Neutral Citation Number: [2017] EWHC 1776 (Admin)

Case No: CO/1830/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 July 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

(1) BEWLEY HOMES PLC
(2) WATES DEVELOPMENTS LIMITED
(3) CATESBY ESTATES (DEVELOPMENTS) LIMITED — **Claimants**

- and -

WAVERLEY BOROUGH COUNCIL — **Defendant**
FARNHAM TOWN COUNCIL — **Interested Party**

- -
- -

Rupert Warren QC (instructed by **Pitmans LLP, Cripps LLP and Eversheds Sutherland (International) LLP**) for the **Claimants**
Clare Parry (instructed by **Sharpe Pritchard LLP**) for the **Defendant**
Lisa Busch QC (instructed by **Kidd Rapinet LLP**) for the **Interested Party**

Hearing dates: 15 & 16 June 2017

- -

Approved Judgment

Mrs Justice Lang:

1. The Claimants seek judicial review of the decision of the Defendant ("Waverley"), made on 10 March 2017, that the draft Farnham Neighbourhood Development Plan 2013 -2031 ("the dFNP") met the "basic conditions" for a lawful neighbourhood plan, pursuant to paragraphs 8(2) and 12 of Schedule 4B to the Town and Country Planning Act 1990 ("TCPA 1990"), in the light of the Examiner's report.

2. The Examiner (Derek A. Stubbing B.A Hons, Dip. E.P., MRTPI) undertook an examination for Waverley on the July 2016 version of the dFNP. As well as receiving written representations and evidence, he held site visits and an oral hearing, and produced a report dated 22 February 2017.

3. On the 4 May 2017 the plan was put to a referendum. The dFNP was passed by 10,044 votes in favour (with 1,097 votes against). Pursuant to an agreement reached between the parties, Waverley has agreed not to make the dFNP, pending the outcome of this application.

4. Because of the urgency of the matter, Holgate J. ordered on 28 April 2017 that it should proceed as a rolled-up hearing, determining the question of permission and, if appropriate, the substantive judicial review at the same hearing.

5. The dFNP was promoted by the Interested Party ("Farnham"). The area covered by the dFNP was the entire administrative area of Farnham Town Council. It was a response to concerns that, in the absence of an up-to-date development plan (the Local Plan was only intended to cover the period 2002 to 2006), development was taking place by means of *ad hoc* grants of planning permission, instead of being plan-led, in accordance with the principles in the National Planning Policy Framework ("NPPF") at 17. In the absence of an up-to-date development plan, developers applying for planning permission benefited from the weighted presumption in favour of development in NPPF 14 (second bullet point) which, in Farnham's view, was the antithesis of the plan-led system. Farnham therefore utilised the powers introduced in the Localism Act 2011 to promote a neighbourhood plan, designed to empower local communities to shape their surroundings.

6. The dFNP 2013 was wide-ranging, and sought to meet the identified needs of the area for the period up to 2031. According to Farnham, it sought to strike an appropriate balance between maintaining the environmental protections in the existing Local Plan, whilst having regard *inter alia* to the housing supply policies in Waverley's emerging Local Plan. The dFNP identified development potential for some 2,000 new dwellings, including allocations for some 784 dwellings.

7. The Claimants are housing developers who participated in the dFNP process because they hold interests in land in the Farnham area, which they wish to develop.

8. The First Claimant, Bewley Homes Plc, has an interest in land at Lower Weybourne Lane, Badshot Lea. It has an outstanding appeal seeking planning permission for 140 dwellings on this site. The appeal decision has been recovered by the Secretary of State. Despite the First Claimant's representations, this site was not allocated for housing in the dFNP.

9. The Second Claimant, Wates Developments Limited, has an interest in land at Waverley Lane, Farnham and recently pursued an appeal at a public inquiry seeking planning permission for up to 157 dwellings on that land. This decision has also been recovered by the Secretary of State. The Second Claimant was aggrieved by the dFNP because it concluded that no housing at all should be allocated to its site due to its "high landscape value" and "high landscape sensitivity". The Second Claimant disputed this finding, and the evidence upon which it was based.

10. The Third Claimant, Catesby Estates (Developments) Ltd, has an interest in land west of Folly Hill, Farnham. Jointly with the First Claimant, it has an outstanding appeal relating to land south of the junction with Upper Old Park Lane, Folly Hill, Farnham for the erection of 102 dwellings and the provision of on-site SANG ("Suitable Alternative Natural Greenspace"). The site was also not allocated for housing in the dFNP.

11. The Claimants submitted that the decision not to allocate their respective sites for allocation might not have been made had the alleged legal errors been avoided. At the heart of their claim was the submission that the dFNP ought not to have been made until after Waverley had adopted the emerging Local Plan, and thus updated the relevant local policies.

Legal framework

(1) Legislation

12. A "neighbourhood development plan" is a plan which "sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan": section 38A(2), Planning and Compulsory Purchase Act 2004 ("the PCPA 2004").

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

14. Where a neighbourhood development plan is to be prepared, a "qualifying body" must make an application to the local planning authority for the designation of an area as a "neighbourhood area": Part 2, Neighbourhood Planning (General) Regulations 2012 ("the 2012 Regulations").

15. The draft neighbourhood development plan, once prepared, must be consulted upon (reg. 14, 2012 Regulations), submitted to the local planning authority (reg. 15) and then publicised by the local planning authority (reg. 16).

16. Schedule 4B to the TCPA 1990 applies to the making of neighbourhood development plans: section 38A(3), PCPA 2004. Paragraph 7 of Schedule 4B requires a local planning authority to submit a draft neighbourhood development plan, after it has been publicised, to independent examination if the requirements of paragraph 6(2) of Schedule 4B are met. The examiner must then consider whether the draft neighbourhood development plan meets the specified statutory requirements, in particular, whether it meets the "basic conditions": Schedule 4B, paragraph 8(1)(a).

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

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

> (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,
>
> ……
>
> (d) the making of the order contributes to the achievement of sustainable development,
>
> (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),
>
> (f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and
>
> (g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order."

18. An examiner must produce a report. Paragraph 10 of Schedule 4B makes further provision for the duties of the independent examiner:

> "(1) The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).
>
> (2) The report must recommend either -
>
> (a) that the draft order is submitted to a referendum, or
>
> (b) that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum, or
>
> (c) that the proposal for the order is refused.
>
> (3) The only modifications that may be recommended are –
>
> (a) modifications that the examiner considers need to be made to secure that the draft order meets the basic conditions in paragraph 8(2),
>
> […]
>
> (e) modifications for the purpose of correcting errors.
>
> (4) The report may not recommend that an order (with or without modifications) is submitted to a referendum if the examiner considers that the order does not –
>
> (a) meet the basic conditions mentioned in paragraph 8(2), or
>
> […]

(6) The report must -

(a) give reasons for each of its recommendations, and

(b) contain a summary of its main findings."

19. After receiving an examiner's report, the local planning authority must consider each of the recommendations made and decide what action to take: Schedule 4B, para. 12(2). If the authority is satisfied that the draft neighbourhood plan meets the basic conditions, and is compatible with Convention rights and complies with sections 61E(2), 61J and 61L of the TCPA 1990, it "must" hold a local referendum on it: Schedule 4B, para. 12(4). If more than half of those voting in the referendum vote in favour of it, the local planning authority must "make" the neighbourhood plan unless to do so would breach "any EU obligation or any of the Convention rights": s. 38A(4) and (6), PCPA 2004.

(2) National policy and guidance

20. The NPPF sets out policy in respect of neighbourhood plans, under the following headings:

"Core planning principles

17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:

- be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency;

…."

"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, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation."
>
> "Determining applications
>
> ……
>
> 198. ……Where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted."

21. The Planning Practice Guidance ("PPG") gives extensive guidance on neighbourhood plans, including the following paragraphs:

> **009**: "**Can a neighbourhood plan come forward before an up-to-date Local Plan is in place?**
>
> Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.
>
> A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. Although a draft neighbourhood plan or Order is not tested against the policies in an emerging Local Plan the reasoning and evidence informing the Local Plan process is likely to be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested. For example, up-to-date housing needs evidence is relevant to the question of whether a housing

supply policy in a neighbourhood plan or Order contributes to the achievement of sustainable development.

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

- the emerging neighbourhood plan
- the emerging Local Plan
- the adopted development plan
- with appropriate regard to national policy and guidance.

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

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

074: "**General conformity with the strategic policies contained in the development plan**

What is meant by 'general conformity'?

