

Extraordinary Local Development Framework Panel

19 May 2016

**Tabled papers for Agenda Item
No. 6 (Faversham Creek
Neighbourhood Plan –
Examiner's Report and next steps**

LDF Panel 19th May 2015

Tabled Item for agenda item 6: Faversham Creek Neighbourhood Plan – Examiner's Report and Next Steps

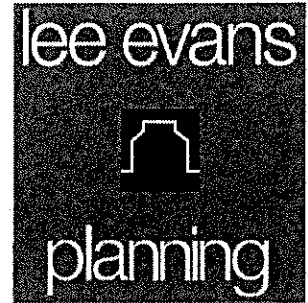
The Head of Planning received a letter from the planning agent for the Swan Quay site last Friday regarding the Faversham Creek Neighbourhood Plan Examiner's Report. They had taken Counsel advice about the Examiner's Report. The letter is attached.

In summary, their Counsel suggests:

"That the Examiner has acted unlawfully and outside the scope of the provisions of the Act. We invite you to give careful consideration to these issues before you take any further steps with regard to the Submitted NP. At the very least, you need to take legal advice."

The letter requested that Officers ensured that the Committee is advised of their Counsel's Opinion in respect of the Examiner's Report and the Swan Quay site.

The Council has subsequently taken its own legal advice from Counsel and the advice that we have received indicates that there are no issues which should prevent the LDF Panel from agreeing the recommendations in the report tonight. As you will be aware Counsel's Opinion is covered by strict legal privilege and will not therefore be made public.



LTR/P03107/K/41/AE

13th May 2016

Mr James Freeman
Swale Borough Council
Swale House
East Street
SITTINGBOURNE
Kent
ME10 3HT

Dear Mr Freeman

FAVERSHAM CREEK NEIGHBOURHOOD PLAN: EXAMINER'S REPORT

Summary of Legal Issues

I am writing to you in the context of your consideration of the Examiner's Report on behalf of my clients Swan Quay LLP who, as you will be aware, have interests in the Swan Quay site. We have sought legal advice from counsel on the approach taken by the Examiner:

- With regard to the undated and unsigned Statement of Common Ground and the Modifications promoted therein.
- With regard to the Modifications suggested with regard to Swan Quay.
- With regard to the adequacy of the SEA Appraisal.

Although I am the signatory, you should be aware that this letter has been drafted by Counsel, Mary Cook of Cornerstone Barristers.

Summary of Legal Provisions

Sections 38A to 38C of PCPA 2004 provide for the making and content of neighbourhood development plans. Section 38A(3) applies the procedure contained in schedule 4B of TCPA 1990 to preparing, consulting upon, examining and making neighbourhood plans, subject to the modifications made by Section 38C(5).

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Paragraph 8(1) of Schedule 4B requires the Examiner to consider the matters specified therein:

- (a) whether the Draft Neighbourhood Development Order meets the Basic Conditions (see sub-Paragraph (2));
- (b) whether the Draft Order complies with the provision made by or under sections 61E(2), 61J and 61L;
- (c) whether any period specified under section 61L(2)(b) or (5) is appropriate;
- (d) whether the area for any Referendum should extend beyond the neighbourhood area to which the Draft Order relates; and
- (e) such other matters as may be prescribed.

Paragraph 8(6) prohibits the Examiner from considering any matters falling outside the ambit of Paragraph 8(1), save for whether the plan is compatible with "*Convention Rights*" under the Human Rights Act 1998. Under Paragraph 8(1)(a) the Examiner must consider whether the draft plan meets (inter alia) the "*basic conditions*" set out in Paragraph 8(2):- "*A draft neighbourhood plan 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 plan; [(b)&(c) do not apply] (d) the making of the plan contributes to the achievement of sustainable development; (e) the making of the plan is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area) (f) the making of the order does not breach, and is otherwise compatible with, EU obligations, an*".

Paragraph 8(2)(e) only requires general conformity with the Strategic Policies in a Statutory Development Plan (Section 336(1) of TCPA 1990 and Section 38 of PCPA 2004).

The "*basic conditions*" also control the ambit of the recommendations on, and modifications to, a draft neighbourhood plan which may be made by an Examiner. Under Paragraph 10(2) of Schedule 4B the Examiner's Report must recommend that the Draft Plan be submitted to a Referendum, or that the draft plan as modified by Modifications specified in the report be submitted to a referendum, or that the proposal for a Neighbourhood Plan be refused. Paragraph 10(3) restricts the Modifications which may be made to certain specified circumstances.

