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Case No: CO/15278/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT AT MANCHESTER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 9th May 2014

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

(1) BDW TRADING LIMITED	<u>Claimants</u>
(t/a BARRATT HOMES)	
(2) WAINHOMES DEVELOPMENTS LTD	
- and -	
(1) CHESHIRE WEST & CHESTER BOROUGH COUNCIL	<u>Defendants</u>
(2) STEPHEN ROBINSON (THE COUNTING OFFICER FOR CWCBC)	
- and -	
(1) TATTENHALL & DISTRICT PARISH COUNCIL	<u>Interested Parties</u>
(2) TAYLOR WIMPEY UK LTD	

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Paul G. Tucker QC and Giles Cannock (instructed by **Brabners LLP**) for the **Claimants**
Stephen Sauvain QC and Martin Carter (instructed by **CWCBC Legal Services**) for the **Defendants**

Hearing dates: 24 and 25 March 2014

Judgment

As Approved by the Court

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Mr Justice Supperstone :

Introduction

1. The Claimants challenge the decision of the Executive Committee of the First Defendant (“the Council”) made on 4 September 2013 to agree that the draft Tattenhall Neighbourhood Plan (“the TNP”), as amended to take account of the recommendations made by the examiner Mr Nigel McGurk, should be put to a referendum.
2. Initially the Claimants sought an order to prevent the TNP progressing further pending the determination of these proceedings, however subsequently it was agreed between the Claimants and the Defendants that the referendum should be held as scheduled but thereafter no further steps shall be taken to progress the TNP. The referendum took place on 24 October 2013 resulting in a majority voting to endorse the TNP.
3. If the TNP is adopted then it will comprise part of the development plan for that part of the Borough of Cheshire West and Chester for the purposes of s.36 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”).

The Parties

4. The Claimants and the Second Interested Party (“Taylor Wimpey”) are national house building companies who have substantial commercial interests within the North West of England, in particular in Cheshire West. They have each applied for planning permission in respect of three green-field sites which lie on the edge of Tattenhall, within the area covered by the TNP. Each application was recommended for approval, but each was refused by the planning committee of the Council, contrary to that recommendation. Each was then appealed, pursuant to s.78 of the Town and Country Planning Act 1990 (“the 1990 Act”). The proposals comprised:
 - i) An appeal by Taylor Wimpey against the failure of the Council to determine within the statutory period an outline planning application for the residential development of up to 110 dwellings including construction of a new access and associated works on land adjacent to and rear of Adari, Chester Road, Tattenhall.
 - ii) An appeal by Mr Ashley Wall against the refusal of outline planning permission by the Council for the residential development of up to 137 dwellings, public open space, access and associated works on land to the rear of Greenlands, Tattenhall. The Second Claimant (“Wainhomes”) have entered into a conditional contract with Mr Wall to acquire his land in the event that permission is granted.
 - iii) An appeal by the First Claimant (“Barratts”) against the refusal of planning permission by the Council for the erection of 68 dwellings on land opposite Brook Hall Cottages, Chester Road, Tattenhall.

5. A combined public inquiry was held in June 2013 into the three appeals. The appeals are to be determined by the Secretary of State for Communities and Local Government. The decisions are awaited.
6. The Council is the local planning authority for the district within which the TNP lies.
7. The First Interested Party, Tattenhall and District Parish Council (“The Parish Council”), is the Parish Council for the Parish of Tattenhall, which has been instrumental in the preparation and promotion of the TNP.
8. The Second Defendant is the Counting Officer for the Council, who was joined to the proceedings solely in relation to the then prospective proceedings for interim relief prior to the referendum.

The Factual Background

The Development Plan in Cheshire West and Chester

9. Cheshire West and Chester Council is a unitary authority area with borough status, and was established in April 2009. It succeeded three former boroughs including Chester City Council and assumed the functions of the former Cheshire County Council within its area. Tattenhall lies within that part of the Borough which was formerly part of the area of Chester City Council.
10. The Chester District Local Plan (“CDLP”) was adopted by the Council on 12 May 2006 and sets out the Council’s policies for development and the use of land in the District for the years 1996-2011. It had been intended that the Local Plan would be replaced by a review of the Local Plan and/or the adoption of further Development Plan Documents (“DPD’s”). However that did not happen and on 10 March 2009 the Secretary of State issued a saving direction under paragraph 1 of schedule 8 to the 2004 Act that certain of those policies within the CDLP should continue to have force. Other policies within the CDLP expired by operation of law, including the policy, HO1, which established the housing land requirement for the district.
11. The Council is currently in the process of preparing a replacement to the CDLP. On 6 September 2013 the Council published for consultation a “publication draft” of its Cheshire West and Chester Local Plan (“CWLP”) (Part One, Strategic Policies). Consultation ended on 1 November 2013. On 23 December 2013 the submission draft was submitted to the Secretary of State who is understood to have appointed an Inspector to conduct an examination into the soundness of the plan. The examination hearing will commence on 17 June 2014. The draft CWLP (Part Two, Land Allocations and Detailed Policies) is due to be published in December 2014. Part One, once adopted, will set out the projected housing land requirement for the district. Part Two will establish where that requirement will be met (save for strategic policies).
12. Mr Paul Tucker QC, for the Claimants, in his skeleton argument summarises the CWLP preparation process as follows:

“4.1.6 CWLP preparation process is subject to a sustainability appraisal, which considers options. All of the options which

have been considered include some level of development within the rural settlements. The relevant full sustainability appraisal at the time of the TNP was entitled 'Interim Sustainability Appraisal' (November 2009, updated in January 2010) considered one of its options, Option D 'Balanced Development', which focussed significant development within the rural settlements as well as the larger settlements of the Borough. The 2012 Sustainability Appraisal has now been superseded by the Submission Sustainability Appraisal which was published in December 2013, which considers options for rural areas... and concludes that the preferred option is '20% of total housing requirement for rural areas including a specific housing provision in key service centres', which reflects the approach of the publication version of the local plan.

4.1.7 The publication draft CWLP was drafted in a manner which is closer to Option B of the 2012 Sustainability Appraisal 'Chester Based Development' but nonetheless recognises that significant development will have to take place within the rural settlements of the Borough, including Tattenhall. That is reflected in the submission version of the Local Plan, in particular STRAT 8 proposes 4,200 new dwellings will be delivered within the rural areas within the planned period with 250 being proposed at Tattenhall. The scale and distribution of housing within the Borough in general and the rural areas in particular is the subject of extensive unresolved objections to the Part One CWLP."

