

**Re: Preparation of the Hickling Neighbourhood Plan**

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**FURTHER ADVICE (2)**

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1. I have previously advised in this matter by advices dated 19<sup>th</sup> May 2019 and 4<sup>th</sup> March 2020. I am asked to advise Mr Mark Samworth with regard to the preparation of the Hickling Neighbourhood Plan ('NP'). Mr Samworth lives at the Old Rectory, Main Street, Hickling. His property is adjacent to the A E Faulks haulage depot (a site described as 'the Wharf' in the draft neighbourhood plan) which is allocated to provide nine dwellings within the NP.
2. In my March 2020 advice I advised that it would be unwise to object to further consultation but that:

‘It is reasonable and appropriate to advise the parish council that as an interested party you will be expecting that any focussed consultation must still be sufficient consultation and consult sufficiently widely and for sufficient time to be effective. So whilst the subject matter can be focussed to specific proposals the parties engaged cannot be ‘focussed’ to something less than

would apply to the rest of the NP. These are matters of natural justice it seems to me’.

3. I also referred to the case law on consultation and in particular the principles in R v N E Devon HA ex p Coughlan [2001] QB 213 per Lord Woolf MR.
4. Subsequently Mr Samworth has received from the Parish Council its consultation paper seeking views on two possible housing sites (including the Faulks depot site). I am asked to review this consultation document and advise whether it is a valid attempt to consult, whether it meets the requirements of natural justice.

### **The consultation**

5. The consultation is written defensively. It opens by commenting that progress in selecting housing allocations has been ‘hindered by unhelpful pre-judgement of the draft. We emphasise we are only at draft stage’.
6. The consultation then gives the following ‘dilemma’: ‘In order to shape the plan and add legal weight we need to make site allocations for 10 dwellings - not necessarily to be delivered all at once, but over time – the period of the plan to 2028’.
7. I would question this statement on two bases. It is not the case that an NP needs to make housing allocations, though I would agree that a NP that plans positively would attract more weight to its more defensive policies. I would certainly not agree that 10 dwellings need to be allocated. As I advised in March 2020, the basis upon which the Parish Council has claimed that there is housing ‘need’ in Hickling is very shaky. A dated survey of residents views does not equate to a meaningful or weight worthy assessment of housing need. Secondly, if the goal is to create a pipeline of housing supply ‘over time’ to the end of the NP plan period then it is utterly irrational to seek to allocate one site for the whole proposed 10 dwelling provision. Having all of the proposed housing on one site virtually guarantees that it will not come forward gradually over the lifetime of the plan.

8. The Consultation goes on to state that an allocation is not a planning application but rather says to developers ‘this is where we would support development’. Obviously an allocation is not an application but it is more than ‘where we would support development’. By allocating a site the NP will give any application on that site the *imprimatur* of development plan compliance. By operation of s.38(6) of the PCPA 2004 the allocation and therefore plan compliance will give any application a presumption for planning consent on the basis that determinations must be made in accordance with the development plan unless material considerations indicate otherwise (s.38(6)). This initial ‘scene setting’ of the consultation is therefore, in my opinion, already apt to mislead the reader by downplaying the significance of allocating a specific site.
  
9. Further, the Consultation proceeds to state that allocating green field land within the allocation will not create a green field precedent but rather ‘say what we allocate and no more’. In this I think the Consultation is again erroneous. As I advised in March 2020 the allocation of green field land does set a precedent that in establishing the NP green field development was considered acceptable. That **will create a precedent** at any review or update to the NP where any reviewer will see that Hickling Parish has previously considered green field development as an appropriate place to focus housing development. Again, the Consultation is apt to mislead the reader.
  
10. The Consultation advises the reader that ‘there is currently no boundary to development’. Again this is apt to mislead. The adopted Local Plan Part 2 whilst not establishing boundaries makes clear that there is such a thing as ‘the identifiable settlement boundary’ in the case of each settlement which can be determined in the circumstances of each case. I advised upon this point in March 2020 and noted:
  40. The Local Plan Part 2 proceeds on the basis that the settlement boundary for the purposes of Policy 22 will be able to be determined at the time an application is considered as a judgement of fact and degree:
    - ‘6.11 The Local Plan does not identify the settlement boundaries for the above settlements, beyond which Policy 22 will apply. The location of the proposal and its relationship to the physical edge of the settlements will determine whether the application is within the settlement or within the open countryside. For example developments that extend beyond the

identifiable settlement boundary are considered within the countryside. Existing outlying buildings, or larger clusters of buildings, separated from the identifiable boundary of the settlement by more than a small scale infill plot are within the open countryside and development located between these buildings and the settlement would be subject to Policy 22’.

