

**The Queen on the Application of Swan Quay LLP v Swale Borough Council**

CO/3447/2016

High Court of Justice Queen's Bench Division the Administrative Court

27 January 2017

**[2017] EWHC 420 (Admin)**

**2017 WL 00895228**

Before: Mr Justice Dove

Friday, 27 January 2017

Hearing date: 12 January 2017

**Representation**

Ms Mary Cook and Mr Robert Williams (instructed by Shakespeare Martineau LLP ) appeared on behalf of the Claimant.

Ms Megan Thomas (instructed by Sharpe Pritchard LLP ) appeared on behalf of the Defendant.

**Judgment**

Mr Justice Dove:

**Introduction**

1 This is a claim for judicial review of the defendant's decision to hold a referendum in respect of the Faversham Creek Neighbourhood Plan ("FCNP") on 21 June 2016. Holgate J granted permission solely on one ground. As this ground was clarified at the hearing, it amounts to the alleged failure of the examiner to provide adequate reasons for his recommendation (adopted by the defendant) that the FCNP should be modified in relation to its proposals for Swan Quay, and thus it is contended that the court could not be satisfied that neither the examiner nor the defendant had acted within the powers given to them to modify a neighbourhood plan which has been submitted.

**The facts**

2 In the early Middle Ages, Faversham was part of the Cinque Ports Confederation as a

limb of Dover. Its significance as a port was built upon the development of Faversham Creek. Faversham Creek is described as a tidal inlet of the Swale waterway, penetrating some 6 kilometres inland on a winding course across the marshes of the North Kent coast. Its fortunes steadily declined as a port, in particular in the 20th century, and by 2000 commercial boat traffic had completely ceased.

3 The creek area forms part of the conservation area and is identified within a draft Character Assessment for the Conservation Area as "Creekside". In particular, that part of the Conservation Area containing the Swan Quay site, which is owned by the claimant and the subject of these proceedings, is described in the following terms:

"4.33. A large joinery works occupies the southern end of Belvedere Road, where a rather pleasing array of traditional-looking industrial buildings fronts onto the creek (although most of the structures are relatively modern). Exceptionally, Faversham Chandlery is a brightly-painted weatherboarded building dating from the early C19. Despite having no direct connection with the water this site has established a rather convincing aesthetic relationship with the creek, the buildings being expressed for the most part in a local vernacular of treated weatherboarding and slated roofs. Alongside to the north is the impressive C19, five storeys high, yellow brick-built Belvedere Mill now being converted to flats and a restaurant. With its characteristic projecting hoist bays the structure is a crucial and prominent part of the historical record of the creek's industrial past. On the opposite side of Belvedere Road are other vacant buildings and land, whilst to the north are brewery premises where barrels and pallets are stored both in the open and under cover."

4 The Swale Borough Local Plan 2008 established a specific planning policy context for the development of Faversham Creekside within its policy AAP2, which provided, together with its explanation, as follows:

"5.12. Faversham creek winds inland crossing the marshes into the heart of the town. Once a thriving place of industry and water-trade, recent years have seen a change in the character of the creekside with new waterside housing. Despite this, as a central component to the historic development of Faversham, the creek remains an important ingredient in its unique character as well as a place of employment, leisure, and tourism opportunity. It is an irreplaceable historic asset of great significance.

[ ... ]

5.14. House builders and homeowners have found the creekside's industrial sites an attractive prospect, but these change the character of the area and place pressures — both financial and environmental — on the remaining businesses and vacant sites to follow suit. Such changes to the character of the creekside lead to the loss of diversity of activity and a severance in the old links between the water and waterside uses. The Council considers that levels of new housing have reached the point where further proposals will damage the area and it will now resist them as both contrary to the strategy for the Local

Plan and the policy for this AAP. Additionally, the Council considers that frontage development not involving active use or management of the creek itself, or that which prevents use of the creek by vessels, should not be permitted.

[ ... ]

5.16. For existing and former employment sites, a rigorous application of Policy B1 will mean retaining the availability of employment land and buildings along the creekside. For existing employment uses, within the context of the strategy for the town and Policy AAP2, the Council will look to support proposals to expand and diversify businesses that will enable them to maintain a presence within the town. However, given the proximity of recent housing development, there are employment uses that would now be entirely inappropriate, as they would in any other residential area, and the suitability of their retention will need to be carefully considered. However, where sites may be considered unsuitable for their current or former use, it will normally be the case that an alternative, more suitable, commercial use will be sought by the Council, rather than the site being accepted for housing development. In exceptional cases, where mixed uses, or wholly non commercial developments, are considered appropriate under Policy B1 and Policy AAP2 for those sites with a frontage to the water, the provision of links to the water, whether by moorings, mooring points, rubbing strips, or through commercial activity, will be sought, alongside the restoration of the quayside frontage.

[ ... ]

5.19. [ ... ] To address the regeneration of the creek basin as described, and the future of the various sites referred to above, Policy B17 promotes use of the wider area of the creek basin for the mooring, maintenance and use of historic craft for employment/tourism purposes. These would be focused around land and buildings at Ordnance Wharf, the Purifier building, and the BMM Weston car park (where open space and environmental enhancement should be additionally considered around a retained car park), but could extend onto other wharfage. Housing development would prejudice these proposals and will not be permitted.