Neighbourhood Plan Preparation

13. In March 2011 the Parish Council secured funding to progress a Neighbourhood Development Plan ("NDP").
14. In August 2012 a document entitled "Tattenhall Neighbourhood Plan: Sustainability Appraisal Scoping Report" was published. That report concluded that the Strategic Environmental Assessment (SEA) Directive (see para 57-61 below) applied to the TNP since its proposals and policies gave rise to significant environmental effects; and that the requirement for an Environmental Report for the purposes of the SEA Directive would be met by the process of undertaking a Sustainability Appraisal.
15. At Appendix 1 the Scoping Report notes that it is a requirement of the emerging CWLP that Tattenhall provide "X new dwellings over the planned period". That is then said to have the following implication for the TNP: "the Neighbourhood Plan shall take account of policies set out in the emerging CWLP". The report indicates that the TNP should be informed by the findings of the Strategic Housing Land Availability Assessment and the Strategic Housing Market Assessment of the emerging CWLP.
16. In October 2012 an Interim Sustainability Appraisal ("ISA") was produced. At paragraph 4.8 the ISA reported a tension between the draft TNP and the requirements of national policy:

“There is some uncertainty in the short term over how successful the Neighbourhood Plan will be in prioritising the reuse of brownfield land, protecting the scale and character of Tattenhall and meeting local housing needs. This is due to possible tensions between the Neighbourhood Plan and the Borough’s current five-year housing land supply shortfall. This issue could take [precedence] over some of the Neighbourhood Plan’s proposals, but this would be dependent on variables that include the application of policies, the weight attached to the Council’s emerging Local Plan and the Neighbourhood Plan in decision making. In the medium to longer term very positive effects are more likely.”

17. In answer to the question as to whether the TNP provides sufficient housing to meet identifiable needs, at Appendix 2 the ISA observes:

“The number of new homes sought through the Neighbourhood Plan is consistent with evidence of housing needs prepared in support of Cheshire West and Chester Council’s emerging Local Plan. The Neighbourhood Plan sets out that proposals for new housing development will be reviewed to ensure they are supplying a mix of housing types and tenures to suit local requirements. A 40% affordable housing requirement will be applied to eligible housing schemes, reflecting local demand and that housing affordability is a key local priority. In the short term there is a risk that housing delivery will not address local needs, as these could be dictated by the housing requirements of the wider Borough. Positive effects should be permanent.”

18. On 17 January 2013 the Tattenhall area was designated for the purposes of preparing a NDP.
19. In May 2013 the final version of the Sustainability Appraisal (“SA”) was produced. By the time of the final draft of the TNP the references within the October 2012 consultation draft to the housing requirement of up to 300 dwellings being required over the plan period (derived from the emerging CWLP) had been removed from the TNP and the SA assessed the TNP against a requirement to provide sufficient housing to meet identified needs. (Criterion 14 of table 2, at page 10).
20. The material parts of the SA state:

“Developing the Plan Strategy and Options

- 3.16 The SEA directive requires the consideration and appraisal of reasonable alternative plan options in the assessment of the Neighbourhood Development.
- 3.17 The preparation of the draft Neighbourhood Plan has been an iterative process. Its direction of travel has been informed by extensive public consultation and a

clear vision about how the Parish should develop. An exhaustive process of identifying, exploring and testing options has therefore not been appropriate or necessary in this instance.

Existing policies

- 3.18 To help quantify the likely effects of producing a Neighbourhood Plan a ‘do nothing’ option has also been assessed. This identifies the likely sustainability impacts that would occur if the Neighbourhood Plan was not adopted and existing policies at the national, regional and Borough level were in place.
- 3.19 The ‘do nothing’ appraisal has been undertaken on the basis that in the short term the adopted Chester Local Plan and National Planning Policy Framework will be in effect, and in the medium to long term the National Planning Policy Framework and the new Cheshire West and Chester Local Plan (currently under preparation).

Technical Difficulties Encountered

- 3.20 The SEA Directive requires the identification of any difficulties, such as technical deficiencies or lack of know-how encountered when undertaking the sustainability appraisal. The following difficulties arose during the appraisal:
- Conformity and Weight – there is still some uncertainty over the alignment of the Neighbourhood Plan with the current and emerging development plan for the Borough and its weight in decision making. ...
- ...
- Options – No alternatives have been proposed to the policies in the draft Plan, however its preparation has been an iterative process guided by a clear vision. Identifying options has not been necessary in this instance.

4. Results of the Assessment

4.1 An appraisal of the Neighbourhood Plan’s objectives and policies has been undertaken against the SA framework. ...

...

Neighbourhood Plan Policies

...

- 4.4 Given that the policy framework is set out more clearly than at draft stage the overall assessment is more certain at this stage. The full appraisal matrix set out in Appendix 2. In summary the assessment of the Neighbourhood Plan has revealed that:

...

- There is some uncertainty in how the Neighbourhood Plan policies would operate in relation to redevelopment of brownfield land, in light of the Borough's five year housing land supply shortfall, status of current Local Plan policies on housing and that the Council is at the early stages of the preparation of the new Local Plan for the Borough. This issue could take [precedence] over some of the Neighbourhood Plan's proposals, but this would be dependent on variables that include the application of policies, the weight attached to the Council's emerging Local Plan and the Neighbourhood Plan in decision making. In the medium to longer term very positive effects are more likely."

21. Appendix 2 in the appraisal matrix, in relation to objective 14, states:

“Effects of the Plan

The Plan supports meeting the identified needs of the area as will be set out in the new Local Plan for the borough, currently in preparation. The Neighbourhood Plan strategy will ensure that proposals for new housing development bring forward a mix of housing types and tenures to suit local requirements including affordable housing requirements.

Existing Policies

Existing policies should deliver housing to meet the Borough's housing demands, but in the short term there is a greater risk that development may come forward without regard to the specific local circumstances of need given the Borough's five year housing land supply shortfall, status of current Local Plan policies on housing and that the Council is at the early stages of the preparation of the new Local Plan for the borough. A 40% affordable housing requirement would be applied to eligible housing schemes in the Tattenhall area.”

22. The draft TNP dated May 2013 for the years 2010 to 2030 in the section headed “The Neighbourhood Plan Strategy – Sustainable Development for the Whole Community” states:

“Sustainable development is about positive growth – making economic, environmental and social progress for this and future generations. These three dimensions constitute what is sustainable in planning terms.

...

People living in Tattenhall appreciate the special qualities the village possesses. It is a great place to live and in accommodating housing growth it will be vital that the qualities which make Tattenhall so successful are protected. Local people accept that new people will want to come and live in Tattenhall and this is important to any thriving and evolving community.

This plan is not anti-development and the community understands the need to accommodate housing growth. But there is great concern that new development in Tattenhall could erode the very qualities that make the village special if it is not carefully managed in terms of its scale and design. The next layer of growth for the village must create developments of quality which contribute to the character of the village and which provide local benefit. It must be more than an exercise in meeting housing supply ‘numbers’ by the addition of characterless estates on the rural fringes of the village more typical of suburban developments. Our objective, therefore, is to enable the provision of a choice of new homes to meet the needs of all sections of the community in a manner which respects the character of the village and wider parish. ...

Strategy

...

Housing growth is to be accommodated in a sensitive way and the strategy for housing growth is explained later in this document (see Policy 1). This is primarily based on modest scale developments within and on the edge of Tattenhall village but also enabling smaller scale development across the Parish. Future growth based on large scale, inappropriate development along existing village boundaries will not be supported by the community.

...

The Neighbourhood Plan Policies

...

