

Report to	-	Cabinet
Date	-	2 November 2015
Report of the	-	Executive Director of Business Operations
Subject	-	Consideration of the Examiner's Report into the Sedlescombe Neighbourhood Plan

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**Recommendation:** It be **RESOLVED:** That Sedlescombe Parish Council be asked if it wishes to withdraw the Sedlescombe Neighbourhood Plan and undertake further consultation under Regulation 14 of The Neighbourhood Planning (General) Regulations 2012.

**Recommendation to COUNCIL:** That: If Sedlescombe Parish Council has not withdrawn the Neighbourhood Plan prior to Full Council, then the Sedlescombe Neighbourhood Plan incorporating the Examiner's modifications, as set out at Appendix 2, proceed to local referendum.

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**Service Manager: Tim Hickling**  
**Lead Cabinet Member: Councillor G.A Johnson**

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## Introduction

1. The Sedlescombe Neighbourhood Plan was prepared and submitted by Sedlescombe Parish Council in July 2014. A seven-week formal public consultation was then undertaken by this Council, following which the Neighbourhood Plan, together with supporting material and all duly-made representations, was submitted for independent examination. It is published on the Council's website – see <http://www.rother.gov.uk/neighbourhoodplans>.
2. The Examiner, Mr Nigel McGurk, appointed jointly by this Council and the Parish Council, duly assessed whether the submitted Neighbourhood Plan meets the required 'basic conditions'. His report, dated January 2015, is attached as Appendix 1.
3. The Examiner proposes a number of modifications but, subject to these being made, he recommends that the Plan should proceed to referendum, based on the Neighbourhood (i.e. Parish) Area.
4. It is now for this Council to decide whether to accept each of the Examiner's recommendations. Hence, the purpose of this report is to present the relevant information to inform this decision.
5. The Examiner's proposed modifications to the submitted Neighbourhood Plan are reviewed below. Particular attention is drawn to his consideration of this Council's own representations, which were primarily in order to achieve general conformity with the adopted Core Strategy (Minute CB14/37 refers).

6. Following consideration of whether the Neighbourhood Plan (incorporating the Examiner's proposed modifications) can be accepted as meeting the relevant tests, an additional assessment is made of subsequent representations by Sedlescombe Parish Council. The Parish Council does not agree with several of the Examiner's key conclusions and their reasoning should be considered.
7. To aid the consideration and formulation of recommendations, legal advice has been sought from both the Council's solicitor and from Queen's Counsel. Indeed, the time taken to get to this stage can be seen as reflecting the complexity of the necessary assessments and the need for a rigorous process, as well as the earlier delay due to the local elections.

### **Examiner's recommendations**

8. To recap, the Sedlescombe Neighbourhood Plan contains seven policies. Policy 1 is its 'spatial policy', relating to development within and outside a slightly amended development boundary for the village. Policies 2-7 relate to specific sites, one (Policy 2) on the edge of the village and the others outside the village.
9. In terms of overall housing supply, the Examiner concurs with this Council that the submitted Plan was not in general conformity with the Core Strategy and failed to have regard to the National Planning Policy Framework (NPPF).
10. While he believes that a neighbourhood plan should have scope to identify suitable housing allocations in various parts of the plan area, he concludes that there is insufficient provision for housing and, significantly, that Policy 1 of the Plan should be amended to allow for suitable sites to be developed "*on the edge of Sedlescombe*" to meet the housing requirement.
11. Hence, he proposes an additional sentence to **Policy 1** to read:  
  