- Conduit Street and Quay Lane: maintaining the strongly industrial character of the area and creekside on both sides of these roads.
- Belvedere Road: retaining remaining employment sites and seeking a greater diversity of uses and activity in what is largely now a residential area.

[ ... ]

## **Policy AAP2**

### *Faversham Creekside*

An Area Action Plan is designated for Faversham Creekside, as shown on the Proposals Map. Within this area the Borough Council will seek to ensure that it continues to function as a place of special interest and activity with strong associations with the water, and will specifically encourage the regeneration of the creek basin for commercial and tourism purposes, including use of the basin and its wharfage for historic craft. Planning permission will not be granted for proposals that would result in the loss of land or buildings suitable for employment uses or, on appropriate sites, would not involve active use or management of the creek itself. All development proposals will:

1. maintain or enhance a mix of uses and activity that respect the maritime, industrial and residential character, as appropriate to the varied parts of the AAP area;
2. maintain or enhance an environment appropriate to enable traditional waterside activities to flourish, including, where appropriate, financially contributing toward improving and maintaining the navigability of the creek channel and its infrastructure, including providing wharfage and moorings;
3. preserve or enhance the area's special archaeological, architectural and historic character, including its open spaces; and
4. avoid any significant adverse environmental impacts and where possible enhance the biodiversity interest of neighbouring internationally designated sites for nature conservation. The Borough Council will expect development to:
  - a. preserve or enhance landmark and other important buildings, waterside structures and details;
  - b. preserve and create access to the waterside, including wharfage and moorings, and where appropriate provide for a creekside walk;
  - c. by use of its grain, scale, form and theme of materials, be creekside in character;
  - d. retain existing greenspace and, where appropriate provide new areas; and
  - e. retain or enhance existing townscapes, including those in the views of higher ground."

5 On 15 January 2013, Faversham Town Council ("FTC") applied to have Faversham Creek designated as a neighbourhood area. The neighbourhood area, and thus the area ultimately covered by the FCNP, is, for present purposes, essentially the same as the area covered by AAP2. The neighbourhood area's designation was confirmed by the defendant on 20 February 2014. FTC published a pre-submission draft of the FCNP for consultation and thereafter consultation occurred in May and June 2014. The pre-submission draft included specific proposals for a number of identified sites within the neighbourhood area. In particular, Site 5 was identified as Swan Quay.

6 In the consultation responses, concern was expressed by a number of respondents in relation to the extent of housing proposed in the neighbourhood plan and its impact on heritage value, especially where housing might manifest itself on the waterfront. FTC responded to these representations by stating that further creekside housing was not being promoted and any housing was solely as an element of an overall mixed-use development.

7 In November 2014, a submission version of the FCNP was submitted by FTC to the defendant, accompanied by a basic conditions statement and a consultation statement. The submission version contained the following proposals for Site 5 Swan Quay:

## **"Site 05**

### *Swan Quay*

#### Site Context

This site was formerly used by Frank and Whittome joinery company and comprises four buildings. The blue two storey building set at right angles to the Creek is listed grade II and was last used as an office. Attached to the rear of this is a vacant shed dating from the turn of the 19th and 20th Centuries, which has been re-clad in weatherboarding to the south and west sides. This is currently vacant but as an attached building would require listed building consent to remove.

There is an open shed with a metal trussed roof with a long elevation to Conduit Street with attached modern offices built in the 1990s. The fourth building is a modern building built for the joinery company (c. 1990) constructed in brick and weatherboard, now used by a sail maker. The site has access for both vehicles and pedestrians off Belvedere Road.

#### Suggested Redevelopments, Designs and Land Uses

On the side of the site adjacent to Town Quay, a range of buildings running at right angles to the creek, up to three and a half storeys, could replace the existing structures. This would create a wider gap between the new and existing buildings to allow more open views of the water down Quay Lane.

- Land uses could include offices/workshops (Class B1) and a gallery (Class D1) and some limited car parking. New buildings should be constructed in yellow stock brickwork and slate roof with metal framed windows
- The upper floors could be in residential use. A second shorter building, also using traditional materials and three and a half storeys in height, could be set parallel to this, with a ground floor workshop with the upper floors residential.
- A single storey extension to the retained workshop at the corner of the site adjacent to Belvedere Quay constructed in suitable materials (e.g. brick and

weatherboard) could provide a retail, restaurant or workshop use. The retained workshop could be used by the sailmaker.

- Additional three storey buildings using traditional materials to the rear of the blue buildings could be used for ground floor parking with residential above. This could provide approximately 15–20 residential units.

[ ... ]

### Swan Quay Site Specific Policies

SWQ1: Use classes: the site shall be used for a mix of retail (A1), restaurant (A3), office and workshops (Class B1) and a gallery (Class D1), with residential (C3) on some upper floors.

SWQ2: Public walkways shall be created through the site from Belvedere Road and along the Creek frontage to connect with the existing walkways to sites on either side with regard to the Faversham Creek Streetscape Strategy.

SWQ3: Moorings shall be provided to the Creek frontage suitable for all sizes of craft up to and including Thames Barges or similar. Swan Quay Site Specific Projects Improvements to the junction of Quay Lane and Conduit Street as indicated in the Faversham Creek Streetscape Strategy, including negotiation with the landowners to improve boundary treatments as necessary.”

8 During the course of the consultation, English Heritage (as they then were) raised concerns as to the potential impact of the FCNP's proposals on the historic environment. English Heritage were concerned that, without modification, the plan may not meet the basic conditions, which I shall set out below.