Housing

Justification and evidence

There are currently 1,090 dwellings in the parish of Tattenhall. Of these 847 are located in the village while the remainder are spread around the Parish including the smaller settlements of Gatesheath and Newton-by-Tattenhall.

The Cheshire West and Chester Local Plan will set the agenda for housing numbers and growth within Tattenhall as a strategic service centre. Tattenhall is looking to plan positively to meet its identified local housing requirement and will respond to the supply of these new homes.

The best villages have developed through incremental growth that harmonises with the existing character of their setting and buildings. It is essential that this continues to be the case in Tattenhall. The supply of new homes in the village and wider parish must be realised in accordance with the distinctive features, scale and grain of the local area. Housing sites must be carefully considered and will only be acceptable where they reflect these principles and are consistent with the Neighbourhood Plan taken as a **whole**.

...

The community recognises that housing development can sometimes bring wider benefits, such as the redevelopment of brownfield sites, securing the ongoing use of a building and providing much needed affordable homes. Such proposals will be supported in accordance with this policy and the Neighbourhood Plan.

Community Feedback

Consultation on the emerging Neighbourhood Plan revealed the following key issues in relation to this topic that the policy seeks to address:

- Respect the current village character – 92% agreed
- Add value and vitality to the community – 91% agreed
- Add housing choice and meet local needs – 86% agreed
- Comply with the Village Design Statement – 88% agreed
- Be limited to 25 new homes over the next 5 years – 28% agreed
- Be limited to 26-50 new homes over the next 5 years – 52% agreed

- Be limited to 51-100 new homes over the next 5 years – 19% agreed
- Use brownfield sites as a priority – 94% agreed

The following plans, documents and strategies support policy 1:

- National Planning Policy Framework
- Cheshire West and Chester Local Plan
- Chester District Local Plan
- Cheshire West and Chester Strategic Housing Market Assessment
- Tattenhall Village Design Statement
- Tattenhall Neighbourhood Plan Sustainability Appraisal Scoping Report

Policy 1

To enable managed housing growth in the Parish:

- Proposals involving up to 30 homes will be allowed within or immediately adjacent to the built up part of Tattenhall village over the period 2010 to 2030.

...

Exceptions will be made where additional housing development involves the redevelopment of brownfield land (subject to its environmental value), the conversion of existing buildings or affordable housing-led ‘exceptions’ schemes. ‘Exceptions’ schemes will be allowed to contain an element of ‘enabling’ market housing, but no more than 30% in any individual scheme.

All housing proposals should

- Provide a mix of homes taking into account objectively identified housing needs, and include an element of affordable housing as specified in the Local Plan. The affordable housing will be subject to a S106 Legal Agreement, or planning condition, ensuring that it remains an affordable dwelling for local people in perpetuity.
- Respect and, where possible, enhance the natural, built and historic environment.

- Maintain both the existing overall shape of Tattenhall village, and the strong and established sense of place.”

23. A section of the document headed “Plan Delivery and Implementation” states:

“The Neighbourhood Plan will be delivered and implemented over a long period and by different stakeholders and partners. It is not a rigid ‘blue-print’ and provides instead a ‘direction for change’ through its vision, objectives and strategy. Flexibility will always be needed as new challenges and opportunities arise over the plan period. In this respect the review period will be crucial.”

In relation to “Housing Growth” it is stated:

“The Parish Council will work with developers and the Local Authority to deliver incremental growth over the Plan period.”

Finally this section states:

“The Tattenhall Neighbourhood Plan is a ‘living’ document and as such will be reviewed every 5 years.”

24. The Tattenhall Neighbourhood Development Plan Basic Conditions Statement dated May 2013 explains how the proposed Tattenhall NDP has been prepared in accordance with the Neighbourhood Planning (General) Regulations 2012 and how the basic conditions of neighbourhood planning and other considerations as prescribed by paragraph 8 of Schedule 4B to the 1990 Act have been considered to have been met. Paragraph 2.5 states that:

“The Tattenhall NDP covers the period from 2010 to 2030. A total of 20 years with 5 year reviews. This period has been chosen to align with the emerging Cheshire West and Chester Local Plan being prepared by Chester West and Chester Council.”

25. In relation to the Cheshire West and Chester Local Plan the Basic Conditions Statement states that it

“5.15 ... endeavours to demonstrate that the Tattenhall NDP will not conflict with the saved policies of the existing Local Plan and the emerging local plan once it is made.

5.16 The policies in the Neighbourhood Plan reflect that the Local Plan is still under preparation. It seeks to refine and add detail to the overall strategic planning policy of the Local Plan, and to be flexible enough to work alongside the implementation of the Local Plan once adopted.”

26. In June/July 2013 there was a six-week consultation period in respect of the second draft NDP during which representations were made to the plan. The Claimants and Taylor Wimpey objected to Policy 1 of the TNP.

27. Subsequently Mr McGurk was appointed to act as the Examiner of the TNP. On 14 August 2013 he convened an oral hearing to examine certain aspects of the TNP in more depth. Thereafter his report dated August 2013 was published by the Council.

The Examiner's Report

28. Mr McGurk noted that “an Independent Examiner must consider whether a neighbourhood plan meets the ‘Basic Conditions’ which were *set out in law* following the Localism Act 2011”, which he summarises. He confirms that he has examined the Neighbourhood Plan against these Basic Conditions, and “whether the policies of the Neighbourhood Plan have regard to national policies, contribute to sustainable development and are in general conformity with strategic development plan policies”. (p6)
29. Mr McGurk records that a small number of representations to the TNP considered it to be “premature” in the light of there being an emerging, but un-adopted, Local Plan for Cheshire West and Chester. However, he observes, “the fact that there is an emerging development plan in a local authority area is not unusual and there is nothing in the legislation to support the contention that such a situation should stop, or slow down, the progress of a neighbourhood plan”. (p6)
30. The Council confirmed that policy HO1, which previously set out the scale of housing provision, has lapsed as it was not saved in 2009 and cannot, therefore be taken into account. Mr McGurk said that this particular point led a number of objectors to state that the TNP should not progress until a new housing provision policy has been adopted across the whole of the local authority area. However, in his view
- “there is nothing in the legislation which states, or suggests, that the absence of a strategic housing provision policy in a development plan means that a neighbourhood plan should not include a housing policy, or policies. On the contrary, ... a neighbourhood plan provides a good opportunity to provide for a degree of certainty in such situations. More fundamental, and the focus of this examination, is whether the policies of the Neighbourhood Plan meet the Basic Conditions.” (p7)
31. Mr McGurk expressed himself as being satisfied that the TNP did not breach, nor is in any way incompatible with the ECHR, and that it is compatible with EU obligations. He notes that it was considered that the TNP would be likely to have a significant environmental effect and that a SEA was required. He further notes that a Sustainability Appraisal (SA), together with a comprehensive Sustainability Appraisal Scoping Report (SR), had been produced to support the TNP. Prior to final versions being produced, the SA and SR documents went through interim and draft stages, respectively, which allowed for the results of consultation and the evolution of the TNP to be taken into account. He states:

“Together, the SA and SR provide a thorough, detailed consideration of the Neighbourhood Plan’s sustainability credentials. Their content is thorough and comprehensive and I find it clearly demonstrates how the SA in particular has

supported the plan-making process, by testing its proposals in the light of a clearly defined methodology.