***'Proposals for new sustainable residential development on the edge of Sedlescombe will be supported where it can be demonstrated that such development is necessary to enable the Neighbourhood Area to meet its housing land requirement and is in keeping with local character.'***
12. Key points in the Examiner's consideration of the site-specific policies are:
  - a) He endorses **Policy 2**, for 6 dwellings off Gregory Walk at the southern end of the village;
  - b) He adds two further criteria to **Policy 3** for Land at Pestalozzi International Village that provide for an alternative estate management facility and requires any new access road to be demonstrated to have an acceptable impact on the character of the Brede Valley and be visually contained from public views, as requested by this Council to protect the AONB;
  - c) He rejects the proposal for housing to the rear of Blackbrooks Garden Centre to the west of the A21 (**Policy 4**), stating that the site would effectively be isolated from Sedlescombe and that to support residential development in this location would fail to have regard to the NPPF, effectively upholding this Council's objection;

- d) He supports the approach to a redevelopment of Sedlescombe Sawmill (**Policy 5**), potentially involving housing, but does not accept that affordable housing should be required as part of any housing to cross-subsidise new employment space;
  - e) He supports **Policy 6** for housing adjacent to the Parish Church, subject to preserving its setting and significance;
  - f) He accepts the 'Local Green Space' designation of 'Red Barn Field', a nature park close to the village hall, but does not accept that such a designation is appropriate for Street Farm, off Brede Lane, as proposed in **Policy 7**.
13. There are also a number of other modifications, including clarifications, removal of unnecessary/out-of-date text and consequential amendments.
  14. A full draft of the Sedlescombe Neighbourhood Plan incorporating all of the Examiner's modifications (Excluding the forward and Chairman's Introduction) has been collated and is contained at Appendix 2.
  15. It is notable that the Examiner acknowledges in several places that the District Council has been helpful in seeking amendments to enable the Plan to meet the basic conditions (page 7, sixth paragraph; page 14, sixth paragraph). This reinforces the appropriateness of making formal representations at this key stage of neighbourhood plan-making.

### **Consideration of the Examiner's report and proposed modifications**

16. The Council must now consider each of the Examiner's recommendations. It is not obliged to accept them, but the circumstances in which this can happen and the process to be followed is set out in legislation. It is not sufficient to simply disagree with the conclusions. The purpose of the examination is to provide independent scrutiny. It is inevitable that there may be some conclusions that are supportive of a particular view and others that are not.
17. Overall, it is believed that the independent Examiner, Mr McGurk, has undertaken a fair and robust examination of the submitted Neighbourhood Plan; also, he has recommended modifications that he believes allow the Neighbourhood Plan to proceed to referendum and hence to be part of the statutory 'development plan' for the area –which is, of course, the goal.
18. While officers have reservations about the approach to some issues, as explained below, it is believed that, taken as a whole, the modifications do make the Neighbourhood Plan acceptable in terms of general conformity with this Council's Local Plan Core Strategy and enable sustainable development in the Parish.
19. As noted above, the Examiner has substantially endorsed this Council's assessment of the submitted Plan. The one area where there remains some concern is the flexibility he believes there is on where housing takes place. If this argument were not qualified, it would be a point to contest, as the Local Plan Core Strategy clearly places the focus on settlements<sup>1</sup>. However, the

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<sup>1</sup> This has subsequently been accepted by an Inspector at a s78 planning appeal.

Examiner does go on to promote ‘*sustainable residential development on the edge of the village*’, which is more in line with the Core Strategy and the NPPF. Hence, with this policy in place, it is not necessary to pursue this concern.

20. In relation to the Sedlescombe Sawmills site, setting aside affordable housing as part of any enabling housing to support continued employment use should not be automatic. However, given that the relevant Core Strategy policy prioritises maximizing business space, it is not further pursued.
21. Members will also recall that this Council challenged the Parish Council’s proposed ‘Local Green Space’ designation of fields forming Street Farm on the south side of Brede Lane, urging that further consideration be given to an alternative comprehensive approach which would allow some discretely-sited housing but bring the large majority of the site into public control and safeguard it as open space for the long-term. In the event, the Examiner did not accept the Neighbourhood Plan’s ‘Local Green Space’ proposal, as noted above.
22. Finally, in response to this Council’s suggestions for two amendments to the development boundary to include the curtilages of some properties, the Examiner said “*this strikes me as a sensible approach for future consideration.*” In response, given the modified Policy 1, officers agree that pursuing such amendments now do not warrant delay to the Plan’s progress.
23. In conclusion, officers’ assessment of the Examiner’s report and modifications is that they can be accepted in their entirety. This will allow the Neighbourhood Plan to proceed to referendum.