9 On 18 December 2014, English Heritage wrote to the defendant setting out their concerns in relation to the FCNP as it was then proposed as follows, in so far as is relevant to this claim:

“In summary, the areas where we have concern about the plan's policies are:

- The lack of assessment of significance of sites, buildings and activities that contribute positively to the Faversham Conservation Area's significance and promotion of their protection and enhancement as part of a designated heritage asset;
- The absence or low level of analysis of the positive components of the area's character, including variation between character areas within the Neighbourhood Plan Area and the definition of an appropriate response to this within the policies relating to the allocated sites;
- Consideration of the potential for presence of as yet unidentified assets of archaeological interest within the plan area and promotion of the need to develop understanding of their significance and their conservation in a manner

appropriate to their significance within policies relating to the allocated sites;

- The potential impact of the policy approach of providing public access to the creekside on the industrial working character of the creek as a distinct area of the Faversham Conservation Area and on Faversham's maritime traditions;
- The impact of the policy approach of providing a mix of uses including residential use on creekside land on the character of the Faversham Conservation Area and Faversham's maritime traditions;
- The lack of a positive strategy for the conservation and enjoyment of the non-designated heritage assets identified within the evidence base study;

[ ... ]

Whilst the draft conservation area appraisal prepared by the Council in 2004 provided a detailed consideration of the character areas that form the conservation area, this assessment does not appear to have been transferred to the neighbourhood plan. [ ... ] The contribution of the historic character which might be distinguished from the character of more recent development of the creekside, appears to be particularly lacking in this analysis. Indeed, without a proper assessment of the potential impacts of development of the opportunity sites on the significance of the conservation area, including potential loss of the special historic or architectural interest of the area or impacts on its character and appearance, the policies cannot be shown to represent a positive strategy for the conservation and enjoyment of the historic environment.

Furthermore, the special interest and character of the conservation area may not reside solely in its buildings and spaces, but may also result from the activities that traditionally were and, in some cases, continue to be conducted within these. The loss of key employment sites that contribute to the viability of the area for a range of waterside industries, notably boat building, that contributes to the working character of the waterway and creekside, would represent a loss of the significance of the conservation area as an historic focus for such activities and ultimately, a reason for the town's existence. The need to protect this character was referred to in the recent planning appeal decision relating to the Black Shed at Standard Quay (Appeal Decisions APP/V2255/A/13/2202894, APP/V2255/E/13/2202924). As un-neighbourly industries these may not be suitable for continuance within mixed-use development. As such, the potential impact of any such allocation on the viability of the creek for these activities should form a part of the analysis that underpins the plan in order for it to comply with both the national and local planning policies.

[ ... ]

Site 5 Swan Quay: We have serious reservations about the appropriateness of the development proposed, including: its potential impact on the character and

appearance of the conservation area; the impacts to archaeological remains that may be of national significance; and the impacts on listed buildings, including impacts to their settings and potential curtilage listed structures. Without more detailed evidence being presented on the significance of these heritage assets and the contribution of the site to them, as well as assessment of the potential impacts of the proposed land use, including the 'suitable development' identified, there is a serious risk that the policy sets a presumption in favour of a development that would not conform with local or national planning policy.

Consideration of the appropriateness of the allocation policy should include assessment of: the impact of the proposed development on the architectural character of the creekside as a distinct character area within the conservation area; the impact on the spatial character of the creek, including the grain of development, open spaces and relationship of buildings to spaces; the impact on the listed buildings both within the site and in its immediate vicinity, including assessment of potential curtilage listed buildings and the settings of buildings both within the site and in its vicinity; and, the impact of the key views looking along the creek. Moreover the early 20th century open sided shed described is likely to be considered both a curtilage listed building associated with the listed 'blue building', as well as contributing positively to the significance of the conservation area by representing the historic and architectural interest of the creekside as a distinct character area within the conservation area as a whole. As such, its demolition would be regarded as substantial harm to the conservation area and would not normally be expected to receive permission.

Whilst the plan may provide guidance that sets parameters within which development should be proposed, the supporting text reads as a description of a specific development that would be considered to impose a detailed form and style of development that is unsubstantiated as a requirement (see paragraph 60 of the NPPF, which sets out limitations on how specific planning policies should be on the style or form of development that can be required). The plan should not prejudice the decision-making process by describing a particular development proposal."

10 During the hearing of this claim, I was provided with summaries of the representations made by other objectors. They expressed concern about the inclusion of new residential development within the proposals for the Swan Quay site and also about the impact of the proposal described and its proposed uses on the historic environment.

11 Following discussion between the defendant, FTC and English Heritage, a statement of common ground was agreed containing what were called "minor modifications" of the plan. Amendments were proposed to the text explaining the historic context of the site and a change to the development proposals and the policy was proposed as follows:



## **"Site 4 and 5 Swan Quay/Frank and Whittome**

At page 47 amended text to read: [Page 47 is the text from the submission draft of the FCNP which I have quoted above]

This site was formerly used by the Frank and Whittome Joinery Company and comprises four buildings: The first is a blue two storey building set at right angles to the Creek is listed grade II and is an early 19th century industrial building last used as an office. Attached to the rear of this is a second building, a shed dating from the turn of the 19th and 20th Centuries, which has been re-clad in weatherboarding to the south and west sides. This is currently vacant but as an attached building would require listed building consent for any alterations that would affect its contribution to the listed building's historic or architectural interest.