This includes sub-Paragraph (a):- "*modifications that the Examiner considers need to be made to secure that the draft plan meets the basic conditions mentioned in Paragraph 8(2).*"

Paragraph 10(4) provides that the Examiner's report "*may not recommend that a plan (with or without modifications) be submitted to a referendum if the Examiner considers that the plan does not – (a) Meet the basic conditions mentioned in Paragraph 8(2), or (b) comply with the provision made by or under sections [38A and 38B of PCPA 2004].*" By Paragraph 10(6) the Examiner's Report must contain reasons for each of the recommendations made and a "*summary*" of the Examiner's "*main findings*".

Paragraph 12 of Schedule 4B of TCPA 1990 generally governs the consideration by the Local Planning Authority of the Examiner's Report and the actions it may then take. By Paragraph 12(2) the Authority must consider each of the recommendations made in the report (and the reasons for them) and decide what action to take in response to each recommendation. By Paragraph 12(4) the Local Planning Authority is obliged to hold a local Referendum under Paragraph 14 provided that it is satisfied that (*inter alia*):- i) the Draft Plan meets the Basic Conditions mentioned in

Paragraph 8(2); or ii) the Draft Plan would meet those conditions if Modifications were to be made to the Draft Plan (whether or not recommended by the Examiner).

Although Paragraph 12(5) confers discretion on the Local Planning Authority to make Modifications to a Draft Plan, that power is restricted to the matters set out in Paragraph 12(6). Paragraph 12(6) provides:- *“(a) Modifications that the Authority consider need to be made to secure that the Draft Plan meets the Basic Conditions mentioned in Paragraph 8(2) and (e) Modifications for the purpose of correcting errors.”*

If one or other of the pre-conditions in Paragraph 12(4) to the holding of a Referendum is not satisfied, then the Local Planning Authority must refuse the proposal for a neighbourhood plan (Paragraph 12(10)). By Paragraph 12(11), the authority is obliged to publish the decisions that it makes under Paragraph 12 and its reasons for making those decisions.

By section 38A(4) of PCPA 2004, if in a referendum held under Paragraph 14 of Schedule 4B to TCPA 1990 more than half of those voting have voted in favour of the plan, the Local Planning Authority is under a duty to make the Neighbourhood Plan and to do so as soon as reasonably practicable after the Referendum is held. The obligation to make the Plan does not apply, however, if the Authority considers that the making of the Plan would breach, or would otherwise be incompatible with, any *“EU obligation”* or any *“Convention Right”* under the Human Rights Act 1998 (see section 38A(6)).

Section 61N of TCPA 1990 (as modified by section 38C(4) of PCPA 2004) provides that a Legal Challenge:- i) to a decision by a Local Planning Authority under Paragraph 12 of Schedule 4B of TCPA 1990; or ii) questioning anything relating to a Referendum under Schedule 4B; or iii) questioning a decision by a local Planning Authority under Section 38A(4) or (6) relating to the making of a Neighbourhood Plan, may only be brought by a claim for judicial review filed within 6 weeks from the date on which the relevant decision is published or declared.

Statement of Common Ground (SOCG)

There is no provision in the statutory scheme for modifications to a draft NP once submitted to the Council or once the Council have submitted it for examination. Paragraph 7 is clear that the authority must submit for independent examination (a) the draft neighbourhood development order, and (b) such other documents as may be prescribed. Modifications and statements of common ground are not prescribed. It is not for the Council or indeed anyone else, once the draft NP has been sent to Council, to amend it or alter it. As for the role of the Examiner, the effect of Paragraph 8 (1)(a) is to confine the examiner's role to scrutinising the draft NP.

The qualifying body, the Council and English Heritage (EH) seem to have approached the submitted NP as if it were a local plan which could be modified after the draft had been settled by the qualifying body and submitted to the Council. We objected to the SOCG which was never published, dated or signed prior to its submission by the Council to the examiner alongside the draft NP. Counsel advises that there was no public consultation upon it because the relevant regulations make no provision for amendment or modification to a NP once the qualifying body has submitted it to the Council in draft. Moreover, Counsel also advises it was no part of the examiner's role to examine documents other than the draft NP and the prescribed documents.

The examiner should have set that SOCG to one side and focused on his task which was to examine the NP as submitted not the NP as submitted and proposed to be modified. Causing an oral hearing to be heard cannot be an excuse to illegitimately extend the scope of the examination.