### **Sedlescombe Parish Council’s response and consideration of its proposals**

24. The Parish Council has advised, at a meeting on 24 July of its views on the Examiner’s proposed modifications. It does not agree with some key recommendations and, instead, seeks alternative modifications to the submitted Neighbourhood Plan. These are:
  - i. Replace the Examiner’s Policy 1 with a new policy which removes the flexibility for “suitable sites” on the edge of village, but instead allocates three further specific sites which it has identified;
  - ii. Reinstate the housing allocation at Blackbrooks Garden Centre, on the basis that the Examiner did not recognise its merits;
  - iii. Reinstate the ‘Local Green Space’ designation of land at Street Farm, south of Brede Lane, on the basis that there are such designations of land that are of a similar size and in some cases larger; hence, it is not an ‘extensive tract of land’ as the examiner concludes.
  - iv. Revise the wording of Policies 3-6, relating to sites in the countryside so they state that these are site “allocations” and not simply that development of the type identified would “be supported”.
25. The Parish Council further stated that these changes are vital to achieve local support at a referendum.

26. The merits and legal implications of each of these options have been considered, as shown in Appendix 3. Of particular note, Counsel's Opinion has been sought on the legal basis and procedures for making such modifications at this stage.
27. The legislative position<sup>2</sup> is that the Authority can only make modifications post-examination if it considers them necessary to meet the 'basic conditions', be compatible with Convention rights, accord with relevant Regulations or correct errors. For reference, the 'basic conditions' relate to the need to:
- have regard to national policies and advice
  - contribute to sustainable development
  - be in general conformity with the development plan's strategic policies
  - not breach or otherwise be incompatible with EU obligations
28. It is found that the Examiner's recommendations meet each of these tests<sup>3</sup> and, furthermore, that the suggested alternative modifications would not be justified in pursuit of any of the stated tests. Hence, it is not recommended that the Council accepts the Parish Council's further modifications to the Examiner's report.

## **Summary and Conclusions**

29. The submitted Sedlescombe Neighbourhood Plan has been independently examined. The Examiner has recommended modifications to enable it to proceed in general conformity with the Council's recently adopted Core Strategy. While the Parish Council has indicated that it does not support some of the Examiner's principal modifications, they are regarded by officers as justified and appropriate.
30. Therefore, it is recommended that the Examiner's proposed modifications are accepted in full and that the modified Plan be subject to referendum. The referendum area would be the Civil Parish, as proposed by the Examiner.
31. It is noted that, as the Neighbourhood Plan will become a statutory plan guiding the determination of planning applications in the area, the decision to take the modified Plan to referendum is a matter for Full Council.
32. On the basis that this Council does not regard the Parish Council's alternatives as necessary in line with legal requirements (nor indeed appropriate) to enable the Neighbourhood Plan to meet the statutory tests highlighted in paragraph 27 above, there is no basis for undertaking further consultation at this stage.
33. However, if, upon further consideration, the Parish Council does not want the modified Neighbourhood Plan to go to referendum, then it has the opportunity (up to the point when Council decide whether to take it to referendum) to withdraw the Neighbourhood Plan and go back to an early stage (under

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<sup>2</sup> Paragraph 12(6) of the Schedule 4B of the Town and Country Planning Act 1990, as amended by the Localism Act 2011, and the Planning and Compulsory Purchase Act 2004 (as amended).

<sup>3</sup> Subject to a clarification that the iterative nature of the Strategic Environmental Assessment reports is appreciated.

Regulation 14<sup>4</sup>) to undertake further testing of options, including strategic environmental assessment, and re-consult and then duly resubmit.