The third building is an open shed with a metal-trussed roof with a long elevation to Conduit Street with attached modern offices built in the 1990s. As an industrial building illustrating the working history of this part of the Conservation Area, the form, shape and scale of the open sided shed makes a positive contribution to the character of the Conservation Area.

The fourth building is a modern building built for the joinery company (c. 1990) constructed in brick and weatherboard, now occupied by a sail maker. The low level of the building, its sensitive choice of materials (preserving an industrial aesthetic) and its position set back from the Creek's edge creating a wharf space, means this building has integrated well with the Conservation Area and retained a distinct working edge to the Creek with views over it to the surrounding historic buildings.

The site provides a long section of timber wharf fronting the creek with an open space of quay behind, both of which make a positive contribution to the character and appearance of this part of the Conservation Area as part of the historic working Creekside. A slip way within the site provides one of the few points of access for boat launching in this side of the creek. The site has access for both vehicles and pedestrians off Belvedere Road.

### **At page 47 paragraph two text to be added as follows:**

The site lies adjacent to the medieval Town Quay and close to the Grade II\* listed 15th century warehouse that is now referred to as TS Hazard. The site is likely to have formed a part of the abbey wharfs from the medieval period and is known to have included a dock in the late 18th Century. The potential for a waterlogged environment and the likelihood of successive phases of wharf development, as well as development of buildings and structures for associated uses throughout the site's history creates a high potential for remains of archaeological interest and, potentially, those of national

importance.

**At page 47 text to be amended as follows:**

The scale of new development will be given particular consideration when considering its sensitivity to the character and appearance of the Conservation Area and the significance of other heritage assets. Whilst three storeys is considered to be an expected maximum height, it is likely that variation across the site, including lower buildings in some areas, will be required to protect the setting of listed buildings and to provide a suitable architectural character. The upper floors could be in residential use.

**At page 48 after policy SWQ1 amended text to read:**

SWQ1. The site is considered suitable for a mix of uses that can include retail (A1), restaurant (A3), office and workshops (Class B1) and a gallery (Class D1) with residential (C3) on some upper floors. New development requiring change of use should not result in a reduction in the footprint of employment uses within the site or an overall loss of the site's contribution to industrial and maritime character of the Conservation Area."

12 Two additional policies at Swan Quay were also agreed in the statement of common ground to be necessary. One of those policies dealt with existing buildings and features which made a positive contribution to the character of the conservation area. This arose from the agreement between the parties that, as set out above in the amended text describing the site, there was a third building and also the timber wharf frontage to the creek which made a positive contribution to the conservation area. The second additional policy which was proposed and agreed related to archaeological potential.

13 In response to the publication of the statement of common ground, the claimant provided a full and detailed response to the issues which were raised and the observations which had been made within it. An examiner was appointed in order to examine the submitted draft of the FCNP. He issued several notes, providing directions and guidance in relation to the conduct of the examination. In particular, he directed on 14 September 2015 that the examination should include a hearing in relation to certain key issues, one of which was Swan Quay.

14 Evidence has been provided within this claim as to what happened at the hearing between 5 and 7 October 2015. Within the evidence from both sides, accounts of the hearings are provided. In particular, notes of the hearing sessions have been provided by Mrs Taylor, a planning consultant who was retained by the claimant to represent them at the hearing. It appears from the notes which were produced by Mrs Taylor that there was debate in the session on Swan Quay about whether the third building did in fact make a positive contribution to the conservation area. Further, it appears that

there was discussion, and the examiner explored “at length”, the merits of three-and-a-half storey buildings and their relationship to existing listed buildings.

15 The claimant provided the examiner during the course of the hearing with floor plans and elevations of an illustrative proposal for the development of the site. It is clear that there were wide-ranging discussions during the course of the hearing about Swan Quay. At a later stage, the hearing turned to consider other proposals at sites known as Standard Quay and Standard House. During the course of that discussion, Mrs Taylor noted the following:

“There was then discussion re the wider issue of maritime uses including Swan Quay and Ordnance Wharf.

RE commented that the Plan should not prevent such uses — any requirements to be demand-led.

Harold Goodwin, speaking for Faversham Society:

Commented that the town had turned its back on the Creek for 30 or 40 years — marketed as a market town.

Maritime connection is very important.

History relating to gunpowder and bricks.

Industrial grittiness important — lost with gentrification and now significant loss of maritime heritage.”

16 On 4 April 2016 the defendant received the examiner's report. In light of the statutory definition of the basic conditions (which is set out below), the examiner proceeded to identify what were the relevant strategic policies of the Swale Borough Local Plan, and, in doing so, was guided by the provisions of the National Planning Practice Guidance. No criticism is made of his identification of policy AAP2 and policy B1 from the Swale Borough Local Plan as the relevant strategic policies for the consideration of the basic conditions. Policy AAP2 has been set out in detail above. Policy B1 provides as follows:

“B1. Supporting and Retaining Existing Employment Land and Businesses

1. Land and buildings currently in employment use will be retained for that use unless it is:

- a) inappropriately located for any employment use, and having an unacceptable environmental impact in an area; or
- b) demonstrated by expert advice that the site is no longer suitable for any employment use; or
- c) demonstrated by market testing that there is insufficient demand to justify its retention for any employment use; or

d) allocated in the Plan for other purposes.

