

**TOWN AND COUNTRY PLANNING ACT 1990**

**IN THE MATTER OF**

**LAND AT GOBBEY'S FIELD**

**AND**

**THE CASTLETHORPE  
NEIGHBOURHOOD PLAN  
SUBMISSION VERSION**

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**OPINION**

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**No5**  
**CHAMBERS**

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## Introduction

1. In this matter, I am instructed by Cerda Planning on behalf of Keynes Investments Ltd (in respect of the Examination of the Submission Version of the Castlethorpe Neighbourhood Plan (“the Neighbourhood Plan”) (published February 2016), which is currently undergoing further consultation under Paragraph 13 of Schedule 4B of the Town and Country Planning Act 1990 from 19 October until 30 November 2016, required by the Local Planning Authority, Milton Keynes Council (“the Council”), following a Report of its Examiner, Peter Biggers (“the Examiner”).
2. The purpose of the paragraph 13 consultation relates to the proposed designation of an area of land, known as Gobbey’s Field as Local Green Space under Policy 5 of the Plan (Page 19: text; Page 24: Policies Map; Page 26-27: Annex B – Green Space Study).
3. In particular, I am asked to advise (with some moderate adaptation to reflect the statutory tests) on the following three questions:
  - (1) Whether the Council is justified in choosing to ignore recommendations of the Examiner based on the limited additional evidence submitted to them?
  - (2) Should the Council order a further independent examination of this issue under paragraph 13 of Schedule 4B?
  - (3) Should the Council seek to send the plan to referendum and then make the plan; can the plan be challenged by way of judicial review?

## **Factual Background**

4. The factual background to this case has been set out within my e-mail Instructions and only a brief summary is necessary, with a focus on Annex B – Green Space Study, the Examiner’s Report (dated July 2016) and the Local Planning Authority’s Consultation document (dated October 2016)
5. Land at Gobbey’s Field is located at the southern edge of the village of Castlethorpe. The precise boundaries of the land ownership are not specified in our instructions, but would appear to extend over the full 4.8 areas proposed for designation under Policy 5.
6. Policy 1 of the Neighbourhood Plan (pages 13-14) seeks to impose a settlement boundary around the entire built-up area, save for the addition of one allocation for a housing scheme of approximately 30 dwellings under Policy 2: Land at Maltings Field.
7. Policy 5 provides (with its supporting text) at pages 19-20:

### ***“Policy 5: Local Green Spaces***

***The Neighbourhood Plan designates Local Green Spaces in the following locations, as shown on the Policies Map:***

- i. Castle Field;***
- ii. Recreation Ground;***
- iii. South Street Paddock;***
- iv. Gobbey’s Field; and***
- v. Village Green.***

***Proposals for development in a Local Green Space will be resisted, unless they are ancillary to the use of the land for a public recreational purpose or are required for a statutory utility infrastructure purpose.***

*4.21 This policy proposes a number of important green spaces in the parish to be protected from development by the designation as Local Green Spaces in accordance with the NPPF.*

*4.22 In each case, the green spaces are an integral part of the settlements in the Parish and are therefore regarded as special to the local community.*

*The Neighbourhood Plan Local Green Spaces study (Annex B in the evidence base) sets out the case for each site to be designated. Once designated, the policy will resist all proposals for development unless it can be clearly*

*demonstrated they are minor, they are ancillary to a public recreation use or they are required utilities development.”*

8. The Policies Map (page 24) further demarcates the areas covered by Policy 5.
9. Annex B provides as follows (so far as relevant):

#### *1. Introduction*

*The village of Castlethorpe falls within the rural area of the Borough of Milton Keynes, close to the boundary with Northamptonshire. It lies on the northern edge of the Tove River Valley, which is designated as being landscape of Special Character.*

*The surrounding countryside is of an undulating nature, populated by relatively small and ancient villages with little urbanisation and a large population of designated Ancient Monuments and Listed Buildings.*

*Within and close to the curtilage of the village there are a number of parcels of land whose use justifies their classification as ‘Green Space’ within the Neighbourhood Plan.*

*The purpose of this study is to provide the rationale for their inclusion in this category.*

#### *2. The Parcels of Land*

*These are Gobbey’s Field, Recreation Ground, South Street Paddock and the Village Green. In addition Castle Field, which is a Scheduled Ancient Monument and thus already has protection against development, is well used by village residents and visitors alike.*

#### *3. Rationale for designations as Green Space*

*Gobbey’s Field has been special to the village of Castlethorpe for a very long time. In the 1972 Castlethorpe Village Plan, it was given particular status due to its amenity and landscape value, being described as a ‘tongue of green fields leading into the centre of the village’.*

*With the substantial growth of the village in population from 530 in 1972 to around 1,100 currently, Gobbey’s has continued to hold a special place in the hearts of villagers, and its use by them has increased proportionally with the growth in population over the years.*

*It is not a large tract of land, 4.8 hectares in total, outside of the settlement boundary, divided in the centre by a row of low-standing ancient trees. It is enclosed by the settlement on three sides.*

*The terrain slopes gradually from north to south. A public right of way, a footpath, runs diagonally through the whole field from north to south. At the northern end the footpath connects directly to footbridge over the railway into South Street in the very centre of the village.*

*At the southern end, the footpath connects to very popular rights of way southwards to the River Tove and northwards to the eastern side of the settlement.*

*There are informal access points to Gobbey's from The Chequers and Shepperton Close developments on the western perimeter and Prospect Place on the eastern perimeter.*

*The northern part of Gobbey's includes part of a Scheduled Ancient Monument (SAM) of the Motte and Bailey Castle and abuts the Fishponds children's play area.*

*Its central location makes Gobbey's very easy to access for the whole village and it is used for a wide variety of informal pleasure activities such as jogging, football, dog walking, children's games, golf practice, kite and model aircraft flying.*

*It is without doubt the most utilised Green Space in the village. Its popularity was demonstrated in the early 1990s and again in the early 2000s when proposals to develop the site for housing both met with stiff resistance from the village, resulting in the proposals being rejected in both cases.*

*The views from the SAM at northern end of Gobbey's and lower down the field to the south are particularly attractive, providing a vista of the Tove river valley and in the distance the ancient settlement of Cosgrove.*

*An ancient copse provides its perimeter for about 200 metres on the south eastern side. This is replete with wildlife, particularly birds and is the site of a large rookery.*

*In summary, Gobbey's is a high-quality public space, providing opportunities for social interaction and meetings that would otherwise not take place. It is tranquil, safe, and accessible and promotes healthy exercise activities within the community.*

10. The landowner made a detailed objection during the Regulation 16 consultation period in respect of the Plan. This provided very full reference to NPPF 76 and 77, the National Planning Practice Guidance ("PPG") Open Spaces Chapter, and the absence of evidence to support the designation. I do not cite the provisions of that letter in full, for the sake of brevity.

