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**From:** Paul Arnett  
**Sent:** 27 April 2020 12:15  
**To:**  
**Cc:**

**Subject:** Broadstairs & St Peters Neighbourhood Plan- Partial Re- examination  
**Attachments:** Broadstairs NP, EQ1-7 to District Council, 9 apr 20.docx; Broadstairs NP, EQ8 to Town Council, 9 apr 20.docx; 200427 Letter to Examiner.pdf; 190731 Broadstairs St Peter's Town Council - Advice Note (002).pdf

**Importance:** High

Dear Mr Kemmann-Lane,

I am instructed by Broadstairs & St Peter's Town Council ('Town Council').

I am emailing with respect to your questions of 9<sup>th</sup> April (1<sup>st</sup> and 2<sup>nd</sup> attachments).

With regards to the Town Council's response to question 8, please find attached:

- A letter dated 27<sup>th</sup> April (3<sup>rd</sup> attachment) and
- Advice Note of 31<sup>st</sup> July 2019 referenced in the letter which the Town Council have agreed to share with you.

I would be grateful if you could please acknowledge safe receipt of this email and attachments which, in the current circumstances, are being sent by email only.

A copy of this email and attachments have been emailed to Mr Poole and to Thanet District Council and for information to MHCLG given the ongoing intervention request.

Regards,

Paul

**Paul Arnett**  
Associate  
Town Legal LLP

[www.townlegal.com](http://www.townlegal.com)

**Most highly rated planning law team in the country (Planning magazine annual planning law survey, 2019 and 2020)**

**tn.**

# Attachment 1

# BROADSTAIRS & ST PETER'S NEIGHBOURHOOD PLAN – ADDITIONAL PARTIAL EXAMINATION OF POLICY BSP5: DESIGNATION OF LOCAL GREEN SPACES

## Examiner's Questions

To: Thanet District Council

## Relationship to Neighbourhood Plan of policies in emerging Thanet Local Plan to 2031

### Preamble

I seek clarification on a number of points. In brief these relate to the version of the NPPF that is relevant to the examination of Broadstairs & St Peter's Neighbourhood Plan (BSPNP); the weight that should be given to the emerging Thanet Local Plan (eLP), given the text of the NPPF 2012 with its lack of reference to an emerging local plan; the lack of any reference to testing the BSPNP against the 2006 Local Plan; and why there appear to be LGSs in BSPNP that are not in the eLP, but are not objected to by Thanet District Council (TDC) – a lack of consistency?

### Background

Among the documents submitted for my examination is the Report to Cabinet - 25th July 2019. Within this document, the reasons for not accepting the recommendations of the Examiner's report on the Broadstairs & St Peter's Neighbourhood Plan (BSPNP) are set out. The following are extracts from the Cabinet Report (within which I draw attention to elements by underlining):

*1.4 One of the 'basic conditions' is that a draft neighbourhood plan should be in general conformity, and not conflict with, national planning policy or local plan policies. It is considered that some of the Local Green Spaces (LGS) proposed do not meet the criteria for designation as set out in the National Planning Policy Framework (NPPF). As part of the council's consultation on the Proposed Revisions to the draft Local Plan (Preferred Options) in 2017, the council invited proposals for sites to be considered as Local Green Spaces for inclusion in the Local Plan. Some of the sites now being proposed in the neighbourhood plan were also submitted at this stage, but were not allocated in the Local Plan as they did not meet the designation criteria. It is considered that their allocation in the neighbourhood plan would therefore conflict with the Local Plan LGS allocations as they have already been considered unsuitable for designation.*

*2.3 The scope of the examination is set out in Paragraph 8(1) of Schedule 4B to the Town and Country Planning Act 1990 (as amended) ('the 1990 Act'). The examiner must consider:*

- *Whether the plan meets the Basic Conditions;*

*2.4 The 'Basic Conditions' are set out in Paragraph 8(2) of Schedule 4B to the 1990 Act. In order to meet the Basic Conditions, the neighbourhood plan must: ● have regard to national policies and advice contained in guidance issued by the Secretary of State; ● contribute to the achievement of sustainable development; ● be in general conformity with the strategic policies of the development plan for the area; ● be compatible with and not breach European Union (EU) obligations; and; ● meet prescribed conditions and comply with prescribed matters.*

2.5 *It is at this point in the process (and the first formal point in the process) that the Council must come to a formal view about whether the draft neighbourhood plan meets the basic conditions. Regulation 18 of the Neighbourhood Planning Regulations 2012 (as amended), and Schedule 4B of the Town and Country Planning Act 1990 require the local authority to propose any necessary modifications to a neighbourhood plan in order that it can meet the Basic Conditions.*

2.7 *However, it is considered that the draft neighbourhood plan does not currently meet the basic conditions because some of the proposed Local Green Spaces do not meet the criteria set out in the National Planning Policy Framework (NPPF) and are not in general conformity with the strategic policies of the development plan for the area (emerging Thanet Local Plan).*

2.8 *The NPPF states that policies for managing development within sites designated as Local Green Spaces should be consistent with those for Green Belts (para 101 [this is from February 2019 version, although 2012 version uses same text]) - the NPPF states that 'Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances' (para 143).*

2.9 *The NPPF also sets criteria for the designation of Local Green Spaces (para 100): 'The Local Green Space designation should only be used where the green space is: (a) in reasonably close proximity to the community it serves; (b) demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and (c) local in character and is not an extensive tract of land.'*

2.10 *Proposed LGS sites were submitted to the Council during the Preferred Options Revisions consultation (20th January - 17th March 2017). Broadstairs Town Council have also assessed proposed LGS sites submitted during their consultation to include in their neighbourhood plan. The assessment criteria set out in the NPPF applies to LGS regardless of whether they are assessed and allocated in a Local Plan or a neighbourhood plan.*

2.11 *The BSNP allocates the following as Local Green Spaces under policy BSP5:*

There follows a list of 18 sites – not all of which I can identify as sites within the Report on Assessment of Local Green Space Proposals, January 2018.

2.12 *Of these sites, four were submitted to the Council during the Local Plan consultation. Culmer's Amenity Land and Kitty's Green were submitted and included for allocation in the Local Plan as Local Green Spaces.*

2.13 *Fairfield Road/Rumfields Road was submitted under a slightly different name of 'Cross-roads of Fairfield Road and Bromstone Road'. The Council did not include this site for allocation in the Local Plan as a Local Green Space for the following reason: 'Possibly highway land on a busy roundabout. Site does not meet the NPPF criteria for designation'.*

2.14 *Reading Street was also submitted and was not included in the Local Plan for the following reason: 'Site is part of the grass verge adjacent to the highway. Site does not meet the NPPF criteria for designation'.*

2.15 *Because these two sites have been considered inappropriate for designation in the Local Plan, their designation in the neighbourhood plan would also not be considered appropriate.*

would not be in general conformity with the emerging Local Plan, so would fail the Basic conditions.