The overall approach to assessing the Neighbourhood Plan's environmental, social and economic effects meet the legal requirements of the EU's SEA Directive." (p9)

32. Mr McGurk considers Policy 1 of the TNP at pages 17-22 of the Report, which need to be read in their entirety. The material parts include the following statements:

"The Neighbourhood Plan recognises that the Cheshire West and Chester Local Plan will 'set the agenda for housing numbers and growth'. In the absence of a current adopted policy setting out housing supply for the whole local authority area, the Neighbourhood Plan does not seek to determine the overall quantum of houses to be built within the Neighbourhood Area during the plan period. Rather, its emphasis is on influencing *how* housing will be delivered. Housing supply for the local authority area will be rigorously examined over the coming period through consideration of the emerging Cheshire West and Chester Local Plan.

...

The approach taken by the Neighbourhood Plan is clear – it allows for any specific housing numbers and site allocations to be determined through the emerging Local Plan and the rigorous examination that this will entail, whilst adopting a positive approach to housing growth. I consider this to be a sensible and pragmatic approach which, crucially, has regard to the Framework. Furthermore, with regard to national policy and in general conformity with strategic local policy, the Neighbourhood Plan, when considered as a whole, sets out the type of new developments that would be appropriate to enable growth whilst respecting local character. Given all of this, Policy 1 provides a housing policy that is relevant and distinctive to Tattenhall and which meets the Basic Conditions..." (p18).

33. Mr McGurk continues:

"In recognising the purpose of sustainable development, the Framework emphasises that *development* means growth. The Neighbourhood Plan is **explicit** in its recognition of the need to plan positively for growth and to provide for a wide choice of high quality homes. Subject to various other requirements, particularly with regard to encouraging sustainable development (and I note the Neighbourhood Plan's helpful reference to the need to consider its policies as [a] whole), Policy 1 does not place a limit on the total quantum of housing to be built across the Neighbourhood Area. This is in keeping

with the Framework's clear agenda for sustainable housing growth, which looks to provide the supply of housing required to meet the needs of present and future generations. Consequently, Policy 1 has regard to national policy and contributes to the achievement of sustainable development.

...

The Neighbourhood Plan recognises the pressures for residential development in the area. The objections from landowners and housebuilders appear to reflect the significant demand to develop individual sites of more than 30 houses around the edge of Tattenhall. Policy 1 is aimed at providing for housing growth, whilst preserving what it is that makes the Neighbourhood Area special." (p19).

34. Mr McGurk notes that a number of different arguments were presented against the "30-limit", which included that the figure is arbitrary, with no evidence base. He stated:

"Importantly, in my view, no representations demonstrated that housing growth *could not be achieved* in the way set out in Policy 1." (p20)

He observed with regard to the suggestion that the 30 threshold is arbitrary, with no evidence base, that he is

"mindful that Policy 1 has been determined by the Parish Council and Steering Group further to a comprehensive and open consultation process... . There is nothing to suggest that developers and housebuilders were prevented from engaging in this process. ...

...

To achieve carefully managed growth, Policy 1 allows for individual developments of a modest scale, whilst, subject to other policies, placing no cap on the total number of houses to be built within the Neighbourhood Area.

In this way, the Neighbourhood Plan provides a clear policy approach which, I find, achieves the difficult overall balancing act of supporting housing growth whilst preventing large scale new development that could, in the words of the Neighbourhood Plan 'erode the very qualities that make the village special'. Through the Neighbourhood Plan, the community is exercising its power to prevent house building from being a mere 'exercise in meeting housing growth numbers'. Policy 1 has thus been drafted to include the specific aim of preventing the addition of large housing estates, more typical of suburban developments, to the edge of Tattenhall.

This approach is entirely in line with the Framework, which requires policies to recognise housing growth *and* respond to local character and reflect the identity of local surroundings.” (p20).

35. Mr McGurk concludes on the “30-limit” as follows:

“Taking all of the above into account, I find that introducing the threshold of 30 homes has been a far from ‘arbitrary’ process. It is an approach founded on the evidenced local desire to maintain and enhance the distinctive and cherished qualities of Tattenhall and District. It is an approach which has regard to national planning policy and which contributes to the achievement of sustainable development. ...

...

It was established during the Hearing that objectors to Policy 1 accept that developments of up to 30 homes can deliver public benefits.” (p21).

36. With regard to the final sentence in Policy 1 Mr McGurk said:

“Were Policy 1 to remain as drafted, it would fail to provide for housing growth. If this were the case, Policy 1 would not have regard to the Framework and would fail to meet the Basic Conditions. However, I am satisfied that the intention of this final sentence is not to prevent housing growth, but is simply a case of poor drafting. The clear intent of this part of the policy is to maintain Tattenhall’s overall character. Alteration to the wording, as set out below, is essential. It ensures that Policy 1 does not fail to meet the Basic Conditions in this specific regard.

Delete the final sentence of Policy 1. Replace it with a sentence which reads ‘*Maintain Tattenhall village’s strong and established sense of place*’.

37. The section of the report on “Housing Growth” concludes:

“...I find that in providing for appropriate growth, Policy 1 contributes to the achievement of sustainable development, has regard to national policy and is in general conformity with the strategic policies of the development plan.

Importantly, I consider the proposal to limit individual developments to 30 homes to be distinctive to Tattenhall and District. It is a *ground-breaking policy*. It provides a tangible example of how neighbourhood planning can empower local people to shape their own surroundings. In so doing, it meets

with one of the core land-use planning principles of the Framework.

Further to all of the above, I am satisfied that Policy 1 meets the Basic Conditions.” (Page 22).

38. On 4 September 2013 the Council’s executive resolved that the TNP should proceed to a referendum, having made certain recommendations.

The Statutory Framework

1. Development Plan Preparations

39. S.70 of the 1990 Act provides that when determining an application for planning permission regard must be had to the development plan for the area. S.38 of the 2004 Act provides, in so far as is material,

“(3) ... The development plan is—

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and

(c) the neighbourhood development plans which have been made in relation to that area.

(5) If to any extent a policy contained in a development plan for an area conflicts with another policy in the development plan the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.

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

40. S.38A(2) of the 2004 Act defines a neighbourhood development plan (“NDP”) as

“... a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan.”

41. By s.15(1) of the 2004 Act the local planning authority must prepare and maintain a scheme to be known as their local development scheme. S.15(2)(aa) provides that the scheme must specify the local development documents which are to be development plan documents (“DPDs”).