11. The Examiner's Report (July 2016) addressed the designation at various paragraphs which are worth citation in full:

*0.4....However regarding my recommendation in respect of policy 5 on Local Green Spaces the Parish Council's aspiration cannot be respected if the policy is to meet the Basic Conditions and I recommend that two of the Local Green Spaces are deleted.*

...

#### *Policy 5 Local Green Spaces*

*6.4.21 Policy 5 seeks to take up the power established in the NPPF at paragraphs 76 and 77 to establish and protect Local Green Spaces. The NPPF sets out clear criteria for such spaces and Annex B of the CNP seeks to explain the rationale for the sites that have been identified. I discuss the appropriateness of the identified spaces below but, on a general point, the policy fails to have appropriate regard to the NPPF in rehearsing the circumstances in which such sites could be developed. The intention of the designation is that these Local Green Spaces would carry the highest level of protection akin to the Green Belt and that very special circumstances would need to be in place to justify development. The NPPF does not say anything about development, which is minor, or relating to recreation or infrastructure being acceptable and the CNP should not rehearse possibilities in this respect.*

*6.4.22 It is possible that part of the difficulty CPC has is that it wishes to promote development of car parking on part of the village green which is one of the identified spaces and there is therefore a tension between policies 5 and 6. However, the solution to this is not to weaken the protection policy 5 seeks to afford to Local Green Spaces. Rather, if the CNP wishes to provide for car parking on part of the village green, the green should be removed from the list of Local Green Spaces.*

*6.4.23 A late representation in response to the Regulation 16 consultation has been received relating to the proposed designation of Gobbey's Field as a Local Green Space. I have decided to accept the representation as valid, despite the lateness, on the grounds that the owners were unaware of the proposal from earlier consultation stages and I accept the point made in representation that the advice in the PPG is that landowners should be consulted when these proposals are being made. This is not to say that I agree with the respondent's point that the plan has failed to meet legal requirements in terms of publicity and consultation. CPC acted in good faith and reportedly had consulted with agents who they thought represented the Gobbey's Field landowner when in fact this apparently was not the case. I am satisfied that CPC fulfilled its obligations in publicising the plan locally including contacting landowning interests. As they have pointed out, other landowners have involved themselves in the plan as a result of the publicity undertaken which would suggest that publicity and consultation was adequate. In any event, agreeing that I will consider the representation in my examination means that the owner in this case is not disadvantaged.*

6.4.24 the facts in respect of Gobbey's Field appear to be that it is privately owned land leased to an agricultural tenant who uses it for grazing although at the time of my visit there were no animals present. The Definitive Map, which is legally conclusive proof of a footpath's existence, shows a public right of way - Footpath no five traversing the site from the footbridge over the railway in the northernmost corner to the southernmost corner of the field where it meets with a track from Station Road. For the most part the route of the path on the ground is not defined as it just crosses open pasture. There is however a surfaced, lit footpath link in the northern corner of the field linking the railway footbridge to The Chequers. This path is entirely open on its east side allowing access from any point of it onto Gobbey's Field. There are also 2 gated access points from Shepperton Close which, although the respondent argues are not public access points, equally have nothing to prevent the public from climbing over them into the field.

6.4.25 the fact that the land is not in public ownership and not in formal use as public open space would not preclude its designation as Local Green Space. Nor would its use principally for livestock grazing preclude the designation. The issue is whether it meets the criteria in paragraph 77 of the NPPF and whether it is demonstrably special to the local community.

6.4.26 looking at each of the NPPF criteria in turn:

□ First, Gobbey's Field is in close proximity to the community with strong footpath links to the older part of Castlethorpe to the north of the railway via the railway footbridge to which there is open access across the field as well as formal access from the footpath link to The Chequers. It is therefore well related to its surrounding community and in that respect is not dissimilar to Castle Field – also proposed to be designated as Local Green Space.

□ With respect to the second test, I acknowledge that the recreational role of Gobbey's Field is not a formal one, in the way the recreation ground is. Annex B of the Plan setting out the Local Green Space Assessment of Sites does not present any evidence for the statement that Gobbey's Field is "without doubt the most utilised Green Space in the Parish" and no evidence to substantiate the range of recreation activities reported to take place on it. I have therefore given no weight to these statements. Whilst it is a field, which allows formal and informal public access across it for countryside walks, dog walking etc. it is not dissimilar in this respect to many other areas of countryside adjoining villages. I accept that the field provides a tranquil, green backdrop to the southern end of the village with open views south to the River Tove but I am not persuaded that this is any different to other areas of countryside bordering the village.

□ Thirdly the area is local to the settlement but it is a large field only the northern section of which is contained by development in The Chequers & Prospect Place.

6.4.27 In terms of the further advice in the PPG regarding Local Green Space designation there is nothing to suggest that such a designation would pre-empt the ability of MKC to provide for sustainable development to meet its objectively assessed housing need. On the other hand, the site is already outside the settlement boundary and Castlethorpe is not a village identified as one where

*significant development would be sustainable. In that respect the starting point for assessing any residential development proposal in the future is that it would not be acceptable. Therefore, the need for the community to protect the space from development by designating it as Local Green Space is not justified. Furthermore, the PPG suggests that the designating authority should consider maintenance implications of designation. In this particular case however as there would be no change over the status quo in respect of public access there would be no increased maintenance obligations on the owner simply in terms of designation.*

*6.4.28 In conclusion therefore in respect of Gobbey's Field I am not satisfied that it has been demonstrated that the field is demonstrably more special to the community than other areas of countryside outside the settlement boundary. The case for designation as Local Green Space in the context of the NPPF and PPG and therefore Basic Condition No 1 has not been sufficiently made and the proposed designation should be removed.*

**Recommendation 10 –**

**10A – Revise the last part of the policy to read:**

***“Proposal for development in a Local Green Space will be resisted unless there are very special circumstances to justify it.”***