*2.16 It is therefore recommended that Fairfield Road/Rumfields Road and Reading Street are removed from the Local Green Space designations in the Broadstairs & St Peters Neighbourhood Plan.*

From the above it can be seen that the reasoning set out in the Cabinet Report for the deletion of 2 LGSs is as follows:

- Basic Conditions – not in general conformity with regard to national policies and advice contained in guidance issued by the Secretary of State; and not in general conformity with the strategic policies of the development plan for the area (referring to the eLP);
- Some of the sites now being proposed in the neighbourhood plan were also submitted at Preferred Options stage, but were not allocated in the eLP as they did not meet the designation criteria. It is considered that their allocation in the neighbourhood plan would therefore conflict with the eLP LGS allocations as they have already been considered unsuitable for designation.
- Fairfield Road/Rumfields Road was not included in the eLP as a Local Green Space for the following reason: ‘Possibly highway land on a busy roundabout. Site does not meet the NPPF criteria for designation’.
- Reading Street was not included in the eLP for the following reason: ‘Site is part of the grass verge adjacent to the highway. Site does not meet the NPPF criteria for designation’

## **Questions**

The District Council’s reasoning is based upon the content of the eLP. Since this Plan has now reached the stage where the Inspectors’ report has been issued and the Main Modifications have been published, I consider that its policies carry considerable weight. However, the examination of the BSPNP is being carried out under the 2012 NPPF where, unlike the 2019 version, there is no reference to an emerging local plan. The relevant part of NPPF12 states:

### ***Neighbourhood plans***

*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:*

- *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.*

*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.*

*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, are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation.*

**Question 1:** What is the relevance of the eLP in this context?

Thanet Local Plan 2006 has no policy for Local Green Space, either strategic or otherwise.

**Question 2:** What is the basis for saying that the LGS allocations in the BSPNP are not in general conformity with the Local Plan 2006?

The NPPF 2012 includes the following:

*77. The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used:*

- *where the green space is in reasonably close proximity to the community it serves;*
- *where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and*
- *where the green area concerned is local in character and is not an extensive tract of land.*

*78. Local policy for managing development within a Local Green Space should be consistent with policy for Green Belts.*

**Question 3:** Since the LGS allocations in the BSPNP must be judged against NPPF 2012, for clarity, please explain fully the reasons for wishing to delete the 2 LGS allocations. For instance, is the fact that Fairfield Road/Rumfields Road space “is possibly highway land on a busy roundabout” a sufficient justification? And, in respect of the Reading Street space, is the fact that it is “part of the grass verge adjacent to the highway” a sufficient justification?

**Question 4:** There are 19 LGS designated under Policy SP30 of the eLP, of which 7 have a ‘Broadstairs’ location. Apart from Kitty’s Green, Culmer Amenity Land, and St Peter’s Recreation Ground (if that is the same as St Peter’s Village Green), I cannot identify which of the LP list of sites are in the NP list of sites. It would be helpful to have these identified for me. It is certainly confusing to have sites identified by different names in different lists, which appears to be the case. I also have difficulty in reconciling the names of the BSPNP areas with some of the sites in the Report on Assessment of Local Green Space Proposals of January 2018. An explanation would be helpful.

**Question 5:** In any event, the submitted BSPNP allocates 18 sites, of which 2 are objected to by TDC, leaving 16 sites that are not subject to objection. Since the LP allocates 19 LGSs, most of which do not appear to be in the NP area, it seems to be the case that there are LGSs in the BSPNP that have not had the endorsement of the eLP. This seems to go against the contention, set out in paragraph 1.4 of the Cabinet Report, that “Some of the sites now being proposed in the neighbourhood plan were also submitted at this stage, but were not allocated in the Local Plan as they did not meet the designation criteria. It is considered that their allocation in the neighbourhood plan would therefore conflict with the Local Plan LGS allocations as they have already been considered unsuitable for designation.” Surely that means that any LGS designated in the NP, that has not been allocated in the eLP, conflicts with that Plan? Is this a lack of consistency, or for a reason?

**Question 6:** Following from this, the Inspectors' report on the eLP deals with LGSs quite briefly. The essential element of their report as far as the choice of LGSs is concerned is in paragraph 329: *"Examination Documents CD5.11 and CD5.12 provide the justification for designating areas of Local Green Space. All sites have been assessed against the requirements of the Framework, which requires an element of professional planning judgement. In our view the Council's conclusions on the sites put forward are reasonable and justified."* (CD5.11 being the Report on Assessment of Local Green Space Proposals, January 2018, and CD5.12 being Addendum to Report on Assessment of Local Green Space Proposals, August 2018, the latter appearing to refer only to sites in Westgate.) Does this mean that there were no omission LGS sites put forward for the Inspectors' consideration; for instance, in relation to the 2 LGS sites that TDC now seeks to delete from the NP?

**Question 7:** As a follow-on from Question 6, the LGS Policy (Policy SP30) in the eLP is a strategic policy. Does this mean that a NP cannot designate additional LGSs, because to do so would be designating strategic sites?

I would be grateful for a reply within 10 working days.

Terrence Kemmann-Lane

Examiner  
9 April 2020

## Attachment 2



**BROADSTAIRS & ST PETER'S NEIGHBOURHOOD PLAN – ADDITIONAL PARTIAL  
EXAMINATION OF POLICY BSP5: DESIGNATION OF LOCAL GREEN SPACES**

**Examiner's Question**

**To: Broadstairs & St Peter's Town Council**

*Please note that Questions 1-7 have been addressed separately to Thanet District Council*

**Question 8**

I note that there is reference, in responses to the Thanet District Council's consultation, to the Town Council obtaining a legal opinion on the matters dealt with in the Thanet District Council Report to Cabinet in which it was decided that the Broadstairs & St Peter's Neighbourhood Plan be subject to process to alter it by the deletion of 2 allocations of Local Green Spaces. Does the Town Council wish to bring to my attention, either matters of law, policy or guidance, in relation to this matter?

I would be grateful for a reply within 10 working days.