When considering whether a policy is in general conformity a qualifying body, independent examiner, or local planning authority, should consider the following:

- whether the neighbourhood plan policy or development proposal supports and upholds the general principle that the strategic policy is concerned with

- the degree, if any, of conflict between the draft neighbourhood plan policy or development proposal and the strategic policy

- whether the draft neighbourhood plan policy or development proposal provides an additional level of detail and/or a distinct local approach to that set out in the strategic policy without undermining that policy

- the rationale for the approach taken in the draft neighbourhood plan or Order and the evidence to justify that approach."

075: "**What is meant by strategic policies?**

Paragraph 156 of the National Planning Policy Framework sets out the strategic matters about which local planning authorities are expected to include policies in their Local Plans. The basic condition addresses strategic polices no matter where they appear in the development plan. It does not presume that every policy in a Local Plan is strategic or that the only policies that are strategic are labelled as such."

076: "**How is a strategic policy determined?**

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

- whether the policy sets out an overarching direction or objective

- whether the policy seeks to shape the broad characteristics of development

- the scale at which the policy is intended to operate

- whether the policy sets a framework for decisions on how competing priorities should be balanced

- whether the policy sets a standard or other requirement that is essential to achieving the wider vision and aspirations in the Local Plan

- in the case of site allocations, whether bringing the site forward is central to achieving the vision and aspirations of the Local Plan

- whether the Local Plan identifies the policy as being strategic

> Planning practice guidance on Local Plans provides further advice on strategic policies."

> **077**: "**How does a qualifying body know what is a strategic policy?**
>
> A local planning authority should set out clearly its strategic policies in accordance with paragraph 184 of the National Planning Policy Framework and provide details of these to a qualifying body and to the independent examiner."

(3) Case law

22. In *R (DLA Delivery Ltd) v Lewes DC* [2017] EWCA Civ 58, the Court of Appeal considered the basic condition of being "in general conformity with the strategic policies in the development plan". Lindblom LJ said:

> "23…. The true sense of the expression "in general conformity with the strategic policies contained in the development plan" is simply that if there are relevant "strategic policies" contained in the adopted development plan for the local planning authority's area, or part of that area, the neighbourhood development plan must not be otherwise than in "general conformity" with those "strategic policies". The degree of conformity required is "general" conformity with "strategic" policies. Whether there is or is not sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment (see the judgment of Laws LJ in *Persimmon Homes and others v Stevenage Borough Council* [2006] 1 W.L.R. 334 at pp. 344D-345D and pp. 347F-348F)."

> "24. …. Housing allocations made in a neighbourhood development plan for a plan period which does not coincide or even overlap with the period of an adopted local plan cannot logically be said to lack 'general conformity' in this respect with the strategic housing policies of that local plan for that local plan period. In those circumstances the two plans will have been planning for the provision of housing in wholly different periods. …

> 25. Paragraph 8(2)(e) does not require the making of a neighbourhood development plan to await the adoption of any other development plan document. It does not prevent a neighbourhood development plan from addressing housing needs unless or until there is an adopted development plan document in place setting a housing requirement for a period coinciding, wholly or partly, with the period of the neighbourhood development plan. A neighbourhood development plan may include, for example, policies allocating land for particular purposes, including housing development, even when there are no 'strategic policies' in the statutorily

> adopted development plan to which such policies in the neighbourhood development plan can sensibly relate. This may be either because there are no relevant 'strategic policies' at all or because the relevant strategy itself is now effectively redundant, its period having expired. The neighbourhood development plan may also conform with the strategy of an emerging local plan. It may, for example, anticipate the strategy for housing development in that emerging plan and still not lack 'general conformity' with the 'strategic policies' of the existing development plan."

23. In *R (Swan Quay LLP) v Swale Borough Council* [2017] EWHC 420 (Admin), Dove J., referring to "the clear statutory language of paragraph 8(2)(e)" of Schedule 4B said:

> "29. I entirely agree with Supperstone J that the basic conditions cannot be equated with soundness as understood from paragraph 182 of the Framework. I would, however, with respect, differ from the suggestion that "the only statutory requirement imposed by Condition (e) is that the Neighbourhood Plan as a whole should be in general conformity with the adopted development plan as a whole". That observation does not reflect the clear statutory language of paragraph 8(2)(e). First, this basic condition relates to the strategic policies of the development plan, not the development plan as a whole. Those strategic policies which are identified will have to be considered as a whole in addressing the question of whether or not the neighbourhood plan is in general conformity with them. This underlines the point made by Supperstone J in paragraph 82 that tension or conflict between one policy of the neighbourhood plan and one policy of the local plan is not the matter at stake. Where there are no strategic policies in a local plan, then paragraph 8(2)(e) is not engaged, as Lewis J concluded in *R (on the application of Gladman Developments Ltd) v Aylesbury Vale District Council* [2014] EWHC 4323, and the absence of strategic policies does not preclude as a matter of law a neighbourhood plan being produced.
>
> 30. The question which is posed under paragraph 8(2)(e) is one which is entirely a matter of planning judgment. The phrase "general conformity" was considered in *Persimmon Homes (Thames Valley) Ltd v Stevenage Borough Council* [2005] EWCA Civ 1365, in which Laws LJ observed at paragraphs 28 and 29 as follows:
>
> > "28. [...] I agree with the judge (at [53]) that to read 'general conformity' as simply meaning that the proposals of the local plan should be 'in character' with the structure plan would be to accept too broad a construction. On the other hand, there are the features to which I have earlier referred – the long lead-times involved, the fact that the exigencies of

> planning policy may present a changing picture, and the statutory words themselves. In construing the general conformity requirement the court should in my judgment favour a balanced approach by which these different factors may be accommodated. I consider that on its true construction the requirement may allow considerable room for manoeuvre within the local plan in the measures taken to reflect structure plan policy, so as to meet the various and changing contingencies that can arise. In particular (for it is relevant here) measures may properly be introduced into a local plan to reflect the fact, where it arises, that some aspect of the structure plan is itself to be subject to review. This flexibility is not unlimited. Thus measures of this kind may not pre-judge the outcome of such a review. They must respect the structure plan policies as they are, while allowing for the possibility that they may be changed. I doubt whether it is possible to derive any more focussed conclusion on the construction of the general conformity requirement. [...]
>
> 29. [...] But if the right interpretation of 'general conformity' is, as in agreement with the judge I would hold, a balanced one, it will as I have said allow what may be a considerable degree of movement within the local plan to meet the various and changing contingencies that can arise. In that case the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents. In those circumstances the answer at length arrived at will be a matter of planning judgment and not of legal reasoning."

31. In his judgment, Lloyd LJ added the following observations:

> "71. The use of the phrase 'general conformity' leaves some scope for flexibility and even, as noted above, for some conflict. The context is that of the structure plan authority setting a general policy, which could no doubt be regarded as a strategy, for its area, leaving it to the local plan authorities within the area to implement those policies and that strategy by detailed policies. It cannot be open to a local plan authority to subvert the general policies, or to resolve that it will not give effect to a general policy within its area. It is open to such an authority to exercise some flexibility as to how the general policy is implemented, though the degree of

> flexibility may depend on the nature of the general policy. [...]
>
> [...]
>
> 86. As I said at paragraph 68 above, it is not sensible to attempt to define the statutory phrase 'in general conformity with' a structure plan, and I do not propose to try. However, it seems to me that, at least, in order to be in general conformity with a structure plan, the local plan must give effect to the main policies set out in the structure plan, and must do so in a way which does not contradict or subvert their achievement. There is room for flexibility, subject to the terms in which the general policies are stated. There may be scope for variations of detail as regards timing, for example. But the local plan must not put obstacles in the way of the fulfilment of the strategic policies in the structure plan such that they will not, or may well not, be achieved as provided for in the structure plan. Otherwise the purpose of the structure plan, and the basis of the relationship between one structure plan and a series of local plans would be altogether undermined, with the purpose behind an overall strategic policy being implemented differently and in conflicting ways in different parts of the area governed by the structure plan, and in some of those parts possibly not implemented at all."

> 32. These observations demonstrate that in exercising the planning judgment in relation to general conformity there is sufficient elasticity in the evaluation to accommodate some conflict with strategic policies as well as the prospect of strategic policies being reviewed. But that elasticity has limits, and the extent of the limit will be part and parcel of the planning judgment."

Grounds of challenge

24. The claim for judicial review was brought pursuant to:

    i) Section 61N(2) of the TCPA 1990: proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc.); and

    ii) Section 61N(3) of the TCPA 1990: proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of Schedule 4B.