**10B – change the last sentence of paragraph 4.22 to read:**

***“Once designated the policy will resist all proposals for development other than in very special circumstances”***

**10C - Remove the village green and Gobbey's Field from the list of Local Green Spaces that the CNP designates in policy 5.**

**10D Amend the analysis in respect of the Village Green and Gobbey's Field in Annexe B to indicate that whilst these areas were considered they were not designated, as it was not felt that their designation would meet the criteria for Local Green Space set out in the NPPF.**

*6.4.29 With these modifications the policy will meet Basic Condition No 1, would be generally in conformity with the development plan at MKCS Policy CS17 and helps to achieve sustainable development.*

12. Between the publication of the Examiner's Report and a further paragraph 12/13 decision, the Neighbourhood Plan Steering Group carried out the "Gobbey's Field Usage Survey", ending on or about Friday 23 September 2016, securing 219 individual responses, of which the vast majority (210) simply ticked the questionnaire to confirm that they had used Gobbey's Field for walking, smaller numbers for other activities, with around half recording "regular public use of Gobbey's Field for the past 20 years". Those were then collated into a survey chart.
  
13. The Chair of the Castlethorpe Duck Race and Fun Dog Show also submitted a single letter (dated 31 August 2016) describing this as a bi-annual event with individuals



passing over the land, and expressing concerns about restricting the access through the field.

14. No other evidence was submitted.

15. In October 2016, the Council their decision a Decision Statement under paragraphs 12 and 13 of Schedule 4B stating that they intended to follow the Examiner's recommendations except for those relating to Gobbey's Field in the following terms:

*“Under section 13 (1) of Schedule 4B of the Town and Country Planning Act 1990, Milton Keynes Council proposes to take a different decision to that recommended by the Examiner on one specific policy matter (the designation of Gobbey's Field as Local Green Space) as a result of new evidence provided by the parish council in support of the value that the local community places on this area of land.*

*As a result of this there will now follow a 6-week period during which people will be asked for their comments on the council's proposed decision on the Gobbey's Field Local Green space designation. A further examination on this specific matter might follow if Milton Keynes Council considers that it would be appropriate to do so.”*

16. The same document continues:

*Since the Examiner's report was received, Castlethorpe Parish Council has undertaken a survey of all residents in the parish to provide additional evidence as to the value that residents place on Gobbey's Field, in support of its proposed designation as a Local Green Space. In view of the new evidence provided by the survey, Milton Keynes Council proposes that Gobbey's Field should remain a Local Green Space in the Castlethorpe Neighbourhood Plan.*

*As Milton Keynes Council proposes to take a different decision from that recommended by the Examiner in respect of the designation of Gobbey's Field Milton Keynes Council will now notify the persons prescribed under the Neighbourhood Planning (General) and Development Management Procedure (Amendment) Regulations, 2016 and allow a 6 week period for comments. At the end of the consultation period, a further independent examination on the specific matter of Policy 5 and Gobbey's Field may be undertaken if appropriate. Following the end of the consultation or, upon receipt of the Examiner's report from the examination, Milton Keynes Council will take a decision as to whether the Castlethorpe Neighbourhood Plan will proceed to a referendum.*

17. The Table then contains very similar text on new evidence and procedure, but notably adds:

*“Additionally, although the Examiner is correct in his comments at para 6.4.27 that “the site is already outside the settlement boundary and Castlethorpe is not a village identified as one where significant development would be sustainable. In that respect the starting point for assessing any residential development proposal in the future is that it would not be acceptable. Therefore the need for the community to protect the space from development by designating it as Local Green Space is not justified” his statement does not acknowledge the current planning position whereby Milton Keynes Council is unable to demonstrate a 5 year housing land supply, rendering local plan policy S10 out of date.”*

18. Table 1 is then said to set out the full reasons for this decision.

19. It appears (although it is not clear from the website) that the Consultation document for the current consultation comprises Table 1. The key sections of this document are as follows, where the LPA disagrees with the Examiner:

(1) Response to NPPF 77(2): *“demonstrably special and holds a particular local significance”* and Examiner’s Report at 6.4.26:

*“We agree that Gobbey’s Field recreational role is not a formal one, in the way the recreation ground is.*

*We also acknowledge that Annex B of the submitted Plan does not present evidence to substantiate the range of recreation activities referred to.*

*We do, however agree with the Examiner’s assessment of the use of the site and its local significance to the Castlethorpe community.*

*In light of the Examiner’s conclusions, the Parish Council, in September 2016 surveyed all residents to ascertain the value they place on Gobbey’s field and the results are set out in the accompanying supporting documents.*

*Also attached is a letter from the organiser of the annual village Duck Race, which explains how the land has been used.*

*It is considered that this additional information provides the evidence needed to substantiate the Parish Council’s claims as to the level and type of uses of the land that the examiner considered to be lacking. As such, it is considered that it can be demonstrated that Gobbey’s Field is demonstrably special and of particular local significance to the Castlethorpe village community.”*

(2) Response to 77(3): Local in character and is not an extensive tract of land.”  
and Examiner’s Report at 6.4.26:

*“We agree with the Examiner that the area is local to the settlement, however, we consider that it is not an extensive tract of land, a large section of it being contained by development in the Chequers and Prospect Place.”*

(3) Response to PPG Paragraph Reference ID: 37-007-20140306: *to be consistent with local planning for sustainable development in the area. In particular, plans must identify sufficient land in suitable locations to meet identified development needs and the Local Green Space designation should not be used in a way that undermines this aim of plan making.”*

*“We agree with the Examiner’s view that designation of Gobbey’s Field as Local Green Space would pre-empt Milton Keynes Council’s ability to provide for development to meet its housing need, given that Castlethorpe is not a village wherein significant development would be sustainable. We also agree with his conclusions on the maintenance implications of a Local Green Space designation on this site.*

*Although, we agree with the Examiner that as the site is outside the settlement boundary “the starting point for assessing any residential development proposal in the future is that it would not be acceptable“ this statement does not acknowledge the current planning position whereby Milton Keynes Council is unable to demonstrate a 5 year housing land supply. The effect of the lack of a 5 year housing land supply is that Milton Keynes Local Plan Policy S10 (Open Countryside) and Core Strategy Policy CS1 (Development Strategy) are currently considered to be out of date (NPPF para. 49).”*

(4) Summary:

*“Having regard to the Examiner’s recommendations in respect of Gobbey’s Field and the additional evidence provided by the Parish Council, Milton Keynes Council considers that there is nothing to suggest that designation as a Local Green Space would be contrary to national policy and advice and therefore Basic Condition No 1 and, as a result, the designation, as per the submitted Castlethorpe Neighbourhood Plan, should remain.”*

20. The current use and extent of public access over the site is described in the Regulation 16 representation, but the footpath's location in particular would benefit from further illustration on maps.
21. Equally, I have not seen detailed commentary on the Milton Keynes development plan position, in respect of five-year supply so this will need to be updated in any consultation submission or submission to the Examiner as part of a further examination.