Terrence Kemmann-Lane

Examiner  
9 April 2020

## **Attachment 3**

**FAO: Terrence Kemmann-Lane JP DipTP FRTPI MCMl**

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**By email only:**

Your ref: Broadstairs and St Peters Neighbourhood Plan

Our ref: BRO002/0001/pa

27 April 2020

Dear Sirs

**Broadstairs & St Peter's Neighbourhood Plan- Additional partial re-examination of policy BSP5:  
Designation of Local Green Spaces**

**Our client: Broadstairs & St Peter's Town Council**

We are instructed by Broadstairs & St Peter's Town Council ('Town Council') in respect of the partial re-examination of the Broadstairs & St Peter's Neighbourhood Plan ('BSPNP') which has been requested by Thanet District Council ('TDC').

We note that the re-examination of the BSPNP is a partial re-examination only limited to considering Policy BSP5: Designation of Local Green Spaces. Specifically, the partial re-examination of the BSPNP has arisen from TDCs proposal to modify the BSPNP by removing the Fairfield Road/Rumfields Road and Reading Street Local Green Spaces ('LGSs') contrary to the original Independent Examiner's conclusions.

We write in response to Question 8 of the Independent Examiner, Mr Terrence Kemmann-Lane, questions of 9 April 2020 which has been specifically addressed to the Town Council. We note and have also considered Questions 1-7, which have been addressed to TDC. While Question 8 states that replies are requested within 10 working days, we understand that the revised deadline for responses is on or before 30th April 2020

Question 8 states as follows:

*I note that there is reference, in responses to the Thanet District Council's consultation, to the Town Council obtaining a legal opinion on the matters dealt with in the Thanet District Council Report to Cabinet in which it was decided that the Broadstairs & St Peter's Neighbourhood Plan be subject to process to alter it by the deletion of 2 allocations of Local Green Spaces. Does the Town Council wish to bring to my attention, either matters of law, policy or guidance, in relation to this matter?*

27 April 2020

As requested, please find attached the legal advice note ('Note') of 31 July 2019 which concerns TDCs refusal to put the independently assessed BSPNP to referendum. We can confirm that the Town Council are agreeable to sharing the Note with Mr Kemmann-Lane.

In addition to the matters set out in the attached Note and by way of an update, the Town Council would make the following additional comments:

1. The Town Council's engagement in the partial re-examination of the BSPNP and, specifically the response to Question 8, should not be taken or construed as any acknowledgment or acceptance on its part that a partial re-examination of the BSPNP is legally necessary or justified.
2. Indeed, for the detailed reasons set out in the Note, the Town Council considers that TDCs decision to partially re-examine the BSPNP is legally flawed and wholly unnecessary in circumstances when the BSPNP has already been independently assessed as according with the 'basic conditions' in paragraph 8(2) of Schedule 4B of the Town and Country Planning Act 1990 ('TCPA 1990') and the other relevant requirements and, therefore, TDC are under a legal duty pursuant to paragraph 12(4) of Schedule 4B TCPA 1990 to put the BSPNP to referendum.
3. While the Town Council consider, for the reasons set out in the Note (see paragraph 6.1-6.6 the), that the post- examination consultation exercise on the BSPNP was legally unjustified, the Town Council note that the consultation responses received were overwhelmingly opposed (84 of 94 responses) to TDCs proposed removal of the 2 LGSs with consultee's responses consistently reiterating, among other things, the particular local significance and special nature of the 2 LGSs which are key criteria in paragraph 77 of the National Planning Policy Framework ('NPPF') 2012 for the designation of LGSs.

For reasons unclear, TDC seem to have disregarded the overwhelming weight of the consultation responses and are continuing to press ahead with their misconceived attempt to remove the 2 LGSs from the BSPNP which, as the original Independent Examiner rightly considered, met all the relevant tests in the policy framework for designation as LGSs. Mr Kemmann-Lane will find a link below to the consultation responses received by TDC (<https://consult.thanet.gov.uk/consult.ti/BSPNPMODS/consultationHome>).

It is no answer by TDC to say that no new evidence was submitted in the consultation responses that the 2 LGSs meet the designation criteria. There was no requirement for the Town Council and/or consultees to provide any such new evidence in the post examination consultation, the matter having been already assessed by the Town Council in its LGS assessment and independently examined by the original Examiner. If notwithstanding the evidence base and original Independent Examiner's recommendation, TDC consider that the 2 LGSs do not meet the LGS designation criteria in the NPPF 2012 and should be removed from the BSPNP then it is surely for TDC and not the Town Council/ consultees to justify this position.

The only purported justification that has been provided to date by TDC for the proposed modifications is that Fairfield Road/Rumfields Road LGS "is possibly highway land on a busy roundabout" and the Reading Street LGS is "part of the grass verge adjacent to the highway". Such scant reasoning is insufficient justification for TDCs approach (contrary to the original Independent

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Examiner's recommendation) and, in particular, in no way address the specific designation criteria in paragraph 77 of NPPF 2012.

4. Having considered TDCs Cabinet report of 16 December 2019, it is also no answer for TDC failing to meet its legal duty in paragraph 12(4) of Schedule 4B TCPA 1990 to put the BSPNP to referendum, that such a decision might be subject to a theoretical judicial review action by the disgruntled proposed residential developer of the Reading Street LGS site. The fact that such a decision is theoretically capable of being judicially reviewed does not, in any way, mean that any such speculative legal action would be brought let alone be successful and should not prevent TDC from meeting its legal obligations under the statutory scheme for neighbourhood plans.
5. As Mr Kemmann-Lane queries in his 7 questions to TDC, TDC continue to labour under the misapprehension:
  - a. That the re-examination of policy BSP5 is to be examined under the revised NPPF whereas, (pursuant to transitional arrangements in footnote 69 to paragraph 214 of the revised NPPF) it is to be assessed against the policies in the original NPPF (2012) which, as Mr Kemmann-Lane notes, makes no reference to emerging local plan policies;
  - b. That there is a requirement for the BSPNP to be in 'general conformity' with the strategic policies in the emerging TDC local plan which is directly contrary to paragraph 8(2) of Schedule 4B TCPA 1990 and relevant case law (see para 3.4 of the Note). The statutory scheme and relevant case law are clear that it is general conformity with the adopted local plan (i.e. Thanet Local Plan 2006) which is the relevant test. As Mr Kemmann-Lane notes. there is, in fact, no LGS policy in the adopted local plan (strategic or otherwise). In the absence of any such relevant LGS LP policy, the Town Council fail to understand how it is considered by TDC that the 2 LGSs that they are opposed to are not in conformity with the Thanet Local Plan 2006;
6. The Town Council agree with Mr Kemmann-Lane's observation as to the seemingly inconsistent approach that TDC are taking to the proposed designation of the 18 LGSs in the BSPNP. In respect of the 2 opposed LGSs in the BSPNP, TDC assert that their removal is justified as they are not allocated in the emerging local plan and therefore conflict with the emerging local plan LGS allocations and yet, as Mr Kemmann-Lane notes, other unopposed LGS allocations in the BSPNP are also not allocated in the emerging local plan and yet are not opposed by TDC;
7. Mr Kemmann-Lane should be aware that the Town Council have made a request to the Secretary of State for Housing Communities and Local Government ('SSHCLG') on 11<sup>th</sup> September 2019 asking (for the reasons set out in the Note) for the SSHCLG to intervene and direct TDC to make arrangements forthwith for a referendum to be held on the post-examination BSPNP pursuant to paragraph 13B of Schedule 4b of the TCPA 1990.