In cases involving a change of use or redevelopment for residential purposes, the Council will additionally require proposals to: (a) demonstrate, by reference to 1a) to c) above, that a mixed use approach to the site, involving a viable level of replacement or alternative employment provision, is not appropriate; and (b) that there is no conflict with Policy SH1.

2. Proposals for the expansion of existing businesses on-site, or onto adjoining land, will be permitted provided the expansion proposal would not result in a loss in the supply of small sites or units which are specifically intended for start-up businesses. Where expansion would result in the development of greenfield land mitigation measures will be required to minimise any adverse impacts on biodiversity and landscape.”

17 In relation to Site 5 Swan Quay, the examiner formed the following conclusions in his report:

“59. Site 05 is in a particularly sensitive location. As the plan on page 46 shows, it is to the north of a critical cluster of heritage assets (TS Hazard with undesignated heritage assets) and existing local landmarks, next to the Creek and at a location that is clearly visible from the publicly accessible Brents Swing Bridge and the proposed (in my opinion rightly) Designated Local Green Space at Front Bents. Two listed buildings, TS Hazard (built in the 15th century as a town warehouse and grade II\*) and the Faversham Creek Hotel (18th-century, grade II) are very close to it and within the site the early 19th-century Chandlery building is listed grade II. It contains a maritime use (sail-making) in a modern building that is in an appropriate style for its location and that contributes to jobs in a town that has a shortfall of jobs. I am not persuaded that the possibility that somewhere might be found for this in new development is a likelihood or a risk worth taking. As such, the loss of this employment use would conflict with SBLP policies B1 and AAP2 and would be of sufficient importance to prevent the NDP being in general conformity with the development plan.

60. In considering this site, I have had regard to national policies and advice contained in guidance issued by the Secretary of State. This includes:

- The Framework's 10th core principle, '*conserve heritage assets in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations*' ;
- The special position of designated heritage asset's in the Framework's paragraph 65; and
- The Framework's specific advice on Conserving and Enhancing the Historic Environment;

61. I also note

- The fact that the LBA in general and the general duties under its [ss 66 and 72](#) underpin government and local policy in respect of listed buildings and their settings and of conservation areas;
- The references in the SBLP to Faversham's '*outstanding range and quality of historic buildings*' and its '*rich architectural and historical heritage reflecting its naval and maritime history, its Roman and medieval legacy and its industrial heritage and archaeology*';
- The protection for existing buildings provided in SBLP's policy AAP2's '*preserve or enhance landmark and other important buildings, waterside structures and details*'; and
- The fact that EH had serious reservations about the appropriateness of the development proposed.

62. The proposals, which I recognise are illustrative, that Ms Taylor showed me for redevelopment of this site, did not impress me. Rather they illustrated the risk of gentrification of a part of the Creek that maintains something of its old character. I do not consider that residential development of this site would occur without gentrification. I recognise that, for some people, more open views of the creek down Quay Lane would be attractive, but this factor does not begin to outweigh my concerns about the historic damage of the proposals.

63. I consider that the first two paragraphs on page 47's column 1 are inadequate for this particularly sensitive site. The suggested '*minor modification*' gives a better and adequate description, which corresponds with my opinion following my site visits. Accordingly I recommend modification to replace the existing text."

18 The examiner's modification incorporated the description of the site and its contribution to the historic environment from the first five paragraphs of the statement of common ground which I have set out in full above and do not repeat. Thus, the examiner accepted that that which had been agreed in those first five paragraphs as a description of the site and its historic context were appropriate for inclusion by way of modification of the plan.

19 Having set out that modification, his report then continues in the following terms:

"64. Having regard to national policies and advice contained in guidance issued by the Secretary of State, I would not consider it appropriate to make the Plan if the proposals in the draft NDP in respect of Swan Quay remained. Without modification, basic conditions (a) and (e) would not be met. I would also have given considerable weight in the balance exercise basic condition (d) requires to the negative contribution to the achievement of sustainable development that these proposals would entail. However since I am recommending

modification to meet basic condition (a) and (e), I need not consider the latter point more fully.

65. In addition to my rejection in principle of the approach to site 05, I do not consider that three and three and a half storey (or higher) buildings would be appropriate in this location. This is not based on public opposition, which is not a matter for the examination stage of the draft NDP, but on my assessment of the impact of such buildings. I agree with the criticisms of such tall buildings by Mr Harrison, whose architectural and conservation expertise I note with respect. I am of course aware that there are taller buildings in other part of the Creek, but I do not consider that these set a precedent in this sensitive location.

## **Recommendation 21**

On page 47 delete the bottom half of column 1 from and including the heading '*Suggested Redevelopments, Designs and Land Uses*' and the whole of column 2 replace with:

'The current nature of the site, including its role as part of the setting of nearby listed buildings should be preserved and enhanced.