### **Legal Framework**

22. The legal framework governing neighbourhood plans is set out across section 38A of the Planning and Compulsory Purchase Act 2004 (as amended by the Localism Act 2011) and section 61G-N and Schedule 4B of the Town and Country Planning Act 1990 (as amended).
23. The core “basic conditions”, against which the Examiner will assess the Neighbourhood Plan, once appointed following completion of the current consultation are set out in paragraph 8(2) of Schedule 4B:

*“(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...”*

24. Paragraph 12 provides:

*12 (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.*

*(3) The authority must also consider such other matters as may be prescribed.*

*(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....”*

25. Paragraph 13 provides:

*“13(1) If—*

*(a) the local planning authority propose to make a decision which differs from that recommended by the examiner, and*

*(b) the reason for the difference is (wholly or partly) as a result of new evidence or a new fact or a different view taken by the authority as to a particular fact,*

*the authority must notify prescribed persons of their proposed decision (and the reason for it) and invite representations.*

*(2) If the authority consider it appropriate to do so, they may refer the issue to independent examination.”*

26. Principles formulated in the initial main four cases: (1) *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin), (2) *R(Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin), (3) *R (Larkfleet Homes Ltd) v Rutland CC* [2015] EWCA Civ 597 and (4) *R(DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin), have now been consolidated by Holgate J in three judgments: (5) *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) and (6) *R (Maynard) v Chiltern DC* [2015] EWHC 3817 (Admin) (QBD (Admin)), (7) *Crown Hall Estates v Chichester BC* [2016] EWHC 73 (Admin). *Crownhall* contains a detailed list of principles which although

controversial and partially superseded by PPG updates, have not yet been overturned or adjusted by the Court of Appeal:

*i) The examination of a neighbourhood plan, unlike a development plan document, does not include any requirement to consider whether the plan is “sound” (contrast s. 20(5) (b) of PCPA 2004) and so the requirements of soundness in paragraph 182 of the NPPF do not apply. So there is no requirement to consider whether a neighbourhood plan has been based upon a strategy to meet “objectively assessed development and infrastructure requirements”, or whether the plan is “justified” in the sense of representing “the most appropriate strategy, when considered against reasonable alternatives” and based upon “proportionate evidence”;*

*ii) Where it is engaged, the basic condition in paragraph 8(2)(e) of schedule 4B to TCPA 1990 only requires that the draft neighbourhood plan as a whole be in “general conformity” with the strategic policies of the adopted development plan (in so far as it exists) as a whole . Thus, there is no need to consider whether there is a conflict or tension between one policy of a neighbourhood plan and one element of the local plan;*

*iii) Paragraph 8(2)(a) confers a discretion to determine whether or not it is appropriate that the neighbourhood plan should proceed to be made “having regard” to national policy The more limited requirement of the basic condition in paragraph 8(2)(a) that it be “appropriate to make the plan” “having regard to national policies and advice” issued by SSCLG, is not to be confused with the more investigative scrutiny required by PCPA 2004 to determine whether a local plan meets the statutory test of “soundness”;*

*iv) Paragraphs 14, 47 and 156 to 159 of the NPPF deal with the preparation of local plans. Thus local planning authorities responsible for preparing local plans are required to carry out a strategic housing market assessment to assess the full housing needs for the relevant market area (which may include areas of neighbouring local planning authorities). They must then ensure that the local plan meets the full, objectively assessed needs for the housing market area, unless, and only to the extent that, any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole , or specific policies in the NPPF indicate that development should be restricted ( St Albans City Council v Hunston Properties [2013] EWCA Civ 1610 ; Solihull Metropolitan B.C. v Gallagher Estates Ltd [2014] EWCA Civ 1610 ).*

*v) Those policies in the NPPF (and hence the principles laid down in Hunston and Gallagher in the interpretation of those policies) do not apply to the preparation by a qualifying body of a neighbourhood plan. Although a neighbourhood plan may include policies on the use of land for housing and on locations for housing development, and may address local needs within its area, the qualifying body is not responsible for preparing strategic policies in its neighbourhood plan to meet objectively assessed development needs across a local plan area. Moreover, where the examination of a neighbourhood plan precedes the adoption of a local plan, there is no requirement to consider*

*whether it has been based upon a strategy to meet objectively assessed housing needs.*

27. *DLA Delivery* was heard by the Court of Appeal on 15-16 November 2016 and judgment is awaited. It will represent the first detailed consideration of Schedule 4B.
28. There is no decided High Court case yet in respect of the imposition of Local Green Space. *R (Legard) v Royal Borough of Kensington and Chelsea* is another Planning Court claim, currently stayed awaiting judgment in *DLA*. It concerns the correct approach to Local Green Space. It is unlikely to be listed and then determined by the Planning Court in the lifecycle of the present consultation and prospective examination.

### **Local Green Space**

29. The fundamental starting point is the text of the NPPF, paragraph 76-78:

*“76. Local communities through local and neighbourhood plans should be able to identify for special protection green areas of particular importance to them. By designating land as Local Green Space, local communities will be able to rule out new development other than in very special circumstances. Identifying land as Local Green Space should therefore be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be designated when a plan is prepared or reviewed, and be capable of enduring beyond the end of the plan period.*

*77. The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used: - where the green space is in reasonably close proximity to the community it serves; - where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and - where the green area concerned is local in character and is not an extensive tract of land.*

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

30. Analysing those terms:

(a) Local Green Space is therefore described as an exceptional designation. NPPF 77 makes clear that LGS designation is not appropriate for most green

spaces or open space, given that, under NPPF 78, LGS is equivalent to Green Belt. The imposition of a “*very special circumstances*” approach inevitably carries with it the same exceptionality requirement for designation at the plan-making stage to be applied in the Green Belt context;

(b) Second, any LGS site must be physically limited and constrained: NPPF, 77: “*reasonably close proximity*” and cannot be an “*extensive tract of land*”.