25. The Claimants submitted that the Examiner's report was flawed in the following respects:

    i) **Ground 1**

a) The Examiner reached an irrational and misleading conclusion that the dFNP complied with the basic condition of being in conformity with the strategic policies of the Local Plan 2002, when the dFNP was significantly different, reflecting the policies in the emerging local plan, rather than the out-of-date policies in the Local Plan 2002. If and insofar as the Examiner's approach was lawful because it accorded with the treatment of "redundant" and "expired" strategic policies by the Court of Appeal in *DLA Delivery Ltd*, the Claimants reserved the right to argue in a higher court that *DLA Delivery* was wrongly decided.

b) The Examiner failed to identify clearly the strategic policies in the Local Plan 2002.

c) The Examiner failed to provide adequate reasons for his conclusion that the dFNP was in conformity with the strategic policies of the Local Plan 2002.

ii) **Ground 2**

The Examiner failed to provide any reasons to dismiss a detailed Note by a consortium of housing developers, including the Claimants, which attacked the SPA Avoidance Strategy used to support the approach to SANG in the dFNP and failed to consider evidence relating to the availability of bespoke SANG at Coxbridge Farm which reinforced the concerns expressed in that Note.

iii) **Ground 3**

The Examiner failed to have consideration or provide any reasons to dismiss representations made by the Second Claimants ("Wates") making serious criticisms of the report by Amec called the 'Waverley Borough Council Landscape Study – Part 1: Farnham & Cranleigh' ("the Amec Report") on which policy FNP10 of the dFNP was based. If the Examiner had properly considered Wates' representations, he would have been unlikely to conclude that the dFNP complied with the basic condition of contributing towards sustainable development.

26. The Claimants contended that the decisions not to allocate their respective sites for housing in the latest version of the dFNP might not have been made had these errors been avoided.

27. Waverley submitted in response that the Examiner adequately identified the strategic policies in the Local Plan 2002, utilising the Basic Conditions Statement drawn up by Farnham, and gave proper consideration to the extent of the conformity between the dFNP and the Local Plan 2002. He applied paragraph 009 of the PPG, which indicates that a neighbourhood plan can be brought forward before an up-to-date Local Plan is in force, but regard should be had to the policies in any emerging Local Plan to avoid conflict, especially in respect of housing supply policies. His clear and adequately reasoned conclusions were that the dFNP was in general conformity with the Local Plan 2002, having regard to the need to update the housing supply policies and align the dFNP with the emerging Local Plan. The test of "general conformity" is a flexible one, which gives scope for some variation between the plans. In applying that test, the Examiner was exercising his planning judgment, and the courts should guard against undue intervention in the planning judgments made by experts acting

within their areas of specialist competence. A claimant alleging that a planning inspector has reached an irrational or perverse conclusion on a matter of planning judgment "faces a particularly daunting task", per Sullivan J in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [8].

28. On Grounds 2 and 3, Waverley submitted that the scope of the Examiner's report and his duty to give reasons was limited by statute, and the Examiner had adequately discharged his obligations. As to Ground 2, it was apparent from the modifications which the Examiner recommended that he did take account of the change in the evidence regarding a bespoke SANG at Coxbridge Farm. He was not required to make express reference to the Claimants' Note; it was one of many documents submitted to him which he confirmed that he had considered. His report (read together with the recommended modifications) made it sufficiently clear how he had dealt with the issues raised by the Claimants, insofar as was required in order to comply with the limited statutory scope of the report, and he gave adequate reasons for his conclusions.

29. In response to Ground 3, Waverley submitted that the Examiner expressly stated that he had given full and careful considerations to the representations seeking to make additional housing allocations, and he gave cogent reasons for not doing so. In reality the Claimants were seeking to make an impermissible challenge to the Examiner's planning judgments which were based on extensive evidence and site visits. The way in which he addressed the issues, including the basic condition of contributing to sustainable development, was sufficient, having regard to the limited statutory scope of the report. Waverley submitted that the Examiner gave adequate reasons for his conclusions.

30. Waverley's submissions were supported by counsel for Farnham.

Conclusions on Ground 1

31. The Examiner had to decide whether the making of the order was in general conformity with the strategic policies contained in the development plan for the area of the authority: paragraph 8(1) and (2) of Schedule 4B to the TCPA 1990. At the relevant time, the development plan was the Waverley Borough Local Plan 2002 ("Local Plan 2002"). The plan was only intended to run until 2006, although a number of its policies have been 'saved'. The policies in the Local Plan 2002 which were most relevant to the present claim were C1 and C2. They comprised restrictive policies on development outside settlements both in the green belt and in and countryside beyond the green belt. There was no settlement boundary as such in the Local Plan 2002 but the areas to which policies C1 and C2 applied were clearly identified on the proposals map.

32. During the preparatory stages of the dFNP, Waverley was in the process of bringing forward an up-to-date plan - the draft Waverley Local Plan Part 1 (Strategic Policies and Sites). This emerging plan had reached examination stage.

33. In my view, there were clear differences between the dFNP and the Local Plan 2002. As Farnham's 'Basic Conditions Statement' explained:

> "The Neighbourhood Plan Planning Strategy defines a built-up area boundary to provide a definition of countryside and Policy FNP10 gives priority to protecting the countryside from

> inappropriate development outside of the Built Up Area Boundary."

Moreover, the new built-up area boundary extended, at the margins, into the areas of countryside identified by policies C1 and C2 in the Local Plan 2002. In some instances, this merely reflected development for which planning permission had been given since 2002. In other instances, it gave effect to proposed new allocations, primarily for housing. It also made other changes in policy designation to some areas.

34. In my view, the Examiner was well aware of the differences between the dFNP and the Local Plan 2002, and that in consequence there was a dispute between Waverley and Farnham on the one hand, and the Claimants on the other, as to whether the dFNP was in general conformity with the Local Plan 2002. He even had the benefit of detailed Opinions from leading counsel for the Claimants and leading Counsel for Farnham setting out the competing arguments. This was one of the issues which led him to take the unusual step of conducting an oral hearing. At the hearing, Mr Fullwood, the planning consultant for Farnham, gave evidence, which he then summarised in his witness statement in these proceedings:

> "4. I stated that the 2002 plan was only written to meet needs to 2006. Although it had been necessary to amend the 2002 LP boundary in order to meet needs beyond the period to 2006, in carrying out this exercise the dFNP had continued to respect core aims of the 2002 LP such as maintaining and enhancing the distinctive character of the Borough and the main environmental assets including natural and cultural resources by, for example, the prevention of coalescence and the protection of valued landscapes.
>
> 5. I also stated that some of the changes had taken into account new development and planning permission since 2002, with the dFNP boundary being drawn to include development which had taken place (or was permitted to take place) outside the 2002 LP boundary since the adoption of the 2002 LP."

35. The Examiner's conclusions on general conformity were set out in his Report as follows:

> "4.11 The development plan for the purposes of this examination is the adopted Waverley Local Plan, 2002 (for the period up to 2006), comprising the policies which have been saved. I note the Borough Council has raised no overriding concerns regarding the general conformity of the neighbourhood plan's policies with the strategic policies of the adopted plan. This is not surprising given the saved policies are aging and the emerging local plan for the area is now at examination stage.
>
> 4.12 The Basic Conditions Statement sets out how the Plan's policies have been assessed for their alignment with the emerging strategic Local Plan policies which have relevance to Farnham. The Borough Council comments that "the Neighbourhood Plan in many respects supports and reflects the emerging Waverley Local Plan, for example in terms of

drawing on its evidence base and seeking to provide for the development needed in the town".

4.13 Whilst it is not a statutory requirement for a Neighbourhood Plan to be in general conformity with the strategic policies of an emerging plan, in practical terms the alignment advised by the PPG will assist in preventing the plan from becoming quickly out of date. The PPG states, inter alia, that "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 and the adopted development plan with appropriate regard to national policy and guidance".

4.14 Subject to the recommended modifications that I set out later in the report on a number of detailed matters, I am satisfied that the Farnham Neighbourhood Plan is in general conformity with the strategic policies of the adopted plan and has been aligned with the emerging Waverley Borough Local Plan, at least up to that Plan's pre-submission consultation stage (August-October 2016), in order for it to be as up to date as possible.

…….