41. Therefore I do not think that the lack of a defined boundary tells for the development proposals. The Local Plan is saying that there **is** a settlement boundary and that it is a thing that can be determined as a judgement of fact.

11. There is a settlement boundary: the statutory development plan says there is. However it is not defined on a map and is to be determined from the circumstances of the relevant settlements. The Consultation is again erroneous and misleading to the reader.
12. The Consultation proceeds to summarise the central concern is the risk of ‘speculative development’. I would agree that there is a risk of speculative development however I would disagree with the implication that an allocation within the NP will remove the risk of speculative development. As written the Consultation implies that the allocation of a housing site will eliminate the risk of speculative development. This is wrong, the nature of speculative development is that it can arise at any time and the risk will remain even with an allocation.
13. The Consultation proceeds to identify to sites for consultation: Long Lane (4 dwellings<sup>1</sup>) and the Faulks’ site (9 dwellings on the owner’s proposed site). The Consultation then explains that the sites to be consulted upon include the extended Faulks’ site (including 10m incursion into green field land) on the basis that this is the site proposed by AE Faulks for the NP process and that a smaller brownfield only site is not offered by the owners.

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<sup>1</sup> I am instructed that the site currently accommodates one dwelling which will be demolished and five dwellings constructed (four dwellings net).

14. The two potential allocations are described within the Consultation. The Faulks' site description highlights the history of 'numerous complaints regarding noise and disruption' over the years but fails to note the recent regulatory action taken against the owner which it is understood has resolved those complaints. By omission, this description misleads. The description explains the owner's aspirations for the site and their wish for its development to facilitate a move to a new depot site where they already have planning permission. The description refers to the owners making clear they will 'not develop the site without an element of greenfield'. I did not understand AE Faulks haulage to be a housing developer but I assume this language is shorthand for the owner's willingness to sell to such a developer. The description of the Faulks site is accompanied by an illustrative plan showing how nine houses could be developed on the extended site. The description notes that if the Faulks site is not acceptable 'we may need to find other site(s) to meet the housing need elsewhere'.
15. The Consultation then proceeds to describe the Long Lane site which, it informs us, came forward in response to previous consultation. The Long Lane site is currently subject to a planning application. The Long Lane description is five lines long with a map below as opposed to the full page of text in the Faulks description which is in total two pages. The Long Lane site is described as a 'redevelopment' and therefore one can infer that it is a brownfield site. I am instructed that the site is currently occupied by one dwelling and some outbuildings. It is a brownfield site but the reader is not informed of this shared policy endorsement which applies to Long Lane as well as the Faulks' site. However, the Long Lane site description does not include the same references to policy endorsing brownfield development which are provided in the Faulks' site description.
16. The Consultation ends by asking the respondent (Question 7) to rank the following four options:
- a. The redevelopment of the Faulks' site with a small greenfield extension.
  - b. The Orchard, Long Lane.
  - c. The development of greenfield sites elsewhere.
  - d. Do not meet the housing need.