(c) Third, LGS must also serve some community activity or purpose (it is not a Green Belt prevention of development policy): “*the green area is demonstrably special to a local community and holds a particular local significance,...*”

(d) Finally, and most importantly: LGS can only be designated where a determination has been made in respect of the sufficiency of housing provision, NPPF, 76: “*Identifying land as Local Green Space should therefore be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services.*”

31. Thus, in our view, an Examiner can only approve an LGS designation, where he has made a prior, positive finding that the NP has made provision for sufficient homes. That “sufficiency” in my view, should be assessed by reference to OAN, NPPF, 47. To be clear, there is no conflict here with the fifth sub-paragraph in *Crownhall* [29]: that there is no requirement to provide for OAN through a neighbourhood plan. The Planning Court was not requested to determine this question of interpretation. In the absence of clear provision at Local Plan level, there can be no confirmation that “sufficient homes” are being provided.

32. The above policy analysis is then supported by the following provisions of PPG:

(a) NPPG, Paragraph: 007 Reference ID: 37-007-20140306 ‘How does Local Green Space designation relate to development?’ further provides “*Designating any Local Green Space will need to be consistent with local planning for sustainable development in the area. In particular, plans must identify sufficient land in suitable locations to meet identified development needs and the Local Green Space designation should not be used in a way that undermines this aim of plan making.*”



(b) Paragraph: 015 Reference ID: 37-015-20140306 'How big can a Local Green Space be?': *"There are no hard and fast rules about how big a Local Green Space can be because places are different and a degree of judgment will inevitably be needed. However, paragraph 77 of the National Planning Policy Framework is clear that Local Green Space designation should only be used where the green area concerned is not an extensive tract of land. Consequently, blanket designation of open countryside adjacent to settlements will not be appropriate. In particular, designation should not be proposed as a 'back door' way to try to achieve what would amount to a new area of Green Belt by another name."*;

(c) Paragraph 019 'Does land need to be in public ownership?' provides: *"A Local Green Space does not need to be in public ownership. However, the local planning authority (in the case of local plan making) or the qualifying body (in the case of neighbourhood plan making) should contact landowners at an early stage about proposals to designate any part of their land as Local Green Space. Landowners will have opportunities to make representations in respect of proposals in a draft plan."*

33. For the purposes of basic condition 8(2)(a), the above policy must be read as a coherent whole (in accordance with the many High Court authorities in this field, culminating in *Suffolk Coastal v Hopkins Homes and SSCLG* [2016] EWCA Civ 168, [6]-[19]).
34. In my view, in a case where LGS is sought to be imposed, given the fundamentally restrictive nature of LGS: basic condition 8(2) (a) ought to require that Examiner under paragraphs 8-10 and the respective Local Planning Authority under paragraph 12 of Schedule 4B to engage closely with the policy wording and determine that the designation would be in accordance with the NPPF tests, within the text of the Report, applying a very close reading.
35. Basic condition 8(2) (d) reinforces basic condition 8(2) (a) and requires a careful examination of the national policy and guidance requirements, see the text of NPPF, 76.
36. Basic condition 8(2)(e) will also be engaged, where there is no strategic guidance in the development plan in respect of sufficiency of housing needs, then the assessment cannot be undertaken.

## Examiners' Reports

37. There have been a number of Examiners Reports in the Neighbourhood Plan context on LGS.
38. For the purposes of the present advice, we will refer to four cases, Examiners have removed LGS designations in response to my written submissions or those of colleagues in Chambers: Backwell (North Somerset) (appearing at the Examination hearing before Nigel McGurk), Rolleston-on-Dove (East Staffordshire), Chapel-en-le-Frith (High Peak) and Outwoods (East Staffordshire). I also includes a series of findings generated by another planning consultancy in a separate case, which are simple numerical findings on the “extensive tract of land” and scale issue.
39. Each case turned on its own facts, but the core principles that emerge from our direct experience are as follows.

### *(a) Extensive Tract of Land*

40. An “*extensive tract of land*” is the crucial gateway test.
41. In Backwell, I was instructed to secure the removal of a site known as Farleigh Fields measures 19 hectares, and is located just outside the Bristol Green Belt. The majority of the site was owned by Charles Church/Persimmon Homes Severn Valley and was proposed for a residential scheme with substantial public open space.
42. Examiner Nigel McGurk, in his Report of 29 October 2014, began by observing that Local Green Space is a “*restrictive and significant policy designation*” equivalent to Green Belt designation. He held that “*it is essential that, when allocating Local Green Space, plan-makers can clearly demonstrate that the requirements for its allocation are met in full.*”
43. The Examiner found that “*the most striking thing about Farleigh Fields and Moor Lane Fields [a site of 32 hectares] is their substantial size*”. He rejected a submission by the

Parish Council that a distinction might apply in respect of rural or semi-rural areas, as no such distinction appeared in the Framework. The Examiner continued:

*“In the case of Farleigh Fields, it is my view that 19 hectares also comprises an extensive tract of land. To provide some perspective, at least twenty-three full size football pitches would easily fit in to an area of this size.*”

*“Given that the Framework is not ambiguous in stating that a Local Green Space designation is not appropriate for most green areas or open space, it is entirely reasonable to expect compelling evidence to demonstrate that any such allocation meets national policy requirements. Specific to demonstrating that Farleigh Fields, and Moor Lane Fields are not extensive tracts of land, no substantive or compelling evidence has been presented.”*

44. The Examiner therefore found that the direct conflict with national policy meant that the Local Green Space Policies in the Neighbourhood Plan did not meet the basic conditions under paragraph 8(2) of Schedule 4B and that national policy did not permit a failure to meet policy requirements to be balanced against other considerations when designating LGS.
45. The Examiner therefore proposed deletion of these Policies with the addition of wording to encourage further working between the Parish Council and District Council “*to establish how recognition of their valuable features may, in future, be incorporated into the development plan.*” and re-wording Community Action for the Parish Council to “*seek to promote the allocation of appropriate areas of Local Green Space in the development plan*”. To my knowledge the LGS has not been pursued successfully further.
46. In addition to the Backwell Neighbourhood Plan, the following Examiner’s Reports into draft Neighbourhood Plans make similar points, finding several proposed LGSs to constitute ‘extensive tracts of land’ and as such, fail to meet the required basic conditions. All the Examiner’s Report are freely available online at the relevant neighbourhood plan or LPA websites.
47. The Alrewas Neighbourhood Plan (Examiner’s Report dated August 2015) – the Examiner removed the proposed LGS designations affecting two sites of 2.5 and 3.9 hectares respectively, having found these to constitute extensive tracts of land by virtue of their size and there being no compelling evidence to demonstrate why the sites were demonstrably special to the local community.