- Land uses could include offices/workshops (Class B1), maritime general industrial (B2 limited by condition) and a gallery (Class D1) and some limited car parking, but not dwelling houses (Class C3). It may be possible to permit new building consistent with the site's current character. If so, they should be constructed in yellow stock brickwork and slate roof with metal framed windows.
- In the event of any substantial development on the site a Creekside walkway must be provided along the frontage of the site in front of all the buildings.
- Moorings to be provided along the frontage suitable for a range of sizes of craft.
- Any redevelopment will need to provide a connection to the nearest point of adequate capacity in the sewerage network, as advised by Southern Water. There should be an adequate gap between the wastewater pumping station and development to allow odour dispersion and help prevent an unacceptable impact from vibration. Development proposals must ensure future access to the existing sewerage infrastructure for maintenance and upsizing purposes.
- Close to this site is the junction of Quay Lane and Conduit Street. The Faversham Creek Streetscape Strategy sets out a project to form a sitting-out area for the Faversham Creek Hotel and formation of a square with better quality paving, measures to encourage slower traffic including a shared surface and measures to improve the boundary treatments of adjoining sites.

The neighbourhood plan places responsibility firmly upon any applicant to demonstrate the appropriateness and suitability of their proposed design through the formal planning application process. This demonstration must be made with regard to the range of policies in this neighbourhood plan, not just the

site-specific ones. It must also comply with the [Planning \(Listed Buildings and Conservation Areas\) Act 1990 sections 66 and 72](#) .’

66. For the above reasons I also recommend modification of policies SWQ1 and SWQ2.

## **Recommendations 22**

Replace policies SWQ1 and SWQ2 with:

‘SWQ1: Use classes: the site shall be used for a mix of office and workshops (Class B1) retail, maritime general industrial (Class B2 limited by condition), and may be used for a gallery (Class D1). It shall not be used for dwelling houses (Class C3).

SWQ2 Public walkways shall be created along the Creek frontage and to the extent that is consistent with the site's character through the site from Belvedere Road.’”

20 The examiner also accepted that it was necessary to include the two additional policies from the statement of common ground in relation to buildings and features making a positive contribution to the conservation area and archaeology. It will be noted that the examiner's modifications to the suggested redevelopment in effect replaced in toto that which was proposed for the redevelopment of the site in the submission draft of the FCNP. In addition his modifications to policy SWQ2, excluded the possibility of residential uses at Swan Quay. This aspect of the modifications is the focus of the claimant's attack on the examiner and the defendant's conclusions and proposed modifications.

21 On 25 May 2016, the defendant resolved to accept the examiner's modifications, as he had concluded that without the modifications he proposed the basic conditions would not be met. The defendant also resolved to progress the FCNP to a referendum. The decision statement in relation to those resolutions was published on 21 June 2016 and is the subject of this challenge.

## **The law**

22 A central feature of the planning system is the development plan. By [section 38\(3\) of the Planning and Compulsory Purchase Act 2004](#) , which defines the development plan outside London, the neighbourhood development plans which have been made in relation to a local planning authority's area are included within the development plan. The neighbourhood development plan as an element of the development plan is itself defined in [section 38A](#) of the 2004 Act:

## **"38 A Meaning of 'neighbourhood development plan'**

(1) Any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan.

(2) 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.

(3) [Schedule 4B](#) to the principal Act, which makes provision about the process for the making of neighbourhood development orders, including—

(a) provision for independent examination of orders proposed by qualifying bodies, and

(b) provision for the holding of referendums on orders proposed by those bodies is to apply in relation to neighbourhood development plans (subject to the modifications set out in [section 38C\(5\)](#) of this Act).

(4) A local planning authority to whom a proposal for the making of a neighbourhood development plan has been made—

(a) must make a neighbourhood development plan to which the proposal relates if in each applicable referendum under that Schedule (as so applied) more than half of those voting have voted in favour of the plan, and

(b) if paragraph (a) applies, must make the plan as soon as reasonably practicable after the referendum is held and, in any event, by such date as may be prescribed.

[ ... ]

(12) [ ... ] 'qualifying body' means a parish council, or an organisation or body designated as a neighbourhood forum, authorised for the purposes of a neighbourhood development plan to act in relation to a neighbourhood area as a result of [section 61F](#) of the principal Act, as applied by [section 38C](#) of this Act."



23 As a consequence of these provisions, [schedule 4B of the Town and Country Planning Act 1990](#) applies directly to the preparation of neighbourhood plans, although the language of [schedule 4B](#) is expressed in terms of neighbourhood development orders. [Paragraph 7 of schedule 4B](#) of the 1990 Act requires the submission by the local planning authority of the neighbourhood plan to independent examination if the requirements of [paragraph 6\(2\) of schedule 4B](#) (which are essentially formal and procedural) have been met. [Paragraph 8 of schedule 4B](#) provides the framework for the independent examination and requires (adjusted for the effect of [section 38C\(5\)](#) of the 2004 Act) as follows:

(1) The examiner must consider the following—

(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 38A and 38B](#)

[ ... ]

(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.

(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.

[ ... ]

(6) The examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights)."

24 Further provisions, so far as relevant to this case, are contained within [paragraph 10 of schedule B](#) in the following terms:

(1) The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).

(2) The report must recommend either—

(a) that the draft order is submitted to a referendum, or

(b) that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum, or

(c) that the proposal for the order is refused.

(3) The only modifications that may be recommended are—

(a) modifications that the examiner considers need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2),

[ ... ]

e) modifications for the purpose of correcting errors.

(4) The report may not recommend that an order (with or without modifications) is submitted to a referendum if the examiner considers that the order does not—

(a) meet the basic conditions mentioned in paragraph 8(2), or

(b) comply with the provision made by or under [sections 61E\(2\), 61J and 61L](#) .