42. S.17(3) of the 2004 Act provides that the local planning authority’s local development documents (“LDDs”) “must (taken as a whole) set out the authority’s policies (however expressed) relating to the development and use of land in their area”. The Town and Country Planning (Local Planning) (England) Regulations 2012, made

pursuant to s.17(7)(za) for the 2004 Act, prescribe which documents comprise local development documents (“LDDs”). Regulation 5 identifies those documents which are to be prepared as LDDs, and which by Regulation 6 are to be referred to as part of the area’s “Local Plan”. Those are, in so far as is material:

“(1)(a) Any document prepared by a local planning authority individually or in co-operation with one or more other local planning authorities, which contains statements regarding one or more of the following—

(ii) the allocation of sites for a particular type of development or use;

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(2) ... The documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

(i) relates only to part of the area of the local planning authority;

(ii) identifies that area as an area of significant change...; and

(iii) contains the local planning authority’s policies in relation to the area; and

(b) any other document which includes a site allocation policy.”

43. S.19 of the 2004 Act provides for the preparation of local development documents. By s.19(1) DPDs must be prepared in accordance with the local development scheme. By s.19(2)

“In preparing a development plan document or any other local development document the local planning authority must have regard to—

(a) national policies and advice contained in guidance issued by the Secretary of State;

(f) the sustainable community strategy prepared by the authority;

(5) The local planning authority must also—

(a) carry out an appraisal of the sustainability of the proposals in each development plan document;

(b) prepare a report of the findings of the appraisal.”

44. S.20, headed “Independent Examination”, provides:

“(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.

(5) The purpose of an independent examination is to determine in respect of the development plan document—

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound; ...”

45. By reason of s.39(2), when promoting a local development document:

“(2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development.”

46. The process for the making of Neighbourhood Development Orders is set out in Schedule 4B to the 1990 Act. Section 38A(3) of the 2004 Act provides that the references in Schedule 4B to the 1990 Act to “Neighbourhood Development Orders” are to be read as if they were references to “Neighbourhood Development Plans”.

47. If a local planning authority receives a proper proposal for a neighbourhood development order (see para 6), then the authority must submit for independent examination the draft neighbourhood development order, and such other documents as may be prescribed (para 7(2)). By para 7(6) the person appointed by the authority to carry out the examination

“... must be someone who, in the opinion of the person making the appointment—

(a) is independent of the qualifying body and the authority,

(b) does not have an interest in any land that may be affected by the draft order, and

(c) has appropriate qualifications and experience.”

48. By paragraph 8(1) the examiner must consider whether the proposal meets the “basic conditions” set out in paragraph 8(2) and “such other matters as may be prescribed”. Paragraph 8(2) provides, so far as relevant:

“A draft order meets the basic conditions if—

(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,

(d) the making of the order contributes to the achievement of sustainable development,

(e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),

(f) the making of the order does not breach, and is otherwise compatible with, EU obligations...”

49. Paragraph 8(6) provides that “the examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights)”.

50. Paragraph 10 provides:

“(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.”

51. Paragraph 12 provides for consideration by the authority of recommendations made by the examiner. By paragraph 12(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.”

The policy framework

52. Paragraph 14 of the National Planning Policy Framework (March 2012) (“NPPF”) states:

“At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For plan-making this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;
- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
 - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; ... ”

Paragraph 17 of the NPPF contains a set of core land-use planning principles which should underpin both plan-making and decision-taking. They include as part of the third principle that:

“Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth.”

53. Section 6 of the NPPF headed “Delivering a wide choice of high quality homes”, includes at paragraph 47 the following:

“To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable sites sufficient to provide five years’ worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the

plan period) to ensure choice and competition in the market for land. ...”

54. Paragraph 49 states:

“Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up to date if the local planning authority cannot demonstrate a five year supply of deliverable housing sites.”

55. Paragraphs 183-184, in the section of the NPPF concerned with Neighbourhood Plans, state as follows:

“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.”

56. The Planning Practice Guidance, in relation to Neighbourhood Planning (latest revision 6 March 2014) answers the question “Can a Neighbourhood Plan come forward before an up to date Local Plan is in place?” as follows:

“Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.

A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. A draft Neighbourhood Plan or Order is not tested against the policies in an emerging Local Plan although the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested.”

2. Environmental Assessments of Development Plans

57. The preparation of plans and programmes relating to the development of land is governed by EU Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment (“the Directive”).

58. Article 3(1) provides that:

“An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.”

59. Article 4 sets out general obligations. By Article 4(1) “the environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure”. Article 4(3) provides as follows:

“Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3).”

60. Article 5 states, in so far as is relevant:

“1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex 1.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the

extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.”

61. Annex 1 includes the following:

“(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.”

62. The Directive is transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004 (“The SEA Regulations”). Regulation 5 of the SEA Regulations requires the decision maker to undertake environmental assessment of an emerging Plan during its preparation and before its adoption or submission to the legislative procedure. Regulation 12 provides in relation to the preparation of the environmental report as follows:

“(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

(4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making...”

Grounds of challenge

63. The Claimants challenge the Council’s decision on four grounds:

- i) A failure properly to comply with the SEA Directive (**Ground 1**)
- ii) Breach of the duty imposed upon the Council to ensure that the NDP meets the Basic Conditions of Schedule 3 of the Neighbourhood Planning (General) Regulations 2012 (**Ground 2**).
- iii) Apparent bias (**Ground 3**).
- iv) Policy 1 was introduced without meaningful evidence and was not properly enquired into by the Examiner who failed to provide proper reasons for its retention (**Ground 4**).

Submissions and discussion

Ground 1: failure properly to comply with the SEA Directive

64. Mr Tucker submits that the Council failed to undertake a proper SEA, and that should have led it to conclude that the TNP should not be submitted for referendum, irrespective of the Examiner’s conclusions in this regard. The obligation for complying with the requirements of the Directive falls upon the Council.

65. The Sustainability Appraisal and the SEA at each iteration expressly disavowed consideration of alternatives other than that which was promoted in the TNP in breach of Regulation 12(2). Thus Mr Tucker submits at paragraph 6.1.4 of his skeleton argument that

“no consideration was given, during the process of SEA of the environmental and sustainability effects of

(i) limiting the extent of development that could come forward in Tattenhall during the plan period, at a time when the extent and distribution of housing across the district has not been established and when the CDLP, which was prepared for the duty under s.39 of the 2004 Act in relation to the pursuit of sustainable development came into effect, is agreed to be out of date in so far as its housing policies are concerned and does not

provide a strategic policy context against which paragraph 8 can be properly assessed;

(ii) limiting the scale of any one site to 30 dwellings without consideration of whether a strategy involving fewer larger sites would represent a more suitable environmental and/or sustainable alternative than a more dispersed pattern of development, notwithstanding that such proposals were being actively considered at the time of preparation of the TNP...; and/or

(iii) complying with the obligation to revisit the issue of the size limit in the light of removal of the specific Tattenhall-wide target.”

66. In this context Mr Tucker submits that the final SEA was inadequate by not considering either the effect of the constraint caused by Policy 1 upon the delivery of housing in the District, or whether an alternative policy approach would be more sustainable. Mr Tucker describes the fundamental issue as being that the TNP has been promoted with a housing development management policy which places a practical constraint on delivery in advance of the adoption of an up to date local plan.