48. The Sedlescombe Neighbourhood Plan (Examiner's Report dated January 2015) – the Examiner found the proposed LGS at Street Farm, stretching 4.6 hectares across an area of open land, to be extensive in size and therefore contrary to national planning policy.
49. The Tatenhill Neighbourhood Plan (Examiner's Report dated November 2015) – the Examiner considered that at 9.2 and 4.3 hectares respectively, sites to the north and south of Branston Road, proposed to be designated as LGS through the NP, constituted extensive tracts of land and instructed their removal from the draft NP, given their inclusion failed to meet the basic conditions.
50. The Oakley and Deane Neighbourhood Plan (Examiner's Report dated December 2015) – the Examiner concluded that a proposed LGS designation on a site of just over 5 hectares to be contrary to national planning policy.
51. Finally, similar findings were made in respect of the Brixworth Neighbourhood Plan, paragraph 4.63 in respect of LGS1, LGS2 and LGS3, three sites measuring 22.5ha, 7.2ha and 2.7ha in size respectively.

*(b) "Demonstrably Special"/ "Local Significance"*

52. In other cases, where I or colleagues in Chambers have worked, the main reason for modification and consequent removal of the LGS has been the quality of the evidence base on access to the land and of its actual use, sufficient to be of local significance.
53. At Rolleston-on Dove, the Examiner, Christopher Collison held of a site known as College Playing Fields:

*"Representations have been made on behalf of the owners of the College Playing Fields that the site has no authorised recreational or leisure role and is not public open space. Opposition to the designation of this site has also been expressed in representations from Sport England. The Framework sets out examples of how a green area may be demonstrably special to a local community. Beauty, historic significance, recreational value (including as a playing field), tranquillity, or richness of wildlife are set out as examples. The basis for inclusion of the site as an area for protection of local green space stated in the Neighbourhood Plan is*

*that the College Playing Field is “ the best drained sports facility in the area” and “ it is currently used completely free of restrictions by a large number of dog walkers, joggers etc for recreational purposes.” Whilst ownership and access are not issues that will necessarily preclude land from inclusion as Local Green Space, they are relevant when the basis of designation is, as in this case, use. On my site visit, I did not see anything to indicate that this land was available for public recreational use. In addition, I cannot identify any particular feature of this land that would distinguish it from the vast majority of other land surrounding the village nor can I see that it has any particular merit for special designation. I conclude, following a site visit, that this site does not meet the criteria for inclusion and should be deleted from the list in the policy.”*

54. In Chapel-en-le-Frith, the Examiner Janet Cheesley observed of Target Wall Field, which Bloor Homes intended to develop for residential development:

*“169. The site is in a countryside location on the outskirts of the settlement, projecting into the wider countryside. As such, the character of the site is as part of the surrounding countryside, rather than local in character. Whilst there is public access along the footpaths, and these footpaths appear to be well used by the local community, there are many areas of countryside where footpaths allow public access.*

*170. It is not the purpose of the Local Green Space designations to include countryside land that provides wider views of the countryside. In my view, the site is a large area, which projects into the open countryside and is part of the wider countryside rather than local in character. Thus, even with the historical significance and possible wildlife significance, I do not consider that this site meets the criteria for designation as Local Green Space.*

*171. There is objection to the designation of the area as Local Green Space on behalf of developers wishing to develop the site. My recommendation to delete the designation does not in any way suggest that the site is suitable for development. This is not something for my consideration under the Local Green Space criteria.”*

## Opinion

### Q1: The Strength of the Case for Allocation of Gobbey's Field as LGS/ Whether the Council is justified in choosing to ignore recommendations of the Examiner based on the limited additional evidence submitted to them ?

*NPPF 77(3): Extensive Tract of Land*

55. Gobbey's Field was in the Examiner's view and remains, in our view, clearly an extensive tract of land, at 4.8 hectares.
56. The Examiner makes a clear finding that it is a "*large field*" and "*only the northern section of which is contained by development in The Chequers & Prospect Place.*"
57. In their response, the LPA have simply disagreed with that conclusion, inverting the findings in a manner that appears so obviously factually wrong, that it passes into the threshold of irrationality in conventional public law terms:

*"We agree with the Examiner that the area is local to the settlement, however, we consider that it is not an extensive tract of land, a large section of it being contained by development in the Chequers and Prospect Place."*

58. The site is either "contained by development" or not. The section that bounds development should be measured on the ground, but on the face of the map attached to Policy 5, it would appear that the section is a very small portion of the whole, with over half open and not enclosed.
59. In any event, the test of "extensive" does not turn on the extent of containment: it purely connotes scale and here again there is not an unbounded scale whereby several hectares of land can be simply recorded as "not extensive". There is a basic standard of rationality, controlled to an extent by the Examiner.

60. Although the football pitch test in Backwell works best only for sites well in excess of 5 hectares, there are ample examples in the Examiner's Plan Reports above of modification being ordered to ensure removal on sites well below 4.8 hectares.

*(b) NPPF 77(2): Demonstrably Special*

61. The Examiner's finding was based upon a careful assessment of the extent to which recreational walking and access amounted to "demonstrably special": 6.4.26:

*"I have therefore given no weight to these statements. Whilst it is a field, which allows formal and informal public access across it for countryside walks, dog walking etc. it is not dissimilar in this respect to many other areas of countryside adjoining villages. I accept that the field provides a tranquil, green backdrop to the southern end of the village with open views south to the River Tove but I am not persuaded that this is any different to other areas of countryside bordering the village."*

62. What has now been provided is simply a local survey that confirms the amount of walking and other similar activities (jogging, travelling to destinations on foot), and the reliance upon a bi-annual event, but the evidence remains very thin and does not displace the above Examiner's finding. 219 individuals within a population of circa 1100 recording that they have walked over a given site, or even engaged in the other activities does not amount to a different evidence base.
63. Again, the test is simply repeated back by the Council with no analysis of the Examiner's underlying reasons, although these are a mandatory material considerations under paragraph 12(1) of Schedule 4B:

*"It is considered that this additional information provides the evidence needed to substantiate the Parish Council's claims as to the level and type of uses of the land that the examiner considered to be lacking. As such, it is considered that it can be demonstrated that Gobbey's Field is demonstrably special and of particular local significance to the Castlethorpe village community."*

64. The letter on the Duck Race is particularly thin: use on two days per year, or just one (the position is not clear) plainly does amount to sufficient regularity of use.