[ ... ]

(6) The report must—

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

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

25 Upon receipt of the examiner's report, the local planning authority must consider it and, in relation to that, [paragraph 12 of schedule 4B](#) provides as follows:

(1) This paragraph applies if an examiner has made a report under paragraph 10.

(2) The local planning authority must—

(a) consider each of the recommendations made by the report (and the reasons for them), and

(b) decide what action to take in response to each recommendation.

[ ... ]

(4) If the authority are satisfied—

(a) that the draft order meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention rights and complies with the provision made by or under [sections 61E\(2\), 61J and 61L](#) , or

(b) that the draft order would meet those conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner)

a referendum in accordance with paragraph 14, and (if applicable) an additional referendum in accordance with paragraph 15, must be held on the making by the authority of a neighbourhood development order.”

26 [Section 61N](#) of the 1990 Act provides that a challenge to a decision maker under [paragraph 12 of schedule 4B](#) shall be brought by way of judicial review.

27 There has been limited consideration by the courts of the statutory framework relating to neighbourhood plans. In [R \(on the application of Larkfleet Homes Ltd\) v Rutland County Council \[2015\] EWCA Civ 597](#) , the Court of Appeal identified the bespoke and separate nature of the neighbourhood planning statutory regime, distinct from the regime for local development documents which are prepared by the local planning authority. As that case established, neighbourhood plans are capable of containing site allocation policies, as indeed the present FCNP did. In *BDW Trading Ltd (t/a Barratt Homes) & Anor v Cheshire West & Chester Borough Council* [2014] EWHC 1470 , Supperstone J had to deal with a judicial review challenge which, amongst other grounds, included a contention that there was a breach of the duty upon the local planning authority to ensure that the neighbourhood development plan met the basic conditions. Amongst other matters, the claimant submitted that the basic condition contained within paragraph 8(2)(a) (ie whether it was appropriate to make the order having regard to national policies and advice contained in guidance published by the Secretary of State) did not admit of a lighter touch than the requirement of soundness contained within [section 20](#) of the 2004 Act in relation to a local plan. Supperstone J concluded in the following terms in relation to that submission:

“In my view the criticisms made by the Claimants under Ground 2 of the challenge fail to appreciate the limited role of the Examiner which was to assess whether the Basic Conditions had been met. Condition (a) required Mr McGurk to have regard to national policies and then consider whether it was appropriate that the Plan should proceed. Condition (d) required that ‘the making of the order contributes to the achievement of sustainable development’. The Examiner considered both conditions and was entitled, in my view, on the evidence, to conclude that ‘Policy 1 has regard to national policy and contributes to the achievement of sustainable development’ (see para 33 above).

Further, I accept Mr Sauvain's submission 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. Whether or not there was any tension between one policy in the Neighbourhood Plan and one element of the eventual emerging Local Plan was not a matter for the Examiner to determine. The parties are agreed that there is no current strategic housing policy in an adopted plan that sets out the overall housing requirement or method of distribution of housing across the local authority area, but the Council does not accept that there are no strategic housing or other policies in the current adopted Local Plan.”

28 In paragraph 83 of the judgment, Supperstone J went on to reject the submission that the requirements of the basic conditions equated to a similar test to that demanded by [section 20](#) of the 2004 Act in respect of a local plan, namely that it is sound, a requirement which is further elaborated in paragraph 182 of the National Planning Policy Framework.

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.

33 The basic condition at paragraph 8(2)(e) does not refer to the neighbourhood plan (or neighbourhood order, for that matter) “as a whole”. Clearly evaluating the overarching policies and proposals of a neighbourhood plan will be a necessary exercise, but where, as here, a neighbourhood plan contains site-specific proposals, then it will be proper, if not essential, for the examiner additionally to consider those proposals individually against the basic conditions. I should add that it is clear that the basic condition in paragraph 8(2)(a), namely that having regard to material policies and advice in guidance from the Secretary of State it is “appropriate” to make the order, is again a question of planning judgment for the examiner to reach, applying that clear and straightforward statutory language.

34 As identified by [paragraph 10\(3\) of schedule 4B](#) , there is a clear limitation on the modifications which can be proposed by the examiner. In this instance only modifications which are needed to secure that the basic conditions would be met can be sanctioned in accordance with the legislation.

35 [Paragraph 10\(6\) of schedule 4B](#) requires the examiner to give reasons for each of the report's recommendations, along with a summary of the report's main findings. The seminal decision in relation to the giving of reasons in planning appeals is [South Bucks District Council v Porter \(No. 2\) \[2004\] 1 WLR 1953](#) . In R (on the application of Crownhall Estates Ltd) v Chichester District Council [2016] EWHC 73 , Holgate J expressed the concern that, given the more limited ambit of the task of an examiner compared to a decision maker in a planning appeal, some modification may be necessary to the principles in South Bucks . Those concerns are understandable. But, for the reasons which I will set out below, this case and my judgment on the reasons in this case do not turn on any such distinction. For the avoidance of doubt and for the purposes of this case, I have deployed the South Bucks principles as the yardstick for considering the examiner's reasons.

## **The grounds**

36 The claimant contends that the examiner's reasons, in particular in paragraphs 59, 62 and 64 to 65, are inadequate. It is submitted that he has failed to properly explain intelligibly why the redevelopment proposals endorsed by the submission draft should be abandoned, and in particular why residential development can no longer be part and

parcel of any residential redevelopment proposal. It is complained that his use of the term “gentrification”, which is not a land use planning term, is incapable of amounting to a land use planning basis for establishing conflict with policy AAP2. It is submitted that it is not capable of being a basis to reject residential redevelopment of the site.