67. In response Mr Stephen Sauvain QC, for the Council, relied upon the witness statement of Ms Hilder, a Principal Planning Officer at Cheshire West and Chester Council, as to how the SEA Directive was applied in the preparation of the TNP. At paragraph 24 of her witness statement Ms Hilder notes that the SEA Directive requires the consideration and the appraisal of reasonable strategic alternative options. She continues:

“25. The consultation undertaken set the framework for deciding the reasonable alternative options for the policies in the Neighbourhood Development Plan and informed the decisions taken on what the draft policies would contain. Those options that had not commanded community support were not considered to be reasonable to take forward in the draft plan. Therefore, reasonable options were determined through the community consultation exercise.

26. The outcomes of the public consultation are set out in the justification and evidence section for each of the policies in the Neighbourhood Development Plan. These results demonstrate what would and would not be supported by the community.”

68. At paragraph 29 Ms Hilder states in relation to Policy 1:

“... The draft policy reflected that the community supports new housing growth in line with the growth proposed in the emerging Local Plan, but [the steering group] wish that development to come forward in a phased manner and at a scale that reflects the existing character of the area’s setting and buildings. The result was Policy 1 which sets out how

managed housing growth in the Parish should come forward. The limit of 30 homes per site is only one part of the policy which includes other guidance for future housing development. ... This was considered to be the only reasonable approach to housing taken in the Neighbourhood Development Plan that would... be supported by the community at referendum stage.”

69. Ms Hilder acknowledges that the Sustainability Appraisal did not appraise any discrete policy alternatives, but she states that in order to quantify the likely effects of the TNP and in line with the SEA Directive requirements, the process did consider two strategic alternatives. These she sets out at paragraph 32 of her witness statement:
- “Having the Neighbourhood Plan in place following a successful referendum and the policies becoming part of the development plan for the borough; and
 - A ‘do nothing’ scenario. This identified the likely sustainability impacts that would occur if the Neighbourhood Plan was not adopted and existing policies at the national, regional and Borough level were in place. The ‘do nothing’ appraisal was undertaken on the basis that, in the short term, the adopted Chester Local Plan and National Planning Policy Framework would have operational effect. It was also assumed the North West Regional Spatial Strategy would by then have been revoked with effect on 20 May 2013. This would be the context at the time the Neighbourhood Development Plan would have been made and, in the medium to long term, the National Planning Policy Framework and the new Cheshire West and Chester Local Plan (currently under preparation) would be in place.”
70. Ms Hilder observed that the methodology and findings of the Sustainability Appraisal process were available at the key stages in the consultation process on the TNP, but no comments were received that the Sustainability Appraisal adopted was inadequate or that it failed to meet the requirements of the SEA Directive (para 34). Mr Sauvain notes that no submissions or representations were made to the Examiner about the adequacy of the SEA/SA nor to the Council prior to the decision that the TNP should be put to referendum.
71. The SA Report at paragraph 3.17 makes the point that the preparation of the TNP has been “an iterative process”, and at paragraphs 3.18 and 3.19 it is noted that the “do nothing” option has been assessed (see para 20 above). (See also the results of the assessment, in particular at paras 4.2 and 4.3 and Annex 2 to the SA (see para 21 above)).
72. The TNP has been the subject of SEA/sustainability appraisal throughout the process of its preparation. Policy 1 had been amended to remove any limit on the overall number of houses by the time the TNP reached the examination stage. It is a Plan that covers a twenty year period which as a Neighbourhood Plan inevitably deals with a limited geographical area. As Mr Sauvain observes it will form part of a hierarchy of

plans where the ultimate numbers of houses required to be built during the plan period and their broad geographical distribution across the local authority area are determined by other development plan documents. These development plan documents will have their own strategic environmental assessments and sustainability appraisals.

73. Article 5(2) of the SEA Directive requires the “environmental report” to include information which “may reasonably be required” taking into account, inter alia, the content and level of detail of the plan, its stage in the decision-making process, and the extent to which certain matters are more appropriately assessed at different levels in the decision-making process (see para 60 above). The requirements of the Directive, as applied to the TNP, have to be considered in that context.
74. In *Persimmon Homes (Thames Valley) Ltd v Taylor Woodrow Homes Ltd* [2006] 1 WLR 334, Laws LJ stated at para 22:

“The question whether there is general conformity between the plans is a matter of degree and, as it seems to me, of planning judgment.”

I accept Mr Sauvain’s submission that similarly, as the issue raised by the Claimants is not whether a SEA/sustainability appraisal was produced but whether it adequately addressed the suitable alternatives, the question is whether the Examiner’s conclusion that the TNP was compatible with EU obligations is again a matter of planning judgment.

75. Mr McGurk concluded that the legal requirements of the SEA directive were met (see para 31 above). In my view the level of consideration of alternatives in the sustainability assessment was sufficient to meet the requirements of the SEA Directive and the Regulations. For the reasons given at paragraphs 3.17-3.19 of the SA no other options-testing was reasonably required. The TNP was supported by a Basic Conditions Statement (May 2013) which set out how the plan complied with the Basic Conditions which included a section on compatibility with EU Regulations and the conclusion that the TNP is compliant with EU obligations (see paras 24-25 above). I reject the Claimants’ criticisms of the sustainability appraisal process that was conducted. In my judgment the Council did properly comply with the SEA Directive.

Grounds 2 & 4: Failure properly to meet the Basic Conditions; Policy 1 was introduced without meaningful evidence and was not properly enquired into by the Examiner who failed to provide proper reasons for its retention

76. These two grounds can conveniently be considered together.
77. Mr Tucker submits that if the Council failed to comply with the SEA Regulations (Ground 1) then plainly there is also a failure to meet the requirements of paragraph 8 of Schedule 4B to comply with EU obligations. Further, Mr Tucker submits that as the TNP sought to control the delivery of housing it could not be progressed in that form in advance of the CWLP, since the first and fifth of the Basic Conditions (i.e. (a) and (e), see para 48 above) could not be met.

78. In summary, in relation to Ground 2, Mr Tucker submits that Mr McGurk failed to address the first Basic Condition – namely whether such a constraint mechanism is appropriate in order to deliver the objectives of national guidance in NPPF, in particular under paragraph 47. Further, by not considering the consequences of such a policy and its wider ramifications upon the delivery of housing he failed to address or consider the fourth Basic Condition (i.e. (d)), namely whether the proposal “contributes to the achievement of sustainable development”. Furthermore Mr McGurk has wrongly concluded compliance with the fifth Basic Condition could be discharged solely by asking whether or not the proposal provides for housing delivery in excess of that within the adopted development plan. There were no strategic housing policies within the Local Plan against which to judge the content of the TNP. In short, Mr Tucker submits, the Examiner, and by extension the Council, have fundamentally misapplied the Basic Conditions.
79. The Claimants submit in relation to reg.8(2)(a) which requires consideration as to whether it is appropriate to make the order – that there is no hint in the guidance that “appropriateness” is a lighter touch than “soundness”. Mr Tucker submits that the two words are not synonymous, but there is considerable overlap between them.
80. In relation to Ground 4, Mr Tucker submits that Policy 1 was promoted without a proper evidential base for doing so; and that the examination was not conducted in a manner which properly probed either the evidence for the policy or the consequences of adopting it.
81. 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).
82. 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. Mr Owens, the Senior Manager for Spatial Planning and Strategic Transport for Cheshire West and Chester Council states (at paragraph 6 of his witness statement):

“The strategic planning of the area is more than just housing numbers. Examples of strategic policies in the Chester District Local Plan which the Neighbourhood Plan is in general conformity with include policy ENV1 ‘Sustainable Development’ and policy HO3 ‘Affordable Housing’.”