(c) *Prevention of Development/Green Belt by Back Door*

65. The Examiner observed at 6.4.27 that non-designation as LGS would not lead to the development of the Site. Strictly speaking, the Examiner over-stepped his remit in this section. There is nothing within the NPPF or PPG text that supports a consideration of whether an LGS will be subsequently built upon. Indeed PPG confirms that:

*“In particular, designation should not be proposed as a ‘back door’ way to try to achieve what would amount to a new area of Green Belt by another name.”;*

66. A finding that alternative protection is available under the Local Plan does not fall within any of the applicable basic conditions: 8(2)(a), (d) and (e), and the combined effect of 8(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)”* and paragraph 12(10): *“In any case where the authority are not satisfied as mentioned in sub-paragraph (4), they must refuse the proposal”* restricts the inclusion of such external planning considerations into the neighbourhood plan examination exercise.

67. However the LPA have further transgressed this in observing:

*“Although, we agree with the Examiner that as the site is outside the settlement boundary “the starting point for assessing any residential development proposal in the future is that it would not be acceptable“ this statement does not acknowledge the current planning position whereby Milton Keynes Council is unable to demonstrate a 5 year housing land supply. The effect of the lack of a 5 year housing land supply is that Milton Keynes Local Plan Policy S10 (Open Countryside) and Core Strategy Policy CS1 (Development Strategy) are currently considered to be out of date (NPPF para. 49).”*

68. The clear inference to be drawn from this finding is that the LPA consider that, external to the basic conditions, they are justified in imposing a Green Belt designation on the site to avoid the full effects of the lack of a 5-year housing land supply.
69. That further contravenes an allied principle observed in *Carpets of Worth Limited v Wire Forest DC* [1991] 2 PLR 84, 94, followed by the Court of Appeal in *Solihull MBC v Gallagher* [2014] EWCA Civ 1610, [34]-[36] as to the avoidance of “sterilisation” of land by Green Belt designation:



*“As it directly prejudices land owners in the otherwise proper development of their land, an extension to the Green Belt should not be brought into effect until it can be justified directly by those purposes for which the Green Belt is designed. There must, therefore, be an inhibition in extending the Green Belt so as to avoid sterilising unnecessarily neighbouring land ... just as much as reduction in the boundaries of the Green Belt, which would prejudice the purposes of that Green Belt, must also be made only in exceptional circumstances. On this basis I think that the general concept of the advice in the circulars is that once a Green Belt has been established and approved as a result of all the normal statutory processes it must require exceptional circumstances rather than general planning concepts to justify an alteration. Whichever way the boundary is altered there must be serious prejudice one way or the other to the parties involved.”*

70. The creation of a form of “pop-up Green Belt” through a designation of this nature therefore cannot inform the LGS designation on a correct understanding of the PPG and the NPPF 77: *“The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used. [etc.]”*

*(e) Summary*

71. The summary does not follow the statutory tests (albeit building upon the Examiner’s initial error) and therefore demonstrates a misdirection in respect of paragraph 8(2) and 12(4):

*“Milton Keynes Council considers that there is nothing to suggest that designation as a Local Green Space would be contrary to national policy and advice and therefore Basic Condition No 1”*

72. Basic condition 1 is apparently 8(2) (a). The Council have not had regard to the full range of PPG provisions and accordingly have not properly applied 8(2)(a) in determining, *having regard* to the relevant or material provisions whether it is appropriate to include this designation.

**Q2: Independent Examination: Should the Council order a further independent examination of this issue under paragraph 13 of Schedule 4B?**

73. In short: yes.

74. In my view, the clear logic of paragraph 13 is that where a significant difference of view emerges on the basis of new factual evidence not provided to consultees in advance of the Regulation 16 stage, then the matter should be referred back to independent examination by the same Examiner. Although worded as a discretionary power, paragraph 13 imports the need for independent scrutiny and recognition of the Examiner's role.

75. I therefore recommend that the submissions request that the matter be returned to examination by the same Examiner, with a request that the Examiner holds a hearing pursuant to):

*“(1) the general rule is that the examination of the issues by the examiner is to take the form of the consideration of written representations.*

*(2) But the examiner must cause a hearing to be held for receiving oral representations about a particular issue at the hearing—*

*(a) in any case where the examiner considers that the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case, or*

*(b) in such other cases as may be prescribed.”*

**(Q3) Should the Council seek to send the plan to referendum and then make the plan; can the plan be challenged by way of judicial review?**

*Procedure*

76. It is important to consider the preliminary question of “target” selection and the procedure for a judicial review challenge.
77. The correct point at which to challenge a neighbourhood plan is within six weeks of the decision to send the plan to referendum under paragraph 12(4) of Schedule 4B. Section 61N of the Town and Country Planning Act 1990 provides:

*“(2) A court may entertain proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc.) or paragraph 13B of that Schedule (intervention powers of Secretary of State) only if—*

*(a) the proceedings are brought by a claim for judicial review, and*

*(b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day on which the decision is published.”*

78. Although the Council’s Decision Statement is framed as having been made under paragraph 12, there has been no final decision yet under paragraph 12(4):

*“(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.*

- (11) *The authority must publish in such manner as may be prescribed—*
- (a) the decisions they make under this paragraph,*
  - (b) their reasons for making those decisions, and*
  - (c) such other matters relating to those decisions as may be prescribed.”*

79. Regulation 17A of the Neighbourhood Planning (General) Regulations 2012 provides:

*“17A. — Decision on examiner’s recommendations*

*(1) This regulation applies where an examiner has made a report under paragraph 10 of Schedule 4B to the 1990 Act (applied by section 38A (3) of the 2004 Act) in relation to a plan proposal.*

*(2) The persons prescribed for the purposes of paragraph 13(1) of that Schedule are—*

- (a) the qualifying body;*
- (b) any person whose representation was submitted to the examiner of the plan proposal in accordance with regulation 17(d); and*
- (c) any consultation body which is referred to in the consultation statement mentioned in regulation 15.*