37 Further, in so far as the examiner was concerned about tall buildings, his proposed modifications did not address building height. It is submitted that it was not legitimate to base any of his concerns on the claimant's illustrative scheme which did not represent a firm proposal or a planning application and was but one design response to the submission draft proposals of the FCNP for Swan Quay. Further, the examiner endorsed both the loss of employment use and the promotion of residential development on other of the FCNP sites, and it is complained that he failed to explain why that was appropriate on those sites but not on Swan Quay, or why the inappropriate and harmful effects he identified at Swan Quay would not also and equally be manifest on those sites.

## **Conclusions**

38 It is important to appreciate, as Ms Thomas pointed out in her submissions on behalf of the defendant, that the inspector's reasoning incorporated his adoption of the description of the site and its context taken from the statement of common ground. The incorporation of that description as part of the modifications recommended by his report is also part and parcel of the reasons which he gave for the conclusions he reached.

39 It is clear, in my judgment, from the examiner's reasons that a number of specific factors underpin his approach. As he noted in paragraph 59 of the report, the Swan Quay site is “in a particularly sensitive location”. The balance of that paragraph sets out the heritage assets which made the location particularly sensitive in terms of the historic environment. In paragraph 63, he explains that the submission draft's site description is inadequate and that the description from the statement of common ground is a better one and corresponds with his view of the site following his site visits. In adopting that description, the examiner also adopts the conclusions in relation to the positive contribution which the third building and the section of timber wall fronting the creek, with the open quay behind, make to the character and appearance of the conservation area. This is, of course, necessarily a very different context for proposals for the site from the submission draft, which contemplated more widespread demolition, and also represents a very different appreciation of the historic value and sensitivity of Swan Quay.

40 All of those matters are, in my judgment, fully, clearly and adequately reasoned and explained in the contents of the report. As the examiner explained in paragraphs 59 and 63 of his report, those conclusions are grounded in the historic assets in and around the site and his site visits, alongside the other material which he rehearses as part and parcel of the report. The site description which he endorsed emphasised within its terms “the working history of this part of the conservation area” and “the character and appearance of this part of the conservation area as part of the historic working Creekside”. The “industrial aesthetic” of a modern building housing a sail



maker “integrated well with the conservation area and retained a distinct working edge to the Creek”. In paragraphs 59 to 61, the examiner set out a range of policies from the Framework, and also included the strategic policies B1 and AAP2 which stressed the importance of retaining employment uses and, further identified the importance of the preservation of the historic character of the AAP2 area and its associations with industrial uses and the port use which historically had taken place within that area.

41 These reasons, in my judgment, fully explain the examiner's findings. His conclusion in paragraph 59 about the potential loss of employment from Swan Quay as a conflict with policies B1 and AAP2, which did not comply with the general conformity requirement, were a clearly explained planning judgment about which no legitimate complaint could be made. He was entitled to have regard to the claimant's proposals which had been placed before him as part and parcel of the examination. He recognised that they, and the residential use which they brought, were inconsistent with and harmful to the historic industrial character of that part of the creek and the site with which he was concerned.

42 Whilst I entirely accept that “gentrification” is not a land use planning technical term, in my view it did not need to be; it is a word which describes the erosion of the legacy of industrial use, and the surroundings of the historic assets associated with that use, by the introduction of a new and historically unprecedented residential use and associated activities. That new and historically unprecedented inconsistent use would bring with it, as the proposals showed, a different aesthetic and different design requirements which would harm the historic character. The findings as to the historic character and value of Swan Quay, the harm to that character caused by residential use and taller buildings, and the weight to be afforded to these matters were all questions of planning judgment, as was the issue of whether the extent of the harm arising meant that the basic conditions at paragraphs 8(2)(a) and 8(2)(e) could not be met by the FCNP without modification. The reasons for both the failure to meet basic conditions at paragraphs 8(2)(a) and 8(2)(e) and the need for modifications are clearly explained, in my judgment, by the examiner. True it is that the examiner could have said more. But that is not the test; his conclusions are clear from the reasons given.

43 The claimant is correct that the examiner did not explain in detail why his concerns in relation to the residential use at Swan Quay did not arise on other sites in the FCNP where residential uses and loss of employment were proposed. However, in my view, he did not need to. The reasons which he gave clearly set out that at Swan Quay he was addressing a site which was “particularly sensitive”. It was a site which, by virtue of the reasons he gave and the site description which he adopted in the modification, was clearly different, with its own particular qualities, from those other sites within the FCNP. There was, in those circumstances, no need for any form of compare-and-contrast exercise with the other sites in the FCNP. The examiner's evaluation of the Swan Quay site and of the FCNP and his modifications addressed the particular sensitivity of the site which he was considering, the demands which that raised in the context of the historic environment and the constraints which had to be respected as to what uses could properly be accepted as consistent with the particularly sensitive historic environment that he concluded was present.

44 It follows that, for all of these reasons, I am satisfied that the examiner's reasons

were legally adequate and fit for purpose, and make clear the basis upon which he made the modifications, which, in my judgment, he plainly had power to make.

45 For all of these reasons, this claim must be dismissed.

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