On 16 April 2020, MHCLG provided an update on the Town Council's intervention request. MHCLG confirmed that the SSHCLG was continuing to closely monitor developments with the BSPNP. MHCLG advised that the SSHCLG continues to carefully consider the Town Council's request to intervene and considers it appropriate to await Mr Kemmann-Lane's conclusions in respect of the 2 LGSs before formally determining the intervention request;

Terrence Kemmann-Lane JP DipTP FRTPI MCMI

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27 April 2020

For the reasons set out above and in the attached Note, the Town Council would ask Mr Kemmann-Lane to conclude, with respect to the partial re-examination of the BSPNP, that policy BSP5: Designation of Local Green Spaces meets the basic conditions in paragraph 8(2) of Schedule 4B TCPA 1990.

A copy of this letter and attached Note has been emailed to TDC and to Mr Poole and for information to MHCLG.

Yours faithfully

**Town Legal LLP**

[Enc]

*Private and confidential*

**BROADSTAIRS & ST PETER'S TOWN COUNCIL**

**BROADSTAIRS & ST PETER'S DRAFT NEIGHBOURHOOD PLAN**

**ADVICE NOTE ON VARIOUS ISSUES ARISING FROM THANET DISTRICT COUNCIL'S DELAY IN DECIDING WHETHER A REFERENDUM IS TO BE HELD ON THE MAKING OF THE BROADSTAIRS & ST PETER'S DRAFT NEIGHBOURHOOD PLAN**

**1. Introduction and background**

- 1.1 Broadstairs & St Peter's Town Council ('Town Council'), as a 'qualifying body', are progressing the draft Broadstairs & St Peter's Neighbourhood Plan ('NP'). The NP was submitted to Thanet District Council ('TDC') in November 2018 under Regulation 15 of the Neighbourhood Planning (General) Regulations 2012 ('2012 Regulations'). A 'Regulation 16' consultation exercise was then undertaken by TDC on the NP from November 2018 to January 2019. Thereafter, the NP was submitted by TDC for examination to an Independent Examiner ('Examiner') in March 2019.
- 1.2 Among other things, the NP proposes, in draft policy BSP5, to designate 18 sites as Local Green Spaces ('LGS'). As part of the evidence base for the NP, the Town Council prepared a detailed background document in July 2018 setting out the methodology adopted for selection of the 18 sites and applying the designation criteria for LGS in paragraph 77 of the National Planning Policy Framework 2012 ('NPPF 1').
- 1.3 The Examiner's Report ('Report') was issued on 14 June 2019. Subject to modifications set out in the Report, the Examiner has recommended to TDC that the NP should proceed to a referendum on the basis that it has met all the relevant requirements. With reference to the proposed LGS, the Examiner was satisfied that a rigorous approach had been adopted by the Town Council for the selection of the proposed sites and concluded that each of the 18 sites met the LGS designation criteria.
- 1.4 Notwithstanding the timescales in the 2012 Regulations, since receiving the Report in June, TDC have delayed taking the decision whether to put the NP to a referendum. TDC have also refused to publicise the Report and are refusing to openly communicate with the Town Council. We understand that it was only after the Town Council published the Report on its own website that TDC have belatedly decided to put the matter before its Cabinet for decision on 25 July 2019.
- 1.5 In summary, the report for the Cabinet prepared by officers recommends that the NP be modified by the removal of the proposed Reading Street LGS and Fairfield Road/ Rumfields Road LGS and these modifications be subject to a 6 week post-examination consultation exercise. At the time of preparing this advice note, we understand that the outcome of the Cabinet meeting on 25 July 2019 has not been published. The next stage in the process is for TDC to issue its 'decision statement' under Regulation 18 of the 2012 Regulations confirming whether or not the NP is to be put to referendum.
- 1.6 Understandably, the Town Council are frustrated by TDC's inaction and suspect that the delay in progressing matters may be a deliberate stalling tactic to enable a pending planning application to be determined, which requires the Reading Street LGS for access purposes.

- 1.7 The Town Council are seeking legal advice on the current position and their options moving forward. Specifically, the Town Council are seeking advice on the following matters:
- (a) Whether TDC are able to disagree with the Examiner's recommendations?
  - (b) Whether TDC can require the Town Council to modify the NP as proposed and the Town Council's options if they disagree with TDCs proposed modifications?
  - (c) If TDC's proposed modifications to the NP are subject to a post examination 6 week consultation exercise, whether the NP will have to be re-examined? and
  - (d) Whether the Report is a material consideration in the determination of the pending planning application concerning the Reading Street LGS?
- 1.8 This advice note starts by setting out the relevant applicable statutory framework (which has aptly been described as a 'statutory thicket') and policy framework. It will then address the specific requests for advice set out in paragraph 1.4 above before recommending next steps for the Town Council to take moving forwards. This advice note is intended for the benefit of the Town Council only and no other person may rely on it.
- 2. Statutory Framework**
- 2.1 The provisions for the preparation of a "neighbourhood development plan" are in sections 38A, 38B and 38C of the Planning and Compulsory Purchase Act 2004 ('PCPA 2004') (as inserted by the Localism Act 2011).
- 2.2 Section 38A(1) PCPA 2004 states that *"[any] qualifying body [defined in subsection (12) as including "an organisation or body designated as a neighbourhood forum"] is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan"*.
- 2.3 Section 38A(2) PCPA provides that *"[a] "neighbourhood development plan" is a plan which sets out policies ... in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan"*. Under subsection (3), Schedule 4B to the Town and Country Planning Act 1990 ('TCPA 1990'), contains provisions relating to the process for the making of *"neighbourhood development orders"*, including provision for independent examination of orders proposed by *"qualifying bodies" – such as a parish council – and for the holding of referendums on such orders, "is to apply in relation to neighbourhood development plans ..."*.
- 2.4 Under paragraph 8 of Schedule 4B TCPA 1990, the examiner must consider whether the draft neighbourhood development order meets the *"basic conditions"* set out in paragraph 8(2), including *"(a) [that] having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order"; "(d) [that] the making of the order contributes to the achievement of sustainable development"; "(e) [that] the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority ..."; and "(f) [that] the making of the order does not breach, and is otherwise compatible with, EU obligations"*.
- 2.5 Paragraph 10(1) of Schedule 4B TCPA 1990 requires the examiner to *"make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations)"*. Under paragraph 10(2) of Schedule 4B TCPA 1990 the report must recommend *"(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".*