83. I reject Mr Tucker's submission that Mr McGurk should have considered the consequences of Policy 1 and "its wider ramifications upon the delivery of housing" (Claimants' skeleton argument, para 6.2.13). In my view Mr Sauvain correctly characterises this submission as confusing the limited role of the Examiner to have regard to national policy in considering a Policy applicable to a small geographical area with the more investigative scrutiny of a local plan Inspector charged with determining whether the Local Plan as a whole is or is not "sound". Mr Sauvain points to the numerous differences in the way in which a Neighbourhood Plan and a Local Plan come forward, although once a Neighbourhood Plan is "made" it will together with any local plan become part of the Development Plan for the area. The making of a local plan is a complex exercise (see Town and Country Planning (Local Planning) (England) Regulations 2012, regs 8(2) and 22(1)(e), in particular). It has to be submitted to the Secretary of State for examination by an independent inspector. Section 20 of the 2004 Act requires the Inspector to consider a number of matters including whether the plan is "sound". NPPF guidance (at para 182) states that a local planning authority should submit a plan for examination which it considers is "sound" – namely that it is:

- **“Positively prepared** – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;
- **Justified** – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
- **Effective** – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
- **Consistent with national policy** – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework.”

84. Whereas a local plan needs to be "consistent with national policy", by contrast the function of an examiner, most importantly, in relation to a Neighbourhood Plan is to determine whether the plan meets the "basic conditions". In that regard the Examiner has a discretion to determine whether or not it is appropriate that the Plan shall proceed "having regard to" national policy and guidance and has to make a judgment whether or not the Neighbourhood Plan is "in general conformity with the strategic policies contained in the development plan".

85. Further I reject the Claimants' contention that it was incumbent upon the Examiner to enquire properly into the justification for the promotion of a 30-dwelling limit. This again, as Mr Sauvain submits, suggests a misunderstanding of a neighbourhood plan examiner's role; he is not considering the matter in the way that an Inspector would when looking at whether a local plan is "sound".

86. Ms Hilder explains in her evidence how the decision of the steering group in relation to the limit of 30 homes per development site in Policy 1 was taken. She said:

“28. ... This was a planning judgment made by the steering group following the consultation with the community. The community had indicated that preference was for 25-50 new homes in the next five years (52% agreed to this statement at the Vision and Objectives stage). There was less support for more than 50 homes in the next five years (19% agreed to the statement that new housing should be limited to 51-100 new homes over the next five years). This question was asked in the Vision and Objectives consultation document. ...

29. In drafting Policy 1 the steering group took this strong preference into account, whilst agreeing to support the emerging housing figures in the new Local Plan. The draft policy reflected that the community supports new housing growth in line with the growth proposed in the emerging Local Plan, but they wish that development to come forward in a phased manner and at a scale that reflects the existing character of the area's settings and buildings. The result was Policy 1 which sets out how managed housing growth in the Parish should come forward. The limit to 30 homes per site is only one part of the policy which includes other guidance for future housing development. This can be found on page 13 of the Tattenhall and District Neighbourhood Development Plan. This was considered to be the only reasonable approach to housing to be taken forward in the Neighbourhood Development Plan that would... be supported by the community at referendum stage.

30. The draft policies put forward in the Tattenhall and District Neighbourhood Development Plan reflected the outcomes of the community consultation process undertaken, the community-driven nature of the proposals and the clear vision the community had for the future of their area. The community support for the draft policies was confirmed at the referendum stage of the Neighbourhood Development Plan. ... The local community gave a ringing endorsement to the plan, with an overwhelming yes vote (905 votes to 38). The ballot produced a convincing 51.8% turnout of the 1,822 eligible voters.”

87. Mr Sauvain submits that there is no reason to suppose that the TNP would be inconsistent with the emerging development plan once it is adopted, whatever housing requirement is eventually settled upon. However by reason of s.38(5) of the 2004 Act if there is such a conflict the most recent plan will take precedence.
88. In my view the content of section 6 of his report, under the heading “Housing Growth” (see para 37 above) makes clear that Mr McGurk properly considered and addressed the material points in relation to the 30-dwelling limit.

89. There was in my judgment no failure on the part of the Council to meet the Basic Conditions. Further I am satisfied that there was a proper evidential basis for Policy 1 which was introduced by the Council after due consideration. The reasons for the retention of Policy 1 are adequately set out in the TNP (see paras 22-23 above) and the Basic Conditions Statement (see para 24 above) and the Examiner's Report (see paras 32-36 above).

Ground 3: Apparent Bias

90. In section 1 of the Report under the heading "Role of the Independent Examiner" Mr McGurk states:

"I am independent of the qualifying body and the local authority. I do not have any interest in any land that may be affected by the Plan and I possess appropriate qualifications and experience – I have land, planning and development experience, gained across the public, private, partnership and community sectors."

Mr Tucker accepts that there was no breach of the statute (paragraph 7(6) of Schedule 4B of the 1990 Act, see para 47 above) as properly construed. The Claimants' challenge is made on the basis of apparent bias at common law.

91. In *Porter v Magill* [2002] 2 AC 357 Lord Hope at paragraph 103 formulated the test in the following terms:

"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

In *Lawal v Northern Spirit Ltd* [2003] UKHL 35 the House of Lords added:

"What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* [2000] 200 CLR 488, 509, at paragraph 53, by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'."

92. All candidates for appointment as the Examiner of the TNP were required to declare any potential conflicts of interest. Mr McGurk signed a declaration as to his business interests on 24 July 2013 in which he stated:

"I am a Non-Executive Director of Himor Ltd, a Manchester-based land and property company. My role is strategic/advisory only and comprises monthly attendance of Board Meetings. Himor has legal interest in land across North West England and this includes a site promoted for development on the urban edge of Chester, within the Chester ring road. Promotion of this site is at an early stage. I confirm that I have had no involvement with the local authority or

qualifying body in relation to this site and that, as a Non-Executive Director, I have not and do not have day to day involvement with this site.”