4.23 I have considered all of these representations together with the discussions and submissions during the Public Hearing and I have reached the following conclusions. Firstly, there is no formal built up area defined for Farnham within the adopted Local Plan (2002). Rather the inner boundary of various countryside policies defines a "white" area extending from the inner edge of those policy areas which represents the then existing urban area of Farnham. I conclude that, in principle, it is appropriate for the Plan to seek to define a BUAB which represents the current built up settlement limits of Farnham. Secondly, I have studied the background document on the BUAB which forms part of the Plan's evidence base. It describes the six guiding principles that were applied to the assessment of the proposed boundary to ensure a consistent and comprehensive approach was taken. I am satisfied that the methodology described in the background paper is based on sound planning principles. With the passage of time since the Local Plan was adopted in 2002, it is inevitable, in my view, that the definition of a new BUAB for Farnham will lead to some differences to the position that existed in 2002. I have carefully studied those parts of the BUAB where land is now included and those areas which are not within the proposed BUAB, having previously been with the urban area of Farnham as described above. In all cases, I consider that the proposed BUAB is appropriate and that the methodology for its definition in those areas has been applied on a consistent basis. Lastly, I conclude that the proposed BUAB is not the sole

> policy criterion by which proposals for new development will be judged, either within or beyond the urban area. The Plan together with the current adopted Local Plan and the emerging Local Plan each contain other policies against which to also measure the acceptability of new development.
>
> ……
>
> 4.34 As previously observed, it is the case that a neighbourhood plan can be prepared and adopted before or at the same time as an emerging Local Plan. Furthermore, the requirement of the Basic Conditions is that the neighbourhood plan "must be in general conformity with the strategic policies of the development plan for the area". In this case, as noted above, the relevant development plan is the Waverley Local Plan, 2002, and specifically its saved policies. I am satisfied that the Farnham Neighbourhood Development Plan is in general conformity with that Plan (see paragraph 4.14 above)."

36. In my judgment, it is clear that the Examiner accepted the representations of Waverley and Farnham and concluded that it was permissible, and in accordance with the guidance in the PPG, for the dFNP to reflect the emerging Local Plan, even where it differed from the Local Plan 2002, as otherwise it would quickly become out-of-date and contrary to local and national policies. Paragraph 009 of the PPG emphasises the need to minimise any conflict between a draft neighbourhood plan and an emerging Local Plan, especially in respect of housing supply policies. The Examiner concluded that the changes introduced by the built-up area boundary, including *de facto* changes to the boundary line, were justified on this basis, reflecting an alignment between the dFNP and the emerging local plan. In my view, the Examiner was entitled to accept the representations from Waverley and Farnham, based upon analysis of the plans, that the individual policies in the dFNP did, in many respects, correspond with the strategic policies in the Local Plan 2002, and despite the differences with policies C1 and C2, the dFNP was in general conformity with the Local Plan 2002.

37. The authorities establish that the phrase "in general conformity" is a flexible test which allows for some differences. The plans do not have to match precisely. It was a matter of planning judgment for the Examiner to decide whether the degree of the differences was such that he could not properly find that "the making of the [plan] was in general conformity with the strategic policies in the development plan", as required by paragraph 8(2)(e) of Schedule 4B. For that purpose, he was required to consider the plan as a whole: per Holgate J. in *R (Crownhall Estates Limited) v Chichester District Council* [2016] EWHC 73 (Admin) at [29(ii)]. As Lindblom LJ said in *DLA Delivery*, at [23], "whether or not there is sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment (see the judgment of Laws LJ in Persimmon Homes…". Dove J. in *Swan Quay*, applied the guidance on the meaning of the "general conformity" test in the judgments of Laws LJ and Lloyd LJ in *Persimmon Homes* to the different context of neighbourhood plans, and concluded, at [31]:

> "These observations demonstrate that in exercising the planning judgment in relation to general conformity there is sufficient elasticity in the evaluation to accommodate some

> conflict with strategic policies as well as the prospect of strategic policies being reviewed. But that elasticity has limits, and the extent of the limit will be part and parcel of the planning judgment."

38. It is well-established that the exercise of planning judgment is a matter for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. In *Persimmon Homes*, Laws LJ observed, at [29], that the balancing exercise required of the inspector meant that "the question whether the local plan is in general conformity with the structure plan is likely to admit of more than one reasonable answer, all of them consistent with the proper construction of the statute and of the relevant documents". This applies equally to the examination of neighbourhood plans. Lord Carnwath recently emphasised in *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, at [25], the Court should respect the expertise of Inspectors whose position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence.

39. The threshold for establishing irrationality is set high. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [8], Sullivan J. said that an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment faces "a particularly daunting task". In this case, the Examiner had the benefit of site visits and a hearing, as well as extensive written evidence and representations. I do not consider that the Claimants have come close to establishing irrationality in this case.

40. In my view, the Examiner's reasoning and his conclusions were adequate, intelligible and clear, and met the required standards, whether applying the more limited duty in paragraph 10(6) of Schedule 4B to the TCPA 1990 or the principles in *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1 WLR 1953, per Lord Brown at [36]. I address the nature of the Examiner's duty to give reasons in detail below. Contrary to the Claimants' submission, I do not consider that anyone who read the report would have been misled about the nature and extent of the differences between the dFNP and the Local Plan 2002.

41. In the light of the judgment of Lindblom LJ in *DLA Delivery*, which was handed down only a week or two before the Examiner's report was published, I consider that the Examiner could lawfully have adopted a different route, holding that the strategic policies restricting housing development had become time-expired in 2006 and were now redundant, and could be disregarded. In my view, Waverley was entitled to rely upon this as a reason why, even if the Examiner's analysis was flawed, I ought not to grant relief by way of judicial review, in the exercise of my discretion. However, as I do not consider that the Examiner's chosen analysis was flawed, this situation does not arise.

42. The Claimants criticised the Examiner for not specifically identifying the strategic policies in the Local Plan 2002. I do not consider that Dove J., in *Swan Quay* at [29], was prescribing how the strategic policies should be identified, or the degree of specificity required. That is likely to be a matter of judgment in the individual circumstances of each case. In this case, the Local Plan 2002 did not state which were its strategic policies (which is now recommended practice: NPPF 156 and PPG paragraph 077). So Farnham undertook the exercise of (1) identifying the policies in the Local Plan 2002 which it considered represented the strategic approach to

development; and (2) compared them with the policies in the dFNP. In my view, it did so in accordance with the principles in the PPG, paragraphs 75 - 77. Farnham concluded that "the analysis of the adopted Local Plan policies … (some of which may not be strategic or up to date) illustrates that the Farnham Neighbourhood Plan is in general conformity with the strategic policies of the adopted Local Plan". The fact that Farnham recognised that some of the many policies listed might not be considered to be strategic, either wholly or in part, did not detract from the validity of the exercise which it had undertaken. In my view, this was simply a precautionary statement, lest there should be dispute over which policies were or were not strategic. Importantly, Waverley agreed with Farnham's conclusions when the dFNP was submitted to the Examiner.

43. On my reading of the report, in which the Examiner expressly referred to his consideration of the Basic Conditions Statement, the Examiner accepted Farnham's Basic Conditions Statement as the basis for identifying the strategic policies in the Local Plan 2002. Whilst the comparison with the policies in the dFNP was at a fairly general level in that document, the Examiner had the benefit of more detailed representations focussing on controversial areas, such as housing allocations, which were then reflected in his report. Bearing in mind the guidance given in the authorities which I have cited above, to the effect that the phrase 'general conformity' is a broad and flexible test which requires the exercise of a planning judgment by the Examiner, I do not consider that the Examiner's approach to the identification of the strategic policies discloses any error of law.

44. Therefore the challenge under Ground 1 fails.

Conclusions on Grounds 2 and 3

(1) The Examiner's function and duty to give reasons

45. Grounds 2 and 3 both raise similar issues about the Examiner's function and his duty to give reasons and so I address them together to avoid repetition.

46. Paragraph 8(1) of Schedule 4B to the TCPA 1990 specifies precisely what the Examiner must consider, and provides in sub-paragraph (6) that the Examiner must not consider any matters falling outside paragraph 8(1). He must consider whether the plan complies with the statutory requirements set out in paragraph 8(1), in particular, whether the plan meets the "basic conditions", as defined in paragraph (2).

47. Thus, the Examiner will not consider whether a neighbourhood plan meets the requirements of "soundness" in NPPF 182, which include (1) that it should be based on a strategy which seeks to meet objectively assessed development and infrastructure requirements and (2) that it should be "justified" i.e. the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence. See *Woodcock Holdings Limited v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin), per Holgate J. at [56-57].

48. It follows that the Examiner will not embark upon the type of detailed scrutiny of the draft policies and the relevant evidence which is conducted by an Inspector when examining a draft Local Plan. In *Crownhall Estates*, Holgate J. explained at [80]:

> "80 I should also add a cautionary note about the legal scope of the process for examining a neighbourhood plan. The more investigative scrutiny involved in the examination of a local plan in order to determine whether the draft policies and proposed allocations are "sound", including whether they are justified by reference to the evidence base relied upon by the local planning authority and reasonable alternative options, can result in a "competition" between rival sites. The extent to which such a case or exercise could be advanced in the examination of a neighbourhood plan will depend upon whether it falls within the scope of paragraphs 8 (1) and (6) of schedule 4B to TCPA which in many instances will simply turn upon whether the plan meets the basic conditions in paragraph 8 (2)."

