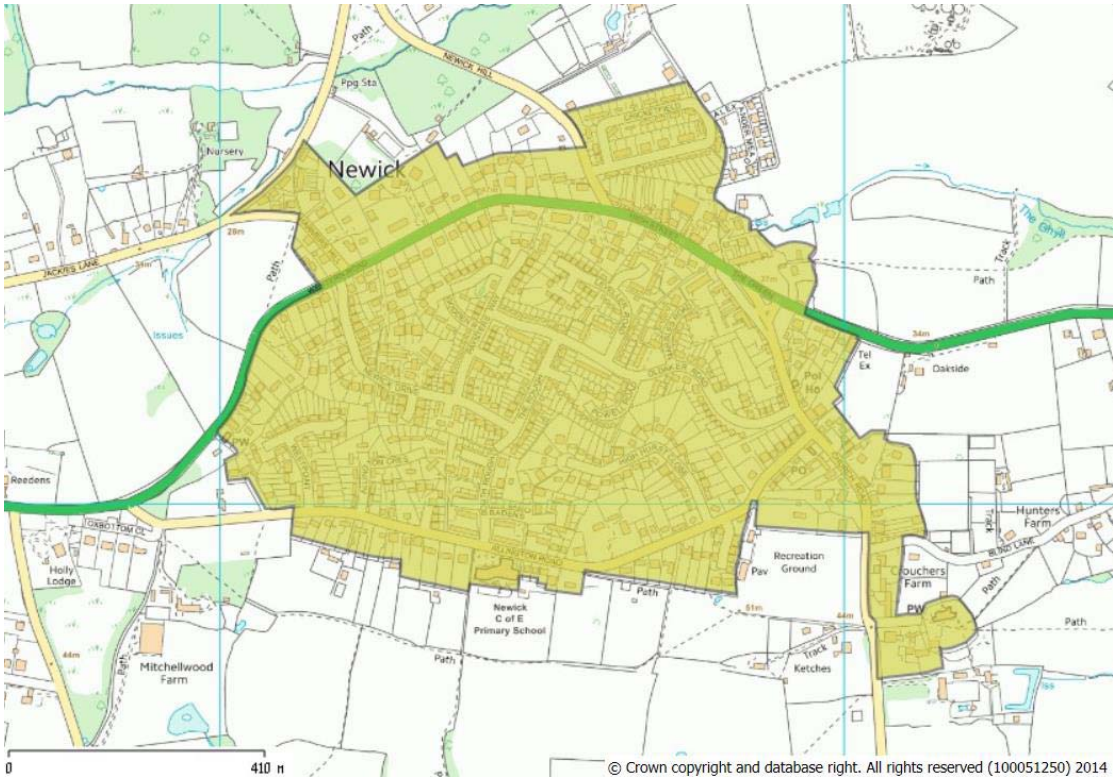
151. For the reasons I have given, I do not consider that any of the grounds of challenge succeed and this application for judicial review must fail.

152. I am grateful to Mr Young, Mr Corbet Burcher and Miss Parry for their assistance.

APPENDIX 1


Newick Parish Boundary
Sheffield Park
Sheffield Park Station
Sheffield Bridge
Sheffield Park Gardens
Lower Womans Way
Pond
East Park Farm
Sewage Works
White Barn Farm
Parsonage Farm
Sluice
Weir
Mill Farm
Fletching Mill Bridge
Hungry Hatch
Great Wet Wood
Fletching Mill Place
River Farm
Netherhall Farm
Fletching Mill Farm
Rotherfield Farmhouse
Rotherfield Wood
Moses Farm
Piltdown
Goldbridge Wood
Valley Farm
Fletching Common
Goldstrow
Grisling Common
The Old Farm
Cobb's Nest
Sewage Works
Argus Farm
Newick
Barkham Manor
Cox's Farm
Goldbridge Road
A272
Goldbridge Farm
Gold Bridge
Hanger Wood
Reedens
Sharpsbridge
Mitchelswood Farm
Ketches
Sharp's Bridge
Sharp's Hanger
Fountnill Wood
Oxbottom
Tilehouse Farm
NEWICK CP
Sharps Farm
Sharpsbridge Farm
Broomlye Wood
Cronk's Wood
Beechland
Fountnill
Cornwell's Bank
New Barn Farm
Schoolhouse Farm
Broomlye
Bunce's Pit
Cinder Farm
Double Barns Farm
Bunce's Farm
Chalybeate Spring
Ridgeland Farm
Sluggs Eye Island
Foxearth Wood
Weir
Newick Park
Chalybeate Spring
Vuggles Farm
Cockfield Bridge (FB)
Lower Park Pond
Gipp's Farm
Oak
Tutts Farm
Cockfield Lane (Path)
Gipps's Wood
Sutton Hall
High House Farm
Weir

*APPENDIX 2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APPENDIX 3

Criteria	Notes	Likely Significant Effect?
1. 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;	Neighbourhood Development Plans are the lowest-level statutory planning documents in the UK. As such, ours does not set a framework for other projects or plans but will be used for guiding development in the Parish until 2030.	No
(b)the degree to which the plan or programme influences other plans and programmes including those in a hierarchy;	Neighbourhood Development Plans are influenced by other plans, such as the Lewes District Core Strategy and national planning policy. The plan is at the bottom of the hierarchy and is not intended to influence other plans and programmes.	No
(c)the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development;	The Neighbourhood Development Plan, as directed by the National Planning Policy Framework, will help promote sustainable development and will consider the environment.	No
(d)environmental problems relevant to the plan or programme; and	The state of the environment will be considered by those making the plan and, where appropriate, they will introduce policy to help overcome any problems. The sustainability appraisal and Habitats Regulations Assessment for the Core Strategy, which the Neighbourhood Development Plan supplements, identified issues relating to the Ashdown Forest and has addressed them in the Core Strategy.	No
(e)the relevance of the plan or programme for the implementation of Community legislation on the environment (for example, plans and programmes linked to waste management or water protection).	Not applicable for the Neighbourhood Development Plan	No
2. 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;	The Neighbourhood Development Plan will guide development in the parish until 2030, with the aim of having a positive impact on the parish and by promoting sustainable development.	No

(b)the cumulative nature of the effects;	The sustainability appraisal of the Core Strategy considered the impact of development in the Parish alongside development in other settlements and parishes. The Habitats Regulations Assessment also considered the effects of development in neighbouring districts on protected sites.	No
(c)the trans-boundary nature of the effects;		No
(d)the risks to human health or the environment (for example, due to accidents);	It is not thought that anything in the Neighbourhood Development Plan will increase risks to human health.	No
(e)the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected);	The Neighbourhood Development Plan, unlike most plans, is to be written for a very small area and population.	No
(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	In collecting information for the Neighbourhood Development Plan, information has been gained on the characteristics of the area – including information on land use, listed buildings, TPOs and SSSIs. This information gathering will inform the contents of the Neighbourhood Development Plan.	No
(g)the effects on areas or landscapes which have a recognised national, European Community or international protection status.	The Habitats Regulations Assessment for the Core Strategy considered the impact of development on the Ashdown Forest Special Area of Conservation/ Special Protection Area. The Core Strategy has put in place policies which mitigate against the effects at the Forest of development in the Parish. Thus the Neighbourhood Development Plan will not have a significant negative effect on the Forest.	No