- 2.6 Paragraph 10(3) of Schedule 4B TCPA 1990 provides that the only modifications the examiner may recommend include those he considers need to be made either "(a) ... to secure that the draft order meets the basic conditions mentioned in paragraph 8(2)" or "(b) ... to secure that the draft order is compatible with the Convention rights". Paragraph 10(4)(a) of Schedule 4B TCPA 1990 provides that his report may not recommend that an order (with or without modifications) is submitted to a referendum if he considers that it does not "(a) meet the basic conditions ...".
- 2.7 If the examiner has made a report under paragraph 10 of Schedule 4B TCPA 1990, paragraph 12(2) requires the local planning authority ('LPA') "(a) [to] consider each of the recommendations ...", and "(b) [to] decide what action to take in response to each recommendation". Under paragraph 12(4) of Schedule 4B TCPA 1990, if the authority is satisfied that the draft order "(a) ... meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention rights, and complies with ... sections 61E(2), 61J and 61L", or "(b) ... 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 must be held on the making of the neighbourhood development order.
- 2.8 Paragraph 12(11) of Schedule 4B TCPA 1990 requires the LPA to "publish in such manner as may be prescribed ... (a) the decisions [it makes] under this paragraph [and] (b) [its] reasons for making those decisions ...". Paragraph 13(1) of Schedule 4B TCPA 1990 provides that if the authority proposes to make a decision differing from that recommended by the examiner and the reason for the difference is "... as a result of new evidence or a new fact or a different view taken by the authority as to a particular fact", the authority must notify prescribed persons of its proposed decision, and the reason for it, and invite representations.
- 2.9 Paragraph 13B of Schedule 4B TCPA 1990 provides for the intervention of the Secretary of State in the case of various specified defaults on the part of the LPA. Paragraphs 14 and 15 of Schedule 4B TCPA 1990 set out provisions for the holding of referendums.
- 2.10 Regulation 17A(4) of the 2012 Regulations requires the LPA, on or after the prescribed date under paragraph (5), to "decide what action to take in response to each recommendation made by [the examiner's report]". Regulation 18(2) of the 2012 Regulations requires the authority, "[as] soon as possible" after making a decision on the examiner's report, to publish that decision and the reasons for it – "the decision statement" – together with the examiner's report. Regulation 19 of the 2012 Regulations requires the authority, "[as] soon as possible" after deciding to make a neighbourhood plan, to publish a statement setting out that decision and the reasons for making it – again "the decision statement".

### 3. Policy Framework

- 3.1 The requirements in paragraph 8 of Schedule 4B TCPA 1990 (see paragraph 1.7 of the Report for a summary of these provisions) are at the heart of the neighbourhood planning process, of which the 'Basic Conditions' in paragraph 8(2) are the guiding criteria (as summarised in paragraph 2.4 of this advice note).
- 3.2 Basic condition (a) requires the Examiner (when examining the NP) and TDC (when deciding whether to put the NP to referendum) to have regard to national policies and national guidance issued by the Secretary of State. Importantly, as the NP was submitted to TDC in November 2018,

the transitional arrangements in Footnote 69 to paragraph 214 of the revised National Planning Policy Framework 2018 ('NPPF 2') apply. This means that the conformity of the NP with national policy and guidance is to be tested by reference to the policies in NPPF 1 and related Planning Practice Guidance ('PPG') and not NPPF 2 and the updated PPG.

3.3 Importantly, case law has held that basic condition (a) is a duty for the examiner/ TDC to *have regard* to national policy and guidance but does not import the more rigorous test of "soundness" as applies to local plan examinations (*BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester Borough Council [2014] EWHC 1470 (Admin) at para. 83*). In effect, a lighter touch examination process is envisaged for neighbourhood plans than local plans.

3.4 Basic condition (e) requires the NP to be in 'general conformity' with the strategic policies contained in the 'development plan' for the area of the authority. Importantly, in the present case, case law has confirmed, with reference to basic condition (e):

- (i) That it relates to conformity with the *adopted* development plan for TDC (i.e. the Thanet Local Plan adopted 2006) only and not the *emerging* Local Plan (i.e. Thanet Local Plan for period 2011-2031) which is currently at examination (*R (Kebbell Developments Limited) v Leeds City Council [2016] EWHC 2664 (Admin) at para.12*); and
- (ii) That it only requires that the draft NP *as a whole* be in "general conformity" with the strategic policies of the adopted development plan *as a whole* and there is no need to consider whether there is a conflict or tension between one policy of a neighbourhood plan and one element of the local plan (*Crownhall Estates Ltd, R (on the application of) v Chichester District Council & Ors [2016] EWHC 73 (Admin) (21 January 2016 at para.29)*)

3.5 As to limb (i) above, while there is no requirement for the NP to be in general conformity with the relevant strategic policies in the emerging TDC local plan, and the policies in the NP are not tested against the policies in an emerging local plan, paragraph 41-009-20160211 of the PPG recommends that LPAs should work proactively with qualifying bodies to produce complementary plans.