49. Paragraph 10 of Schedule 4B strictly limits the recommendations which the Examiner may make in his report. By sub-paragraph (2), the report can only recommend one of three options: (a) that the plan is submitted to a referendum; or (b) that the 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 proposed plan is refused. By sub-paragraph (3), the only modifications that can be recommended are those that the Examiner considers are needed to secure that the statutory requirements are met.

50. Paragraph 10(6) sets out the statutory duty to give reasons:

> "The report must -
>
> (a) give reasons for each of its recommendations, and
>
> (b) contain a summary of its main findings."

51. In my judgment, this is a limited duty. The Inspector is only required to give reasons for his recommendations, which are themselves limited to one of the three options in paragraph 10(2). In respect of his other "findings", he need only give "a summary" (i.e. a brief account, not full reasons). Even that duty is only limited to his "main" findings. So there is no requirement to give any reasons for his subsidiary findings.

52. This limited duty may be contrasted with the broad duty imposed upon Inspectors under the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure)(England) Rules 2000 which require the Inspector to "notify his decision on an appeal, and his reasons for it, in writing". The scope of this broad statutory duty upon Inspectors was analysed by Lord Brown in *South Bucks* in the following terms:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for

> example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

53. The Claimants invited me to hold that the lawfulness of the Examiner's reasons had to be assessed in accordance with the *South Bucks* principles. I am not convinced that is the correct approach. Of course, some aspects of the *South Bucks* principles are of universal application: all reasons must be intelligible; they must be adequate; and they need not refer to every point raised. But what is adequate depends upon the context and the circumstances; so too does the degree of particularity required.

54. There are obvious differences between the role and function of an Inspector deciding a contested appeal, which is an adversarial process and an Examiner examining whether a neighbourhood plan meets the statutory requirements, which is an inquisitorial process. The adversarial process gives rise to a particular obligation to inform the parties of the reasons why their main arguments succeeded or failed, and the extent to which their evidence was accepted. An Examiner conducting an inquisitorial process into a neighbourhood plan is not subject to the same obligation, and he will only have to provide such reasons insofar as they fall within the scope of the matters upon which he has to give recommendations under paragraph 10 of Schedule 4B, and the reasons which he is required to give by sub-paragraph (6) of paragraph 10.

55. The differences between the Examiner considering a neighbourhood plan and the Inspector deciding an appeal were addressed by Holgate J. in *Crownhall Estates*, at [56 - 58]:

> "56 With regard to the reasons challenge the Claimant submits that the principles on the duty to give reasons set out in South Bucks District Council v Porter (No.2) [2004] 1 WLR 1953 apply and so both the Examiner and CDC were obliged to give reasons dealing with the "principal important controversial issues" raised by the Claimant's representations in the examination (paragraph 36 of South Bucks). Mr Morgan on behalf of CDC did not dispute that the principles in the South Bucks case are, in general terms, applicable and so I will proceed on the assumption that that is correct.
>
> 57 However, I should record that in my judgment the question of whether the South Bucks principles apply, with or without

> modification, may need to be considered in a subsequent case. I say that for a number of reasons. South Bucks was concerned with the obligation to give reasons for a decision determining a planning appeal. Such appeals may involve a range of issues raised by a number of parties to do with the planning merits of a proposal for development. By contrast the ambit of an examination into a neighbourhood plan is rather different. Generally, the main focus is on whether or not the basic conditions in paragraph 8(2) of schedule 4B are satisfied, or would be satisfied by the making of modifications to the plan. The level of scrutiny is less than that applied to the examination of a local plan and the obligation to give reasons must be limited to matters falling within the true ambit of the examination process.
>
> 58 The obligation on the Examiner is to provide a report which (a) give reasons for each of its recommendations and (b) contains a summary of its main findings (paragraph 10(6) of schedule 4B to TCPA 1990). The Examiner may only make recommendations as to whether the plan should be submitted to a referendum because it satisfies the basic conditions and the statutory requirements, or whether modifications should be made in order to satisfy those requirements, or, if they are not satisfied, that the plan should not proceed. If the plan is to be submitted to a referendum the Examiner may also make a recommendation as to whether the area for the referendum should extend beyond the area covered by the plan (see paragraph 10(5) of schedule 4B). Similarly, the local planning authority (a) is obliged to consider each of the Examiner's recommendations (and the reasons for them) and to decide what action to take in response to each recommendation (paragraph 12(2)), (b) may consider the making of modifications, for example in order to secure compliance with the basic conditions (paragraphs 12(5) and (6)), and (c) is obliged to give reasons for the decisions it takes under paragraph 12 of schedule 4B (paragraph 12(11)). Thus the statutory scheme delimits the matters which the Examiner and the local planning authority are able to consider, which in turn will affect the application of the obligation to give reasons. At the very least the statutory process will affect what may be considered by the Court to have been the "principal important controversial issues"; they will not necessarily be any matter raised in representations on the draft plan."

In conclusion, therefore, I consider that an Examiner examining a neighbourhood plan is undertaking a function which is narrowly prescribed by statute and he is subject to a limited statutory duty to give reasons. It is distinguishable from the function of an Inspector determining a planning appeal, where the duty to give reasons is expressed in general terms. Therefore the *South Bucks* principles have to be modified to reflect these differences.

(2) Ground 2

56. Ground 2 concerned the policies for the provision of SANG. Much of Farnham is within a 5km "buffer zone" of two European Special Protection Areas for the purposes of the Habitats Directive. This case only concerned the Thames Basin Heaths Special Protection Area ("SPA") which is protected because it supports important populations of vulnerable ground-nesting birds (Dartford warbler, nightjar and woodlark). Natural England has advised all local authorities with land in the Thames Basin Heaths area that new housing within a 5km buffer zone of the SPA might harm the rare bird populations, because of the increase in walkers, cats, dogs and other recreational uses that are typically associated with additional housing.

57. To allow development to go ahead while at the same time protecting the integrity of the SPA, retained South East Plan policy NRM6 states that:

    i) within 400m of the perimeter of the SPA, the impact of additional residential development on the SPA is likely to be such that it should not be permitted;

    ii) between 400m and 5km of the SPA, mitigation measures will be needed prior to occupation and in perpetuity, based on a combination of managing access to the SPA and providing SANG.

58. The standard of SANG provision set by policy NRM6 of the South East Plan is 8 hectares per 1000 population. SANG measures must be agreed with Natural England.

59. At the relevant time, Farnham Park was the only designated SANG serving Farnham. In July 2016 Waverley adopted the Thames Basin Heaths SPA Avoidance Strategy Review, updating the potential capacity of Farnham Park in an assessment which was approved by Natural England, and concluding that there was SANG capacity to accommodate the additional residential development proposed by the dFNP. It referred in paragraph 7.1 to the options available to developers for providing SANG, either buying into, or contributing to the upgrading of, existing SANG or providing new bespoke SANG themselves.

60. The July 2016 submission version of the dFNP, in Policy FNP12 (Thames Basin Heaths Special Protection Area), made provision for Thames Basin Heaths SPA, limiting development in accordance with policy NRM6, and the Waverley's SPA Avoidance Strategy Review 2016. The SANG provision identified was at Farnham Park. It did not refer to the option of a new bespoke SANG.

61. The provision of SANG was one of the issues which prompted the Examiner to hold the oral hearing in November 2016. At the hearing, the need for further SANG capacity, in addition to Farnham Park, was discussed. According to the account given in Mr Fullwood's witness statement, Mr Woods, planning consultant for Waverley, stated that, since the re-appraisal of the capacity of Farnham Park, he was of the view there would be suitable SANG available to serve the projected housing sites although there might be a shortfall towards the end of the plan period. Councillor Adams on behalf of Waverley explained that the situation regarding SANG provision would be monitored, and if there were to be a need for additional SANG, it would be towards the end of the period, and Waverley was conducting a review of potential SANG sites to address this.

62. The Claimants submitted, in written and oral representations, that it was too restrictive to require mitigation to be provided at Farnham Park; that the SPA Avoidance Strategy Review 2016 (paragraph 7.1) was not so limited; and that there was potential for allocated sites to provide SANGs on sites outside the settlement boundary, adjoining development sites.