*(3) Representations invited under paragraph 13(1) must be submitted on or before the date, which is the **last day of the period of 6 weeks beginning with the day immediately following that on which the local planning authority first invited representations.***

*(4) On or after the date prescribed in paragraph (5) the local planning authority must decide what action to take in response to each recommendation made by the report mentioned in paragraph (1).*

*(5) The date prescribed in this paragraph is—*

- (a) where the local planning authority and the qualifying body agree a date, that date;*
- (b) where sub-paragraph (a) does not apply but paragraph 13 of Schedule 4B to the 1990 Act (applied by section 38A (3) of the 2004 Act) applies—*

*(i) where the authority refer the issue to independent examination, the date which is the **last day of the period of 5 weeks beginning with the day immediately following that on which they receive the report of the examiner on that issue;***

*(ii) where the authority do not refer the issue to independent examination, the date which is the **last day of the period of 5 weeks beginning with the day immediately following the date prescribed in paragraph (3);***

*(c) in all other cases, the date which is the last day of the period of 5 weeks beginning with the day immediately following that on which the local planning authority receive the report mentioned in paragraph (1)."*

80. Regulation 18 of the same Regulations provides:

*18. — Publication of the examiner's report and plan proposal decisions*

*(1) Paragraph (2) applies where a local planning authority decide—*

*...*

*(c) what action to take in response to the recommendations of an examiner made in a report under paragraph 10 of Schedule 4B to the 1990 Act (as applied by section 38A of the 2004 Act) in relation to a neighbourhood development plan;*

*(d) what modifications, if any, they are to make to the draft plan under paragraph 12(6) of Schedule 4B to the 1990 Act (as applied by section 38A of the 2004 Act);*

*...*

*(f) that they are not satisfied with the plan proposal under paragraph 12(10) of Schedule 4B to the 1990 Act (as applied by section 38A of the 2004 Act).*

*(2) As soon as possible after making a decision referred to in paragraph (1), a local planning authority must publish—*

*(a) the decision and their reasons for it ("the decision statement"),*

*(b) details of where and when the decision statement may be inspected; and*

*(c) in the case of a decision mentioned in paragraph (1) (c), the report made by the examiner under paragraph 10 of Schedule 4B to the 1990 Act (as applied by section 38A of the 2004 Act),*

*on their website and in such other manner as they consider is likely to bring the decision statement and, as the case may be, the report to the attention of people who live, work or carry on business in the neighbourhood area."*

81. Regulation 2A of the Neighbourhood Planning (Referendum) Regulations 2012 provides:

*"2A (1) The referendum must be held on or before the date prescribed in paragraph (2).*

*(2) The date prescribed in this paragraph is—*

*(a) where—*

- (i) regulation 10 applies,*
- (ii) regulation 16 applies, or*
- (iii) regulation 17 applies,*

*the date which is the last day of the period of 84 days beginning with the day immediately following the day on which the decision that the referendum **must** be held is first published in accordance with paragraph 12(11) of Schedule 4B to the 1990 Act;*

*(b) in all other cases, the date which is the last day of the period of 56 days beginning with the day immediately following the day on which that decision is first published in accordance with that paragraph.*

- 82. Regulations 10, 16 and 17 are not applicable, and the referendum date would therefore be 56 days or 8 weeks after the final decision.
- 83. The Decision Statement's reliance upon paragraph 13 makes clear that they are merely "proposing to make a decision different from the Examiner" and indeed no final decision has been taken on whether to send to the Examiner for further independent examination.
- 84. In summary, the following timescales will apply.
- 85. If the Council send the plan back to examination, then they must make a further decision under paragraph 12 of Schedule 4B within 5 weeks of the receipt of that Report (Regulation 17A (5) (b) (i)). That decision must be challenged within 6 weeks (Section 61N (2) TCPA).
- 86. If the Council do not send the plan back to examination, they must make a decision under paragraph 12 of Schedule 4B within 5 weeks of 30 November, i.e. the last date of the paragraph 13 consultation (Regulation 17A(5)(b)(ii)). That decision must be challenged within 6 weeks (Section 61N (2) TCPA).

#### *The Scope of the Challenge*

- 87. The above procedural navigation should demonstrate how the challenge by way of judicial review must respond to the final decision as crystallised in the reasons given for that decision under paragraph 12(4) and (11).

88. As section 61N makes clear, the judicial review challenge “questions”, i.e. explores the legality of that final decision.
89. As matters stand, were the Council to take no further action on the issues above and simply proceed to referendum, there would *appear* to be the basis for a legal challenge on the basis of:
- (a) Failure correctly to take account of and/or interpret the provisions of NPPF 76 and 77, and further NPPF 78 and 82 read together on exceptional circumstances requires to generate new Green Belt;
  - (b) Failure correctly to take account of and/or correctly interpret the provisions of the PPG on Local Green Spaces, including Paragraph: 007 Reference ID: 37-007-20140306 and Paragraph: 015 Reference ID: 37-015-20140306;
  - (c) Failure correctly to take account of the Examiner’s first Report and/or failure to provide reasons for reaching a different view on a material issue, in breach of paragraph 12(11) and Regulation 18;
  - (d) Procedural unfairness in failure to send the plan back to the Examiner under paragraph 13(2)
  - (e) Material error of fact in respect of the extent of “containment” of the LGS;
  - (f) Failure to have regard to the landowner’s submissions in the paragraph 13 consultation.
90. In the absence of a final decision, it is however impossible to identify precisely whether all or only a few of those grounds could be argued in a challenge by way of judicial review. At present, such a decision looks clearly challengeable.
91. However, once a decision is made, with further reasons and a new explanatory table, or if the Examiner is asked to write a further Report, generating in turn a final decision, then the prospects of a challenge can only be considered *at that stage*.

92. In conclusion, whenever the final decision is made under paragraph 12(4) to send the Plan to referendum, either without a further Examiner's Report, or with one, then I would be able to advise on the prospect of a challenge by way of judicial review.

**22 November 2016**

**CHRISTOPHER YOUNG**

**No5 Chambers**

**Birmingham - Bristol - East Midlands - London**





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**TOWN AND COUNTRY PLANNING  
ACT 1990**

**IN THE MATTER OF**

**LAND AT GOBBEY'S FIELD  
AND  
THE CASTLETHORPE  
NEIGHBOURHOOD PLAN  
SUBMISSION VERSION**

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**OPINION**

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**Cerda Planning**