3.6 Turning to the policy issue of LGS designation, paragraph 77 of NPPF 1 provides as follows:

*"The Local Green Space designation will not be appropriate for most green areas of open space. The designation should only be used:*

- *Where the green space is in reasonably close proximity to the community it serves;*
- *Where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and*
- *Where the green area concerned is local in character and is not an extensive tract of land."*

3.7 Further guidance is available in the PPG in relation to LGS designation. The PPG provides (so far as relevant) as follows:

*"Paragraph: 013 Reference ID: 37-013-20140306*

*What types of green area can be identified as Local Green Space?*

*The green area will need to meet the criteria set out in paragraph 77 of the National Planning Policy Framework. Whether to designate land is a matter for local discretion. For example, green*

*areas could include land where sports pavilions, boating lakes or structures such as war memorials are located, allotments, or urban spaces that provide a tranquil oasis."*

*Revision date: 06 03 2014*

*Paragraph: 014 Reference ID: 37-014-20140306*

*How close does a Local Green Space need to be to the community it serves?*

*The proximity of a Local Green Space to the community it serves will depend on local circumstances, including why the green area is seen as special, but it must be reasonably close. For example, if public access is a key factor, then the site would normally be within easy walking distance of the community served.*

*Revision date: 06 03 2014*

*Paragraph:017 Reference ID: 37-017-20140306*

*What about public access?*

*Some areas that may be considered for designation as Local Green Spaces may already have largely unrestricted public access, though even in places like parks there may be some restrictions. However, other land could be considered for designation even if there is no public access (eg green areas which are valued because of their wildlife, historic significance and/or beauty).*

*Designation does not in itself confer any rights of public access over what exists at present. Any additional access would be a matter for separate negotiation with land owners, whose legal rights must be respected."*

3.8 The correct interpretation of the three bullet point criteria in paragraph 77 of NPPF 1 for designation of LGS, was recently considered by the High Court in *Legard, R (On the Application Of) v The Royal Borough of Kensington and Chelsea [2018] EWHC 32 (Admin)*. The High Court held, in terms:

- (a) That there is no separate and distinct test proposed by the use of the word "serves" in the first bullet point of para. 77 NPPF 1;
- (b) That the focus of the first bullet point in para.77 NPPF 1 is "close proximity", and the use of the word "serves" introduces the requirement that the green space is "demonstrably special" (2<sup>nd</sup> bullet point) by reference to examples of qualities and characteristics which it may enjoy and which are of benefit to the community; and
- (c) Overall, that the 3 bullet points in para. 77 NPPF 1 are intended to be read and applied together and there will necessarily be an element of overlap between each of the 3 bullet points;

3.9 Having summarised above the factual background and statutory and policy framework, this advice note now addresses the Town Council's specific requests for advice under separate subheadings for ease of reference.

#### 4. **Whether TDC are able to disagree with the Examiner's recommendations?**

4.1 TDC are empowered under paragraph 12(6)(a) of Schedule 4B TCPA 1990 to depart from the Examiner's recommendations on the NP.

- 4.2 However, the only modifications that TDC may make to the draft NP are (so far as relevant here) modifications it considers necessary to "secure that the draft [plan] meets the basic conditions mentioned in paragraph 8(2)" (paragraph 12(6)(a) of Schedule 4B TCPA 1990).
- 4.3 The scope of the LPA's power to make modifications in paragraph 12(6) of Schedule 4B TCPA 1990 was recently considered by the Court of Appeal in the case of *Kebbell Developments Ltd v Leeds City Council* [2018] EWCA Civ 450. The Court of Appeal held, at paragraph 34 of the judgment, that:
- "The power in paragraph 12(6)(a) allows the authority a broad discretion in considering whether a particular modification is necessary for the purposes of satisfying the "basic conditions" in paragraph 8(2): whether the modification "[needs] to be made to secure that the draft order meets the basic conditions ...". The question of whether such a modification is necessary, and, if so, what form it should take, requires the exercise of planning judgment. And so does the ultimate question of the "basic conditions" being met or not, regardless of whether it has been necessary to make modifications to the plan to ensure that they are. To the extent that these are matters of planning judgment, they are for the local planning authority to resolve, subject to review by the court in accordance with the principles of public law. But the broad ambit of a legitimate planning judgment on the question inherent in paragraph 12(6)(a) suggests a generous view of the local planning authority's statutory power, and that the court should be cautious before accepting an argument that the power has been exceeded".*
- 4.4 While *Kebbell* emphasises the broad discretionary nature of TDCs modification power, we consider that the report to Cabinet, which recommends that the NP is modified to remove the Reading Street LGS and Fairfield Road/ Rumfields Road LGS on the grounds that they do not meet the 'basic conditions', is legally deficient for several reasons.
- 4.5 First, the report to Cabinet incorrectly considers compliance with basic condition (a) (i.e. the duty to have regard to national policies and advice) as against NPPF 2 and the related updated PPG whereas the transitional arrangements in Footnote 69 to paragraph 214 of NPPF 2 make it clear that the NP is to be assessed as against the policies in NPPF 1 and its related PPG.
- 4.6 Second, and more fundamentally, the report to Cabinet considers compliance with basic condition (e) (i.e. general conformity with strategic policies contained in the development plan) in relation to the emerging TDC local plan (incorrectly elevating it to development plan status) whereas it is clear from the face of the statutory provisions in paragraph 8(2), relevant case law (*R (Kebbell Developments Limited) v Leeds City Council* [2016] EWHC 2664 (Admin)), and relevant sections of the PPG (paragraph 41-009-20160211) that there is no requirement for the NP to be in general conformity with any strategic policies in emerging local plans. As an example of this erroneous approach, paragraph 2.7 of the report to Cabinet incorrectly refers to the emerging Thanet Local Plan as part of the development plan and paragraph 2.15 of the report to Cabinet states that the recommendation to modify the NP by removing the two LGS sites on the grounds that they do not meet the 'basis conditions' is hinged on the fact that the two sites were considered inappropriate for designation in the emerging Thanet local plan (i.e. considering conformity with the emerging local plan).
- 4.7 Third, we consider there is an inadequate level of consideration or analysis in the report to Cabinet why officers consider that the Reading Street and Fairfield Road/ Rumfields Road LGS do not meet the designation criteria for LGS in para.77 NPPF 1. While the LGS designation criteria (albeit the NPPF 2 designation criteria) are set out by officers in a cursory fashion in paragraph 2.9 of the report to Cabinet, there is no reference by officers to the relevant sections of the PPG and, most importantly, no application by officers of the designation criteria in para.77 NPPF 1 to the specific

sites. As to the Fairfield Road/ Rumfields Road LGS, it is asserted by officers, at paragraph 2.13 of the report to Cabinet, that it is possibly highway land on a busy roundabout and the site does not meet the NPPF criteria for designation. As to the Reading Street LGS, it is asserted by officers that the site is part of the grass verge adjacent to the highways and also does not meet the NPPF criteria for designation. No further analysis or reasoning is provided for the proposed modification. In contrast, the Examiner's report explicitly refers to and relies upon, at paragraph 4.17 of his Report, the LGS background document prepared by the Town Council as part of the evidence base for the NP. This background document sets out the methodology for the selection of the proposed LGS and individually applies the designation criteria in paragraph 77 of NPPF 1 to each candidate site. The Examiner concludes that a rigorous approach has been taken to site selection in accordance with NPPF 1 and the PPG and that each of the proposed sites meets the designation criteria for a LGS in para.77 NPPF 1.