93. The Claimants make no criticism of Mr McGurk who they say rightly drew attention to his involvement in Himor and to that company’s promotion of a site close to the area of the TNP, within the same district. However they contend that once the link between Mr McGurk and Himor came to the attention of the Council it should have appointed a different examiner to examine the plan. These were not matters known to the Claimants at the material time.
94. The factual basis on which the Claimants put their challenge is as follows. The company of which Mr McGurk is a director is part of the wider Himor Group which is a strategic land company engaged in the promotion of development throughout the North of England. It is a commercial rival therefore to the Claimants in the promotion of land for development. On 11 June 2013 the Himor Group published proposals for a substantial urban extension to the City of Chester in a location known as Hoole Gate. That would involve the removal of land from adopted Green Belt and is being promoted through the emerging Cheshire West and Chester Local Plan. Within the website set up by Himor Group to promote the development its position is stated under the “latest news” tab for November 2013:

“HIMOR has submitted representations on the draft Cheshire West and Chester Council Local Plan.

The draft plan proposes to release Green Belt land south of Chester (land at Wrexham Road) for a residential development of approximately 1300 dwellings, but Hoole Gate is not currently proposed as an allocation.

Our representations raise the following concerns about the Local Plan as drafted:

** the proposal Borough-wide housing requirement is insufficient to meet objectively assessed needs;*

** the plan does not provide for a 5 year supply of housing land;*

** insufficient land is identified for development around Chester; ...”*

95. The sites either within the emerging Local Plan as allocations or alternatives assessed by the Council in the Sustainability Appraisal dated July 2013 include Wrexham Road (Housing). In addition the July 2013 Chester Green Belt Study assessed ten areas adjacent to Chester which are currently designated as Green Belt. They include Area 6: Land at Piper’s Ash. The Hoole Gate site was part of Area 6 of the Chester Green Belt Study. The Hoole Gate site is located within 5.2 miles (as the crow flies) of the edge of the TNP boundary.

96. Mr Tucker submits that the effect of a constrained policy on the delivery of housing in Tattenhall would mean first, that the commercial interests of the Claimants at Tattenhall may be adversely impacted; and second, the need for housing elsewhere within the district (including at Hoole Gate) would potentially be elevated. There is a dispute of evidence between the parties as to whether the Hoole Gate site is or is not within the same market area as Tattenhall, but in any event Mr Tucker submits they are geographically very close and could be reasonably seen to be competing for the same purchasers. The sites are seven miles apart in the same part of the Borough and within the general area south of Chester. As such, he submits, they fall within an area that would be seen to be objectively close in market terms.
97. Mr Oliver, a practising Chartered Surveyor, instructed by solicitors who act for Wainhomes and Barratt Homes, states:

“5. The majority of my professional time is spent inspecting and preparing reports on residential and commercial property mostly in the Chester, Ellesmere Port and Wirral areas... I am therefore very familiar with the residential market around Chester.

9. I understand that Wainhomes are seeking to develop 133 homes on land at Greenlands, Tattenhall, near Chester and that Barratt are seeking to develop 68 homes on an adjacent site at Brookhall Cottages, Tattenhall, near Chester.

11. I have been asked to provide my opinion as to whether these developments could be considered to be in direct competition for purchasers with a third proposed development known as Hoole Gate, which is to the Chester suburb of Hoole, to the East of Chester. That is to say whether the market for such properties in Tattenhall overlaps with or is distinct from that of Hoole Gate.

20. Summary of general similarities.

... Both locations are likely to be offering similar house types.

21. Conclusions.

...

I consider the similarities in market appeal between the two sites to be strong. I believe that fundamentally they will appeal to the same markets...

... They are plainly competing sites for the same purchasers. At the very least there will be a significant overlap in prospective purchasers.

22. I therefore consider the proposed developments at Tattenhall to be direct competitors to the proposed development

at Hoole Gate and vice versa... The three sites should be considered to be direct commercial competitors for the same or very similar prospective purchasers.”

98. Commenting on Mr Oliver’s statement, Ms Carr, a Chartered Surveyor who is a Principal Planning Delivery Officer at Cheshire West and Chester Council states:

“The submission by Mr Richard Oliver suggests that the sites in Tattenhall and Hoole Gate are at the same stage in the development process. This is not the case and the sites are at different stages and subject to different planning policies and considerations. This means that the sites are unlikely to come forward for development at the same time and are not considered to be in direct competition” (para 3).

The site at Hoole Gate does not have planning permission for residential development and there is no current planning application for the development of this site. The Hoole Gate site is proposed to remain in the Green Belt (para 4). In contrast the sites in Tattenhall are on the edge of a rural village and in the open countryside. They fall under different planning policies to the site at Hoole Gate given their location on the edge of a key service centre in the open countryside. The sites are the subject of current planning applications being heard at appeal, following refusal of planning permission by the Council.

99. Ms Carr further comments on Mr Oliver’s suggestion that the Hoole Gate and Tattenhall sites will be in direct competition with one another due to the limited amount of housing development within the area to the south and east of Chester. She states (at para 8) that it cannot be said that housing development is limited in this area because of the level of housing development currently on site. Moreover she states (at para 9):

“The sites in question are not directly comparable in terms of nature of the locations, and again must be viewed within the wider housing market context. There are many sites of similar character, size and price that are currently marketing properties and are commercially successful both in the areas around Tattenhall and the proposed Hoole Gate scheme, as well as in the wider area. Many of these have been brought to the market by the same developers.”

100. At paragraph 10 of her statement Ms Carr concludes:

“The above evidence demonstrates that the sites in question will not be in direct competition with one another, both in terms of the stage in the planning process which they are in, and the locations which appeal to different purchasers. Although there may be some level of competition within this broad market in general, it is not something that would pose a threat to sales on either site. There is not limited housing supply in the area in question, and there are a number of sites that are in the process of being brought to the market which are much closer to

Tattenhall. Therefore, even if these sites were brought to market at the same time, their locations and their housing market dynamics means that they are not in direct competition with one another and do not pose a threat to the commercial success of one another.”

101. I accept Mr Sauvain’s submission that it is the material factual matrix that needs to be considered. In the present context the state of knowledge of the fair minded observer must include an awareness of the role of the Neighbourhood Plan in the planning process, the function of the examiner in relation to the Neighbourhood Plan, the nature of the interest that is alleged to create the bias, and some knowledge of the geographical relationship between the two sites and the market.
102. The informed observer would, in my view, be aware of the factual matters to which Ms Carr refers. First, that the position in relation to the Hoole Gate site and the two Tattenhall sites is different from the premise on which Mr Oliver proceeds; they are unlikely to be coming onto the market at the same time, and indeed the Hoole Gate site being in the Green Belt at present, it is uncertain when that development may take place. Second, and in any event, that there is a shortage of housing in the Chester area.
103. Further Mr Sauvain submits that Himor’s proposals for their Chester site are being promoted through representations to the emerging Cheshire West and Chester Local Plan. The outcome of the TNP process will have no effect upon the eventual content of the Local Plan as regards the Borough-wide need for and approach to development or the contribution that the City of Chester should make to meeting such needs. Moreover the TNP does not limit the eventual amount of development at Tattenhall.
104. I do not consider that the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that Mr McGurk was biased.

Conclusion

105. In my judgment, for the reasons I have given, none of the grounds of challenge succeed. Accordingly this claim is dismissed.