63. After the hearing, in January 2017, the Claimants and other housing developers submitted a joint written Note to the Examiner, raising concerns about the approach to SANGs in the dFNP, as follows:

i) The dFNP was predicated on Farnham Park SANG having sufficient residual capacity to accommodate the additional housing proposed in the dFNP, without the need for further "bespoke" provision for SANG elsewhere.

ii) The current residual capacity in the Farnham Park SANG had been calculated in the SPA Avoidance Strategy Review 2016 based on the average dwelling being occupied by 1.98 persons over the period 2007-2016.

iii) Waverley accepted that this occupancy level would rise over the period of the emerging Local Plan (up until 2032), such that further provision for SANG would be needed outside Farnham Park during the period of the dFNP. The current average occupancy in the Borough, based on the latest ONS population statistics was 2.4 persons.

iv) The SHMA housing mix requirements for the Farnham area confirmed that most of the new housing required over the period of the dFNP would be for families.

v) Inevitably, therefore, the increase in the average occupancy rate in the area of the dFNP, over the period of that plan made it virtually certain that Farnham Park alone will not provide sufficient capacity for the SANGs required.

vi) The solution proposed by the promoters of the dFNP was to amend policy FNP12 to allow developers to propose a "bespoke solution" (understood as the provision of "on-site" SANG(s) in individual cases as mitigation to avoid any adverse effect on the integrity of the SPA).

vii) However, the amendment to allow for "bespoke solutions" was objectionable because it had not been assessed in an update to the Habitats Regulations Assessment ("HRA") for the dFNP.

viii) The only major allocation in the dFNP that could accommodate SANG on site was Coxbridge Farm. The number of housing units allocated for that site should be reduced from 350 to some 180 units to allow for that on-site provision. (At this stage the Claimants had not seen the letter from the Coxbridge Farm developer indicating that bespoke provision was not being made).

ix) In addition, the dFNP should include an additional policy setting out criteria for other greenfield sites to come forward to provide SANGs, and these should also be assessed in an updated HRA.

x) In the absence of an updated HRA, it could not be concluded that the dFNP would not have an adverse effect on the integrity of the Thames Basin Heaths SPA.

xi) As it was Waverley's function to take a strategic lead on the provision of SANGs in the Borough, the proper approach now would be to put the dFNP process in abeyance until the SANG issue was resolved in the emerging Local Plan process.

64. After the hearing, Mr Fullwood, on behalf of Farnham, submitted proposed amendments to policy FNP12 to Natural England to review. In his covering email, dated 8 December 2016, he said:

> "Once again, the Neighbourhood Plan's housing provision remains within the SANG capacity at current occupancy rates.
>
> Neighbourhood Plan Policy FNP15 seeks the provision of smaller dwellings but clearly if the average occupancy of dwellings does rise in Farnham there is some tolerance in this capacity before additional SANG would be required.
>
> As you are aware, the Neighbourhood Plan allocates land at Coxbridge Farm (Policy FNP14(i)) for approximately 350 dwellings. The site promoters have indicated that the effects of their development could be mitigated through the provision of 'bespoke' SANG, either on- or off-site. Other suitable sites may seek this option during the plan period and developers may offer their own bespoke solution to mitigate against any adverse effects on the Thames Basin Heaths SPA. Such mitigation measures will clearly need to be agreed by Natural England. As a contingency for higher occupancy levels, it is proposed that Neighbourhood Plan Policy FNP12 be revised to make a more explicit reference to bespoke SANG (the policy already refers to the standards which a bespoke SANG would need to meet but does not make specific reference to bespoke SANG):
>
> Waverley Borough Council also made it clear at the Examination that they were actively pursuing land for additional SANG should this be required for later in the Plan period.
>
> I attach a copy of the proposed revised Neighbourhood Plan text and policy.
>
> The Examiner has requested that Natural England review the updated position set out above and comment on the proposed revised policy.
>
> In addition, it would be helpful to understand whether Natural England would see a need to reconsider the Sustainability Appraisal on the basis of the revised policy.

> Finally, it would be helpful to have the view from Natural England on whether the revised policy would be likely to change the conclusions of the HRA that no likely significant effects are expected to the eight Natura 2000 sites and one Ramsar site within 20km of Farnham as result of the revised text and Policy."

65. Natural England responded on 9 December 2016 stating:

> "Thank you for your email and your update. I can confirm that I see this as a relatively minor amendment to the neighbourhood plan and thus not a material change in circumstance to warrant update of either the Sustainability Appraisal or the Habitats Regulations Assessment. Ultimately the SPA is still protected and likely significant effects continue to be screened out. I have read through the four page document you have sent through to me with suggested amendments. I can confirm that Natural England are comfortable with the changes and have no comments to make."

66. These documents were posted on Waverley's website in December 2016 and so were available to the Claimants when they sent their Note, and so the implied criticism of the Defendant was not justified.

67. I accepted Mr Fullwood's evidence that the basis of his information about the Coxbridge Farm site was the communication from Sentinel Housing Association, the promoters of the Coxbridge Farm site, who had made representations on the dFNP in a letter dated 12 December 2014, stating "there is additional land available immediately adjacent to the site which can be utilised for SANG mitigation …. This land is within the control of the same landowner. As such there is no reason to reduce the site capacity to take account of this".

68. However, on 6 January 2017, Mr Bray of WYG, acting on behalf of Sentinel Housing Association, wrote to the Examiner, commenting on the proposed amendments to policy FNP12, stating that no bespoke solution was now being promoted for the Coxbridge Farm development because the dFNP had prescribed that the new housing development envisaged would be adequately catered for by the available SANG capacity at Farnham Park.

69. The Claimants submitted that Natural England had agreed to the amendments to policy FNP12 on an incorrect basis. However, they did not make a pleaded challenge the validity of the dFNP on that basis, nor did they plead that the dFNP was in breach of the Habitats Directive, or that it was invalid because a further HRA was required. In my view, they were wise not to do so. It was apparent from the text of Mr Fullwood's email that he was identifying for Natural England that, while the existing SANG had capacity to meet the housing in the dFNP at current occupancy levels, there was a possibility that this would not continue if occupancy levels changed, and so there was a proposed change to the policy to refer expressly to provision of bespoke SANGs by developers, at Coxbridge Farm and potentially elsewhere. The guidance which he was seeking was whether such a change to the policy would require (*inter alia*) a different conclusion on the HRA.

70. In its response, Natural England simply confirmed that the proposed alterations to the policy, referring to the provision of bespoke SANG, would not require any

amendment to the HRA. Its assessment was based on the changes to the policy, not whether a specific bespoke site, at Coxbridge Farm, would or would not be provided.

71. The Claimants also submitted, if the Examiner had given proper consideration to the letter of 6 January 2017 from WYG, he would likely not have endorsed the modifications proposed to policy FNP12, when considered together with the Claimants' Note. It was suggested that he might well have required further SANG sites to be identified. The Claimants also submitted that the Examiner failed to discharge his duty to give reasons because he failed to grapple specifically with the contents of the Note in his report, in particular, the likelihood of increased occupancy levels and their impact; the need for further SANG sites to be identified; the need for further HRA assessments and the postponement of the FNP.

72. On a fair reading of the report, I was not satisfied that any of these submissions had merit. The Examiner said in his report:

> "4.36 The third policy issue which I wished to discuss in greater detail at the Public Hearing concerned the Plan's provisions for SANG capacity within the Plan area, arising from the designated SPAs at Thames Basin Heaths and Wealden Heaths. Farnham is within the buffer zone of these SPAs which has a direct relationship upon the projected capacity for new dwellings in the Plan area. The Borough Council undertook an assessment of potential opportunities for new SANG in the Farnham area in April 2015, including sites put forward as part of the Call for Sites undertaken during the preparation of the Neighbourhood Plan. However, in accordance with the Thames Basin Heaths Special Protection Area Avoidance Strategy Review 2016 (which was adopted by the Borough Council in July 2016) the strategic SANG capacity of Farnham Park can be increased during the Plan period. I do however note that some potential SANG capacity may come forward at part of the restored Farnham Quarry. I consider that this document provides a robust and up to date assessment of the unallocated (enhanced) SANG capacity in Farnham, and forms an appropriate basis upon which to assess potential avoidance measures. Under the Habitats Regulations, the Borough Council is the competent authority to consider whether applications for development are likely to have a significant effect on the SPA.
>
> 4.37 Policy FNP12 in the Plan provides the proposed policy framework for determining the mitigation measures that will be necessary, in the form of enhanced SANG capacity, that will be required for new residential development. Whilst the policy, as drafted, refers to the provision of SANG meeting certain criteria, it does not explicitly refer to the option for bespoke SANG capacity, either on-site or off-site, to be provided by developers as part of their development proposals. Following discussion at the Public Hearing, I consider that the policy should explicitly identify this option, which in my assessment could improve the opportunities for achieving new SANG

capacity in the Farnham area and thus contribute to the achievement of sustainable development.