- 4.8 Fourth, we consider there is an inadequate level of consideration or analysis in the report to Cabinet as to the specific contents and recommendations of the Examiner's report and the Examiner's proposed modifications to the NP. A hyperlink only to the Examiner's Report is provided at the end of the report to Cabinet with no hard copy annexed for members to consider. The report to Cabinet seems unduly focussed on TDCs proposed modifications and mentions only in a very cursory fashion at paragraph 1.3 of the report to Cabinet that officers consider otherwise that the draft NP and the Examiner's proposed recommendation are 'generally acceptable'. Regulation 17A(4) of the 2012 Regulations requires, on or before the prescribed date (5 weeks from receipt of the Examiner's report), for LPAs to decide what action to take in response to *each* recommendation made by the Examiner's report. Given this specific requirement in the 2012 Regulations to consider each individual recommendation, it is considered that the broad-brush approach taken by officers in the report to Cabinet is inadequate.
- 4.9 Fifth, as the Town Council have themselves spotted, there is curiously no option given to members in the report to Cabinet to put the NP to referendum as modified by the Examiner. This failure is arguably contrary to the legal duty on LPAs in para. 12(4) of Schedule 4B TCPA (see below).
- 4.10 Sixth, and for the reasons set out below, we consider that it is unnecessary for TDC's proposed amendments to the NP (if lawfully made) to be the subject of a 6 week post examination consultation period as is recommended at paragraph 4.1 of the report to Cabinet.
- 4.11 While it will be necessary for the Town Council to carefully consider the details of TDC's 'decision statement', which is the next step required to be taken by TDC pursuant to Regulation 18(2) of the 2012 Regulations, for the reasons above, if such a decision statement refers to or relies upon and/or is informed by the report to Cabinet then we consider that it arguable that TDC will have misdirected itself.
5. **Whether TDC can require the Town Council to modify the NP as proposed and the Town Council's options if they disagree with the proposed modifications?**
- 5.1 The legal responsibilities both: (a) whether to hold a referendum on a draft NP; and (b) whether to modify the NP (whether recommended by the Examiner and/or TDC) both rest on TDC (as the LPA) and not the Town Council (as the qualifying body).
- 5.2 If TDC is satisfied either:
- (a) that the draft NP:
- (i) meets the 'basic conditions' in paragraph 8(2) of Schedule 4B to the TCPA 1990;



- (ii) is compatible with ECHR rights (see paragraph 3.9 of the Examiner’s Report); and
  - (iii) complies with the relevant formalities/ procedural requirement in ss. 38A and 38B of the PCPA 2004 (see paragraph 1.7 of the Examiner’s Report); **or**
- (b) that the draft plan would meet those basic conditions, be compatible with ECHR rights and comply with the PCPA 2004 sections if modifications were made to the draft NP (whether or not recommended by the examiner)
- a referendum in accordance with para. 14 of Schedule 4B *must* be held on the making by the authority of a NP (Schedule 4B, para. 12(4)).
- 5.3 From considering the report to Cabinet, it seems that TDC are proposing to take option (b) above and only hold a referendum on the draft NP after a further 6 week post examination consultation exercise has been undertaken on its proposed modifications to the NP.
- 5.4 If the Town Council is dissatisfied with TDCs inaction and/or its proposed modifications to the NP then they can request the intervention of the Secretary of State.
- 5.5 The Secretary of State is empowered pursuant to paragraph 13B of Schedule 4B of TCPA 1990 (as inserted by section 141 of the Housing and Planning Act 2016) to intervene, where requested by a qualifying body, in 3 specified circumstances being:
- (a) where the LPA has failed to take a decision to send a NP to referendum within 5 weeks of receipt of the examiner’s report;
  - (b) where the LPA does not follow all of the Examiner’s recommendations; or
  - (c) where the LPA modifies the NP in a way that was not recommended by the Examiner (except where the modification is to ensure compatibility with EU or human rights obligations or to correct an error).
- 5.6 As to specified circumstance (a) above, Regulation 17A of the 2012 Regulations requires TDC to have taken a decision within 5 weeks of receipt of the Examiner’s Report. The Examiner’s report was issued on 14 June 2019. TDC themselves acknowledge in paragraph 1.2 of the report to Cabinet that this 5- week deadline expired on 19 July 2019.
- 5.7 As to specified circumstance (b) above, it seems from the report to Cabinet that TDC do not intend to follow all of the Examiner’s recommendations in relation to the designation of LGS.
- 5.8 As to specified circumstance (c ) above, it seems (the minutes from the Cabinet Meeting on 25 July 2019 have not been published at the time of writing) that TDC are proposing to modify the NP in a way which was not recommended by the Examiner and the proposed modifications (i.e. removal of the Reading Street LGS and Fairfield Road/ Rumfields Road LGS) would not be on ECHR or EU grounds and/or to correct an error.
- 5.9 Accordingly, we consider that all 3 specified circumstances apply in the present case to the NP.
- 5.10 If the intervention powers were to be exercised, the Secretary of State is able to direct (i.e. legally require) TDC to make arrangements for a referendum. Paragraph 13B of Schedule 4B of TCPA 1990 also makes provision for notification and consultation of ‘prescribed persons’ in these circumstances, and possible further examination, where the Secretary of State proposes to direct the authority not to act in accordance with the Examiner’s recommendations. Importantly, if the

Secretary of State directs TDC to arrange a referendum, TDC may only modify the NP to secure compliance with EU obligations or ECHR rights, or to correct errors. The proposed removal of the LGS' would not fall into any of these categories.