Whilst at Paragraph 14 of the report the examiner appears to recognise this limitation he does not in fact apply this limitation. On the contrary, he repeatedly refers to the SOCG throughout the report. For example at Paragraph 45 he states: *"A proposed policy was included in the Statement of Common Ground and Schedule of Minor Modifications agreed by FTC, SBC and EH. That has been available to members of the public and was considered at the hearing. I see no reason to depart from it significantly. I therefore recommend modification to add it"*. He refers to it again at Paragraph 54 (he felt it was not within his power to make the amendment), and at 56 (whilst not all of the *"minor modification"* is needed) at 63 (the suggested *"Minor Modification"* gives a better and adequate description, which corresponds with my opinion following my site visits). See also Paragraphs 68, 72 and 73. Thus he had regard to a matter which was immaterial to the task of examining the submitted NP against the statutory scheme.

The Recommendations to Swan Quay

At Swan Quay (SQ) the submitted draft NP promoted a mix of use including residential and commercial use. According to the Strategic Environmental Assessment (SEA) report¹ SQ was one of 12 sites, 9 of which specifically provided for business floorspace. 9 of the 12 sites² also provided for residential use, six of which as part of a mix of uses including residential. The submitted draft NP admitted to some residential development. Accordingly, SQ was one of the six sites where a mix of uses including residential was promoted. The examiner went on to suggest (§62) that the introduction of residential development on this site (but not any of the others) could not occur *"without gentrification"*. He did not relate this finding to the basic conditions. Rather it seems to be a subjective planning judgement based on a site visit but one which offered no explanation as to what was meant by this phrase; especially in the context of the Conservation Area which included residential uses and a NP which was promoting residential development in close proximity to and on SQ.

SQ includes a building which is an open sided timber shed built in the 20th Century. It is not a listed building. Faversham TC had not included this as an undesignated heritage asset in the report identifying heritage assets around the creek which they used as part of their evidence base. The effect of the amendments made by the examiner to SQ (based yet again upon the SOCG) is that this building is identified as one which makes a positive contribution to the conservation area. In other words the examiner set aside the fact that the building had not been so identified by the qualifying body's assessment and imposed his own subjective view. Although in §§60 and 61 the Examiner purports to give reasons, he does not distinguish between designated and Non-Designated Heritage Assets much less explain why he regards it as part of his role to adjudicate on such an issue. The closest one gets to an explanation is *"EH had serious reservations about the appropriateness of the development proposed"* and the fact that *"the proposals... did not impress me"*. The Inspector's inadequately reasoned report fails to identify why it was necessary to comply with the basic conditions to superimpose his judgement as to whether a building should or should not be treated as a Non-Designated Heritage Asset.

At the time of Examination there was a modern building on the site, occupied by a sail maker. At the hearing the Examiner was shown development proposals which indicated a loss of that building. The examiner opined the loss of any employment use would be contrary to SBLP Policies B1 and AAP2. In so doing he failed to appreciate and apply any flexibility to AAP2 which simply calls for development proposals to *"maintain or enhance a mix of uses and activities..."* across SQ rather than proscribe precisely where they might be, let alone impose an embargo on any loss of employment floorspace.

¹ 24.1.1

² 22.1.1

The Examiner has applied Policies B1 and AAP2 flexibly to other existing or former employment sites within the NP, and accepted mixed use including residential. He fails to acknowledge this and explain the inconsistent approach taken at Swan Quay.

SEA Appraisal

The SEA was done late on in the process. However nowhere does it actually assess each site against the 15 sustainability topics. There is no consideration of each site on a comparative basis. There is no reference to alternatives. There is nothing in the report which sustains the examiner's treatment of SQ. Indeed the SEA environmental report suggests the submitted draft NP would have an overall significant positive effect on cultural heritage.

In Paragraph 59, the Examiner's Footnote 14 refers to SEA Paragraph 7.7.1 to support the retention of the building which accommodates the sailmaker.

Paragraph 7.7.1 of the SEA contains general text seeking additional employment opportunities at Faversham.

This part of the SEA, therefore, applies to all employment sites in the NP Area.

The Swan Quay site is considered in the SEA as one of a number of sites for mixed use redevelopment including residential that would have significant positive effects in terms of:

- *employment and skills (20.1.3)*
- *development of the local economy (24.1.2)*
- *housing (22.1.2)*
- *cultural heritage (Paragraph 19.1.3).*

In Summary:

We suggest that the Examiner has acted unlawfully and outside the scope of the provisions of the Act. We invite you to give careful consideration to these issues before you take any further steps with regard to the submitted NP. At the very least you need to take legal advice.

Yours sincerely

Jeanne Taylor
PARTNER

cc: Natalie Earl - Swale Borough Council
Neil Flanagan - Swan Quay LLP
Mary Cook - Cornerstone Barristers