4.38 Following the Public Hearing, the Town Council and the Borough Council have put forward a series of amendments to the text of the Plan and to Policy FNP12 to update and clarify the content of the Plan with regard to the provision of additional SANG capacity. These amendments were published by the Town Council and have subsequently been agreed with Natural England, who raise no objections. I consider that these amendments fully accord with the SPA Avoidance Strategy Review and following consideration of the comments made by other parties, I recommend the following modifications:

….

"Page 40 – 2nd column, 1st paragraph – delete final two sentences and replace with the following text:

"At current monitored levels of residential occupancy of 1.98 persons per dwelling, the Waverley Borough Council SANG Topic Paper, August 2016, states that the unallocated (enhanced) SANG capacity was 1,370 dwellings (at 1 April 2016). This method of re-assessment has been verified by Natural England and represents a significant increase in the amount of SANG available at Farnham Park as an avoidance measure…..

Policy FN15 seeks the provision of smaller dwellings but clearly if the average occupancy of dwellings does rise in Farnham, there is some tolerance in this capacity before additional SANG would be required.

Certain site promoters have indicated that the effects of their development could be mitigated through the provision of 'bespoke' SANG, either on-site or off-site. Other suitable sites may seek this option during the plan period and developers may offer their own bespoke solutions to mitigate against any adverse effects on the Thames Basin Heaths SPA. Such mitigation measures will need to be agreed by Natural England."

…..

Policy FNP12

Amend criterion i) and add new criterion ii) as follows:

i appropriate contributions towards the provision of …SANG at Farnham Park; or

ii a bespoke solution to provide adequate mitigation measures to avoid any potential adverse effects; "

> **Page 45 – 1st column, 4th paragraph – amend to read as follows:**
>
> **"Other than Farnham Park which has a capacity to accommodate residents from approximately 1,370 dwellings …., no suitable alternative strategic SANG site is currently available to support additional housing in the period to 2031."**
>
> ……
>
> **Page 46 – 3rd column – delete text alongside Summary table, and replace with the following text:**
>
> **"At current occupancy rates (and even if these were to increase slightly) there is sufficient SANG capacity at Farnham Park to mitigate against the adverse effects of the housing projected to come forward as a result of the Neighbourhood Plan. Waverley Borough Council is monitoring the situation closely and is actively seeking further provision whilst bespoke SANG is also allowed should this be necessary."…**
>
> 4.39 In conclusion on this issue, I consider that with the above-listed recommended modifications, this ensures that the Plan meets the Basic Conditions, adequately addresses the policy requirements for the provision of additional SANG capacity in the Farnham area and in particular the requirements of Natural England."

73. The Examiner recommended the modification of the report to remove the reference to the bespoke SANG at Coxbridge Farm. In my judgment, this demonstrates that he took into account, and acted upon, the letter of 6 January 2017 from WYG, on behalf of Sentinel Housing Association, which explained that a bespoke solution was not planned for the Coxbridge Farm development, as the promoters intended to rely on the increased SANG capacity at Farnham Park. The Examiner was making a factual correction – Farnham had been relying upon out-of-date information in relation to Coxbridge Farm. The Examiner was not required to go into any further detail about it in his report.

74. It is apparent from the report that the Examiner accepted that capacity at Farnham Park would possibly not be sufficient for the entirety of the Plan period, and part of the reason for that was increased occupancy levels. The recommended modifications expressly referred to the possibility of increases in occupancy rates – the point emphasised by the Claimants in their Note - and provided for that eventuality. It is clear that the Examiner had occupancy rates well in mind.

75. The Examiner expressly considered the availability of alternative sites. Waverley had conducted an assessment of potential sites as recently as 2015, and adopted the SPA Avoidance Strategy Review in 2016. The Examiner was entitled to conclude that this provided a robust and up-to-date assessment of the SANG capacity in Farnham. He referred to the enhanced capacity at Farnham Park and the possibility of some potential capacity at the Quarry. The Examiner recommended modifications to policy FNP12 to include express references to the provision of bespoke sites by developers,

as sought by the Claimants, and he explained that this was desirable because it could improve the opportunities to achieve new SANG capacity and thus contribute to the achievement of sustainable development. The Examiner was referring to potential bespoke sites, not actual bespoke sites. The Examiner was satisfied, on the evidence, that there was currently sufficient SANG provision with capacity at Farnham Park; that the situation would be closely monitored by Waverley; and there was scope for more provision, by way of bespoke sites, during the life of the plan. As, in my view, he was aware that there was not going to be a bespoke site at Coxbridge Farm, it is reasonable to infer that he took that fact into account in making his assessment. His assessment of the SANG provision, both actual and potential, was a planning judgment, which the Claimants could not realistically challenge in these proceedings.

76. Earlier in his report, at paragraphs 4.19 and 4.20, the Examiner described the HRA screening document for the Plan which had been the subject of consultation with the necessary statutory bodies, including Natural England. The Examiner was satisfied that the relevant EU obligations under the Habitats Regulations had been met. The Examiner recorded at paragraph 4.38 that the recommended modifications to policy FNP12 had been agreed with Natural England who raised no objections. This was a sufficient response to the Claimants' assertion that a further HRA was required. After all, Natural England has a statutory role in this regard, confirmed in policy, and the Examiner was entitled to rely upon the specialist expertise of Natural England, despite the concerns raised by the Claimants' planning consultants. As I have explained above, the change in relation to Coxbridge Farm did not affect the basis upon which Natural England concluded that a further HRA was not required. The Examiner concluded overall, at paragraph 4.39, that the Plan adequately addressed the policy requirements for the provision of additional SANG capacity and, in particular, the requirements of Natural England.

77. At paragraph 4.9 of the report, the Examiner concluded that the basic condition of contributing to sustainable development was met by, *inter alia*, "ensuring SANG capacity to serve development". At paragraph 4.15 of the report, he concluded that the dFNP was compatible with EU law obligations, amongst others, the Habitats Directive.

78. In the light of the Examiner's conclusions, the Claimants' representations that the dFNP should not be made until after the emerging Local Plan had been adopted fell away.

79. In my judgment, the Examiner discharged his duty to give adequate reasons for his recommendations, and to provide an adequate summary of his main findings. He was not required to refer specifically to the Claimants' Note. There was a large volume of evidence and it was not a principal document. It was sufficient that the Examiner recorded at paragraphs 2.4, 2.7 and 2.8 that he had considered all the written material submitted to him, together with the discussions at the public hearing, all of which provided him with sufficient information to enable him to reach his conclusions. The main points raised by the Claimants were adequately addressed in the report and the Examiner's conclusions were made sufficiently clear. Furthermore, even if the *South Bucks* principles were applied, without any modification, I consider that the reasons met the required standard.

80. The challenge under Ground 2 therefore fails.

(3) Ground 3

81. Under Ground 3 the Claimants submitted that the Examiner failed to consider representations made by Wates which were critical of the Amec Report (the 'Waverley Borough Council Landscape Study – Part 1: Farnham & Cranleigh') and/or failed to give adequate reasons for his conclusions on the landscape issues. On a proper consideration of the Wates' representations, the Examiner would have been unlikely to conclude that the dFNP complied with the basic condition of contributing towards sustainable development.

82. The Amec Report, dated August 2014, was commissioned by Waverley to undertake a landscape sensitivity and capacity study, to assess the ability of the landscape to accommodate future residential development, for the purposes of the new Local Plan. It was an extensive study, based on site survey work, as well as desktop study based on mapping and aerial photographs.

83. As part of its preparation of the dFNP, Farnham produced the 'Farnham Housing Land Availability Assessment' ("FHLAA") in May 2016 which examined each proposed site against fixed criteria giving reasoned decisions as to why sites were or were not proposed for allocation. The Third Claimant's site was not put forward for allocation in the dFNP. The First and Second Claimants' sites were rejected for the following summary reasons:

    i) **Land West of Badshot Lea**. "Development of the site would cause the coalescence of Badshot Lea and Weybourne resulting in the loss of identity of both settlements. The site is unsuitable as a housing allocation".

    ii) **Land off Waverley Lane**. "The sites have high landscape value and high landscape sensitivity in their own right and form part of the setting of the Candidate AONB currently under review. The treed boundaries to Waverley Lane provide a verdant entrance to the town and are likely to be adversely affected by development. The site has no footpath connection. The site is not suitable as a housing allocation."