- 5.11 If the Town Council were to take forward this option and request the intervention of the Secretary of State, paragraph 41-094-20161116 of the PPG requires the request to be submitted in writing with reasons given for making this request. We consider that any reasoned request, among other things, would be assisted by a clear description of the factual background, a chronology of events, and copies of the Examiner's Report and the report to Cabinet. In practice, we consider it would also assist the Town Council's case for intervention if the reasoned request was supplemented by a letter of support from the local MP. We are unsure whether or not the local MP has been cited in relation to the current impasse and, if so, what his/her views are on matters.
- 5.12 In addition, we consider that any request for Secretary of State intervention in the NP process should also be accompanied by a request for a 'holding direction' pursuant to Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 restricting TDC from granting planning permission on the pending planning application (during such a period as may be specified in the holding direction) to prevent TDC from frustrating the proposed designation of the Reading Street LGS.
- 5.13 While we consider the circumstances in the present case fall squarely within the Secretary of State's intervention territory, we should point out that, as far as we are aware, these recently introduced intervention powers for neighbourhood plans are unused and untested. That being said, we note that the Secretary of State has shown a recent appetite to formally intervene in TDCs emerging local plan process<sup>1</sup> and often, in practice, the threat rather than the formal use of Secretary of State intervention powers may be sufficient to stir TDC into action and re-consider their position.
6. **If TDCs proposed modifications to the NP are subject to a further 6 week consultation exercise, whether the NP will have to be re-examined?**
- 6.1 If TDC proposes to make a decision that differs from that recommended by the Examiner and the reason for the difference is (wholly or partly) as a result of new evidence or a new fact or a different view taken as to a particular fact, TDC must notify "prescribed persons" of their decision and reasons, and either:
- (a) invite representations, or
  - (b) refer the issue to independent examination
- (Schedule 4B, paragraph 13(1) and (2) TCPA 1990.
- 6.2 From considering the report to Cabinet, it seems that TDC are proposing to take step (a) above and invite representations from prescribed persons rather than referring the issue to independent examination.
- 6.3 Regulation 17A of the 2012 Regulations specifies both:

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<sup>1</sup> See letter of 29.01.19

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/776028/Local\\_Plan\\_intervention\\_-\\_Secretary\\_of\\_State\\_letter\\_to\\_Thanet\\_District\\_Council.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/776028/Local_Plan_intervention_-_Secretary_of_State_letter_to_Thanet_District_Council.pdf)

- (a) Who the 'prescribed persons' are for these purposes, which are (i) the qualifying body; (ii) persons who representations were submitted to the Examiner; and (iii) any consultation bodies referred to in the consultation statement mentioned in Regulation 15 of the 2012 Regulations; and
  - (b) That the post examination period is 6 weeks
- 6.4 However, and having considered the report to Cabinet, we consider that TDC's proposed difference from the Examiner's recommendation in relation to the LGS designation for Reading Street and Fairfield Road/ Rumfields Road are matters of judgment (i.e. whether or not they meet the LGS designation criteria in the NPPF) and not matters of new fact and/or new evidence triggering the requirement for post-examination consultation in paragraph 13(1) of TCPA 1990.
- 6.5 The requirement for post examination consultation in paragraph 13(1) of Schedule 4B TCPA 1990 was recently considered by the Court of Appeal in *R. (Kebbell Developments Ltd) v Leeds City Council [2018] EWCA Civ. 450*. This provision, indicated the Court of Appeal at paragraph 50 of the judgment:
- "is concerned with giving participants in a neighbourhood plan process who qualify as "prescribed persons" a fair opportunity to address "new evidence" or "a new fact" that has emerged after the examination, or a "different view" taken by the local planning authority "as to a particular fact" from that expressed by the examiner in his report – when the local planning authority proposes to make a different decision from that recommended by him. It does not generate for participants in the process a general entitlement to consultation after the examination has taken place. Nor was it enacted to give parties a second opportunity to advance a case already heard and considered by the examiner, simply because the local planning authority is minded to depart from a recommendation he has made.*
- 6.6 Applying the Court of Appeal's reasoning in *Kebbell*, we consider the present case is not one in which the circumstances are within the scope of the paragraph 13(1) consultation exercise. There is no "new evidence". There is also no "new fact". And TDC are not proposing to take a "different view" from the examiner's view "as to [any] particular fact". We consider that what TDC are proposing is, in truth, taking a different view from the Examiner as to a matter of judgment being whether the Reading Street LGS and Fairfield Road/ Rumfields Road LGS meet the designation criteria for LGS in para.77 NPPF. We consider that such a difference of judgment does not engage the requirement for post-examination consultation under paragraph 13.
7. **Is the Examiner's Report a material consideration in the determination of the pending planning application concerning the Reading Street LGS?**
- 7.1 The High Court confirmed in *Legard, R (On the Application Of) v The Royal Borough of Kensington and Chelsea [2018] EWHC 32 (Admin)* (paragraph 192) that the Examiner's Report is an important material consideration in a LPAs decision whether or not to proceed to referendum.
- 7.2 As to the status of the emerging NP in relation to the pending planning application, while it is not part of the development plan, section 70(2)(aza) TCPA 1990 explicitly requires a LPA to have regard to a post-examination draft neighbourhood plan, so far as relevant to the application, as a material consideration and section 38(6) PCPA 2004 requires the planning application to be determined in accordance with the development unless material considerations indicate otherwise.
- 7.3 Concerning the weight to be attached to the emerging NP, Paragraph 48 of NPPF 2 (applicable to the determination of the pending planning application) permits LPAs to take into account the



policies of emerging plans depending on (i) the stage of preparation; (ii) the extent of unresolved objections; and (iii) the degree of consistency of the emerging NP with the policies in the NPPF. As to limb (i), the NP is at an advanced stage having gone through examination. As to limb (ii), we understand that there are no/ no significant unresolved objections to the NP. As to limb (iii), the Examiner has concluded that as modified the NP is consistent with the policies in NPPF 1 which apply to the examination of the NP given the transitional arrangements in NPPF 2.

7.4 Accordingly, while the weight to be attached to the emerging NP is ultimately a matter of planning judgment for TDC (subject to review by the Courts on public law principles), we consider, applying the 3 limbs of para. 48 of NPPF 2, that the NP should properly carry considerable weight, but not yet full weight, as emerging policy in decision taking so far as it is material to the determination of planning applications.

## **8. Conclusion and Next Steps**

8.1 In summary, and for the reasons set out above, we consider that:

- (a) TDC's proposed approach to the NP set out in the report to Cabinet is flawed;
- (b) The Town Council should consider making an early reasoned request to the Secretary of State for him to direct TDC to hold a referendum on the NP; and
- (c) Prior to or alongside making the intervention request in (b) above, the Town Council should consider writing an early letter to TDC (enclosing this note of advice as suitably amended for external purposes) requesting- in terms- that the NP be put to referendum without further delay.

8.2 We hope that the contents of this advice note are helpful to the Town Council in considering its options.

8.3 Please do not hesitate to contact Simon Ricketts or Paul Arnett for further advice or assistance on this matter as necessary.

**Town Legal LLP**  
**31 July 2019**