17. I have noted before that the evidence base for the alleged housing ‘need’ in Hickling is not sufficient to establish a need. Further, I would note that this question is skewed in characterising the greenfield take for the Faulks’ site as ‘small’. That is self-evidently gratuitous commentary.
18. The question also does not include the possibility of other brownfield sites even though in the introduction it is conceded that they exist though there are ‘very few’. Whilst the Consultation is clear that the owner of the Faulks’ site is not amenable to pursuing a brownfield only allocation I think it is remiss not to provide that option as one upon which the respondents can express a preference. If nothing else a strong response in favour of that option would provide the Parish Council with support for asking the owners to reconsider that position if they wish to attract NP support.
19. Further to the Consultation document the Neighbourhood Plan Steering Group (‘the Steering Group’) issued a ‘Note of Clarification’ (‘the Note’) on 31<sup>st</sup> July 2020 following ‘some anonymous communication’. I will comment on this document as well since it makes a number of claims regarding the operation of the planning system and the NP process.
20. The Note begins by stating that ‘gradual development’ is ‘not an option’ and that neighbourhood plans exist because it is not an option. I am uncertain what the Steering Group means by ‘gradual development’ but I think it is suggesting that allowing for the gradual ‘dwelling by dwelling’ growth of a Neighbourhood Plan area is not possible.
21. I think in stating this the Steering Group have been too absolute: absolutes are rarely true and when absolute statements are made by councils or other authorities they are easily open to criticism and challenge. In this case it is not the case that a Neighbourhood Plan could not be prepared with such a goal. I can conceive of the ability of a parish council, with suitable advice, seeking to frame a series of development control policies within their NP which controlled and limited scale of development whilst demonstrating a positive approach (allowing) for development to come forward. Such policies could justify the growth of a settlement by one, two or three dwelling increments without having to focus all development on one site as is

proposed in Hickling. Frankly, to state gradual development is absolutely ‘not an option’ is foolhardy.

22. The Note proceeds to state that there is currently ‘no limit to development’. As I have advised above this is to ignore the provisions of the extant development plan for Rushcliffe that makes clear that identifiable settlement boundaries do exist but are not recorded in a map. Again the reader is misled.
23. The Note records that Rushcliffe is pursuing a new Core Strategy and will need to allocate new housing and that villages ‘continue to be impacted by development’. As a generality I would not disagree with this statement but note that there is a significant gap between those pressures and the allocation within the statutory development plan of greenfield land which under Policy 22 would rationally appear to be in the open countryside. Again in carrying out the Consultation the Parish Council and its Steering Group displays a significant bias in how it seeks to ‘inform’ the electorate. A consultation (such as this extension of consultation) can be informed by previous work but **care must be taken to not be so one sided** that the Consultation appears to be predetermined.
24. I would note again at this stage the general principles concerning consultation set out in R v N E Devon HA ex p Coughlan [2001] QB 213. At [108], Lord Woolf MR specified that:

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168.”

25. The Note again restates what is said in the introduction to the Consultation that an allocation does not set a precedent. As I have advised above, this is wrong. An allocation encompassing greenfield land will set a precedent at any review of the NP in the future where there will be a precedent that Hickling is suitable for greenfield allocations. This means that a future greenfield allocation in a review of the NP would probably **not go to a further referendum** as it would not change the ‘nature’ of the NP. It is correct that a greenfield allocation now does not set a precedent for non-allocated greenfield site coming forward **now** but it appears that the Steering Group/Parish Council have not considered or been made aware of the implications when the NP is reviewed in the **future**.
26. At this point the Note also claims that an allocation will provide greater protection from speculative development. As I have noted above, speculative development is just that and can come forward at any time with or without allocations extant. An allocation may give some policy shield but only of a limited nature and one that goes once the allocation is developed.
27. The Note then makes specific reference to the Faulks’ site and the potential to remove ‘noise and industrialisation’ from the village. Again the Steering Group fails to note the recent action to enforce and control the Faulks’ site and by specifically referencing this site undermines the ability to argue that the Consultation is not predetermined.

### **Conclusion**

28. I must advise Mr Samworth that I think that the Consultation (including the Note) is not a fair exercise in its differing approaches to the two housing options provided. Further, as I have advised above, the Consultation is apt to mislead in how it advises the reader in its introduction. I am aware that Mr Samworth wishes to provide my advice to the Parish Council to highlight the issues perceived with the Consultation. However, I would advise Mr Samworth that in addition to this he should make his concerns known to his neighbours and his community in Hickling.
29. From the materials I have advised upon over the last year it is quite apparent that the Parish Council is committed to the Faulks depot site and has pursued its allocation single mindedly. I think that Mr Samworth should be drawing his concerns with the

draft NP and the Parish Council's approach directly to his community's attention. If the Parish Council will not take heed of his concerns and the advice of the professionals he has retained he should make his community aware of them as the Parish Council's approach thus far has been apt to mislead the Parish electorate.

ANTHONY GILL

4<sup>th</sup> August 2020

KINGS CHAMBERS

MANCHESTER, BIRMINGHAM, AND LEEDS