84. The dFNP referred, at page 22, to the "Areas of Great Landscape Value" identified in the Local Plan 2002, and the "further areas of high landscape value and sensitivity at Farnham Park and to the north of Hale, Heath End and Weybourne in the narrow gap with Aldershot" identified in the Amec Report. Additionally, the Amec Report identified the "historic landscape of Old Park" as a "sensitive landscape". The dFNP referred, at page 34, to the Amec Report providing "the most up to date assessment of the landscape character, value and sensitivity of detailed segments of the countryside around the town".

85. Policy FNP10 in the dFNP provided:

> "**Policy FNP10**
>
> **Protect and Enhance the Countryside**
>
> Outside of the Built up Area Boundary, as defined on Map A, priority will be given to protecting the countryside from inappropriate development.

> A proposal for development will only be permitted where it would:
>
> a) Be in accordance with Policies FNP16, FNP17 and FNP20 in the Neighbourhood Plan or other relevant planning policies applying to the area,
>
> b) Protect the Green Belt
>
> c) Conserve and enhance landscape and scenic beauty of the Surrey Hills Area of Outstanding Natural Beauty and its setting – including those Areas of Great Landscape Value under consideration for designation as AONB,
>
> d) Retain the landscape character of, and not have a detrimental impact on, areas shown on Map E as having high landscape value and sensitivity and Map F Old Park as having high landscape sensitivity and historic value; and
>
> e) Enhance the landscape value of the countryside and, where new planting is involved, use appropriate native species."

86. Wates commissioned SLR Consulting Ltd to review the Amec Report in September 2016. It made a number of criticisms of Amec's methodology and conclusions, which may be summarised as too much generalisation in the definition of landscape segments assessed and a lack of transparency and structure in the assessment process. It recommended that a new landscape capacity study be commissioned.

87. Genesis Town Planning made written representations on behalf of Wates to the Examiner in October 2016. They appended the SLR Report and relied upon its findings. They put forward a detailed case in favour of allocation of Wates' Waverley Lane site, criticising the findings of the FHLAA and the proposed allocations in the dFNP, referring to the critique of the Amec Report at the Waverley Lane public inquiry, and submitting that the dFNP did not meet the basic condition test of contributing to sustainable development.

88. In his report, at paragraph 4.23 (set out at paragraph 35 above), the Examiner carefully considered the challenges to the boundary of the Built Up Area, which protected countryside from inappropriate development. He was satisfied that the underlying methodology and principles were sound, and that the boundary was appropriate. He noted that it would not be the sole policy criterion against which proposals for new development would be judged.

89. In his report, the Examiner considered the proposed housing site allocations, having regard, *inter alia*, referring to sustainable development and the "protection of landscapes of high value and sensitivity":

> "4.29 I turn now to consider the individual housing site allocations contained within Policy FNP14 of the Plan and which are numbered FNP14 a) – FNP14 j). Firstly, I note that the proposed sites have all been confirmed as available by the landowners concerned and that a site selection process of seeking to accommodate new housing, as far as possible, on previously developed or "brownfield" land has been followed.

> This accords with national policy and is an important aspect of seeking to achieve sustainable patterns of development. I also note that other principles of national policy have been followed in identifying potential sites, including the protection of landscapes of high value and sensitivity, the protection of the Green Belt and the avoidance of flood risk. I am therefore satisfied that the proposed housing allocation sites all accord with the relevant national and local policy guidelines."

90. After recommending some modifications to the detail, he explained why he had not recommended inclusion of other proposed allocations, including those of the Claimants:

> "4.33 In reaching my conclusions and recommendations regarding the proposed housing site allocations in the Plan, I have given full and careful consideration to those representations which seek to make additional allocations of land for residential development in the Plan. They have included submissions that the Plan be either held in abeyance pending the Examination of the emerging Waverley Local Plan 2013-2032 or found to not satisfy the Basic Conditions. Such representations have generally been linked to other matters, including regard to national and local policy, housing need, housing supply, housing delivery and the extent of the BUAB for Farnham. In the majority of cases, I note that those parties proposing additional allocations of land and specific sites for housing in the Plan area have also made the appropriate submissions and representations to the Borough Council and in some cases, by the submission of planning applications. Having considered all of these matters, it is my assessment that they are essentially strategic issues which fall, quite properly, to be tested and considered at the Local Plan Examination."

91. Overall, the Examiner found that the basic condition of contributing to sustainable development was met. He expressly had regard to the need for housing, as well as the need to protect and enhance the natural environment, countryside and landscape quality. He said, at paragraphs 4.9 to 4.10:

> "*Contribution to the Achievement of Sustainable Development*
>
> 4.9 The Basic Conditions Statement (at Section 5) describes how the Plan contributes to the achievement of sustainable development. It notes that the Plan "contributes to the achievement of sustainable development by:
>
> - planning positively for housing development to help meet the needs of present and future generations by identifying opportunities to meet housing need up to 2031;
>
> - locating new development where it relates well to the existing town, incorporating sustainable transport links, and protects the high quality for business or tourist environmental assets of the Plan area;

> - contributing to building a strong local economy and supporting the rural economy by allocating a new site for business use; supporting the retention, intensification and regeneration of the main clusters of business activities in Farnham; promoting an Enterprise and Incubation Hub at the University of the Creative Arts; focussing on the vitality of the town and neighbourhood centres and supporting the change of use or extension of rural building for business or tourist purposes;
>
> - supporting the retention and enhancement of community and leisure facilities which are important to the social fabric of the town and the distinctive areas within it;
>
> - protecting and enhancing the high quality natural, built and historic environment of Farnham and the surrounding countryside (including the integrity of the SPA) by ensuring SANG capacity to serve development; encouraging high quality development that responds to the distinctive character of Farnham and protecting and enhancing the area's public open space, biodiversity, landscape quality and historic assets; and
>
> - securing the necessary social, physical and green infrastructure needed to support the proposed development, or the additional infrastructure identified in the Neighbourhood Plan which can be provided in a timely manner."
>
> 4.10 I have reviewed the Plan in this context. I note, in particular, that the Neighbourhood Plan Strategy set out in Section 4 of the Plan clearly has placed the presumption in favour of sustainable development at the heart of the Plan and its policies. Again, I do consider there is a need to make a number of detailed modifications to fully address this Basic Condition. Subject to those modifications which are set out later in this report, I consider the Plan will contribute to the achievement of sustainable development and that it has been prepared in order to meet that fundamental objective."

92. In my judgment, these conclusions were open to the Examiner on the extensive evidence before him, and the benefit of his site visits. They were based on planned judgments which the Claimants could not realistically challenge in these proceedings. The Examiner was entitled to conclude that the sites allocated met local policy and contributed to sustainable development. He gave cogent reasons for deciding not to consider other sites not allocated.

93. I am unable to find any proper grounds upon which to challenge the Examiner's statement in paragraph 4.33, where he said:

> "I have given full and careful consideration to those representations which seek to make additional allocations of land for residential development in the Plan."

This statement must be taken to include the evidence and representations presented by Wates, among others. The Claimants invited me to infer that the Examiner did not consider the Wates' material because he did not refer to it. However, given the limited scope of his examination, he was not required to refer specifically to the evidence and representations presented by the Claimants, and the points raised therein. There was a large volume of evidence and these were not principal documents. It was sufficient that the Examiner recorded that he had considered the representations. He also stated at paragraphs 2.4, 2.7 and 2.8 that he had considered all the written material submitted to him, together with the discussions at the public hearing, all of which provided him with sufficient information to enable him to reach his conclusions.

94. In my view, the Examiner's conclusions were made sufficiently clear to the Claimants. He accepted the proposals in the dFNP, and the evidence relied upon by Farnham and Waverley. Both the Amec Report and the FHLAA explained why the areas which the Claimants sought to develop were not recommended for allocation. He plainly did not accept Wates' submission that the evidence submitted could not be relied upon and that, in respect of landscape protection, the dFNP did not meet the basic condition test of contributing to sustainable development. Even if the *South Bucks* principles were applied, without any modification, I consider that the reasons met the required standard.

95. The challenge under Ground 3 therefore fails.

Overall conclusion

96. As the Examiner's examination and report were both lawful, Waverley was entitled to rely upon his recommendations in deciding, pursuant to paragraph 12 of Schedule 4B of the TCPA 1990, that the dFNP (as modified) met the basic conditions in paragraph 8(2) of Schedule 4B and should be put to a referendum.

97. As the grounds were arguable, the application for permission is granted, but the claim for judicial review is dismissed.