34. The recommendations are worded accordingly.

Dr Anthony Leonard  
Executive Director of Business Operations

### **Risk Assessment Statement**

The Council is obliged at this point to formally decide if the Neighbourhood Plan meets the basic conditions. It must do so fully in accordance with the legal framework. Legal advice, from a respected QC, has been sought to ensure this, especially given the risk of legal challenge. His advice has been accepted.

Officers are confident that the Neighbourhood Plan, incorporating the Examiner's modifications meets the legal tests. The need to clarify that the respective SEAs should be read collectively has been drawn out in this report.

On the basis of the legal advice received, there is a risk of judicial proceedings against the Council being successful if it does not allow the Neighbourhood Plan to proceed to referendum. There would be similar risks if the Council were to accept the Parish Council's suggested further modifications and re-consult on those at this point in the process. Also, to accept those changes would be seen as contradicting the Council's previously stated position, as set out in its formal representations.

If the Parish Council were to withdraw the Neighbourhood Plan for further refinement, potentially including new sites, there would be a cost to this Council both in officer time in undertaking consultation on the Pre-Submission Plan and in meeting the costs of the re-examination.

There is a risk of the Neighbourhood Plan being rejected at referendum, but there is clear merit in having a Neighbourhood Plan in place as part of the statutory development plan in relation to the determination of planning applications.

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<sup>4</sup> Under The Neighbourhood Planning (General) Regulations 2012.  
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**Consideration of SPC alternative modifications**Suggested alternative Policy 1 and new housing sites

1. The Parish Council has identified three sites, not previously included in the submitted Neighbourhood Plan to help boost housing supply. All three sites are on the edge of the village, two being at least partly in the existing development boundary.
2. Two of the sites (land at Powdermills and at Scotch Down) are assessed as having potential for less than 6 dwellings each, even assuming that certain issues could be satisfactorily addressed. The larger, third site (land at Gate Cottage) is estimated to offer potential for some eight dwellings. These quantum are a little less than suggested by the Parish Council, but take particular consideration of site constraints, especially the need to protect trees that contribute to local amenity.
3. In terms of the potential contribution to housing supply, the larger site could contribute to Sedlescombe's housing target, but it is not sufficient to meet the likely shortfall in supply against the target of 35 dwellings, given the uncertainty surrounding delivery on other sites.
4. Hence, while the Examiner's approach is still regarded as meeting the basic conditions, it is not considered that the bringing forward of the identified sites would, in the absence of the Examiner's modification to Policy 1, overcome the deficiencies of the Plan in relation to housing supply and promoting sustainable development.
5. At the same time, it is acknowledged that, if a proposal for housing here were duly accepted in accordance with Policy 1 (see paragraph 9 of the main report), it would reduce the need for further allocations.
6. If found acceptable following more detailed assessment, housing on the two smaller sites would contribute to the Core Strategy's small windfall sites target for rural areas.
7. Of course, as none of these sites has been previously put forward in the draft Neighbourhood Plan nor, in two cases, subject to any local consultation or Strategic Environmental Assessment, these would need to be undertaken.

Land at Blackbrooks Garden Centre

8. The Parish Council maintains its view of the merits of this site for housing on the same grounds that it did previously. It suggests that the Examiner's recommended deletion is flawed on several grounds: that he overlooks the proposed provision of a footpath, he overlooked actual distances to the village shop, he did not have due regard to social, economic and social factors, he overlooked the fact that it will deliver a major infrastructure improvement to the highway to the benefit of all road users and overlooked the additional employment space added, which is a key objective. Incidentally, it also suggests that he may have breached the code of conduct by entering the site without permission.

9. In response, the suitability of this location for housing – or rather its unsuitability – has been previously considered by this Council, which resulted in objections being made to this housing proposal, as noted earlier.
10. Furthermore, the Examiner has unequivocally rejected the proposal on page 18 of his report, as also noted earlier.
11. While the Parish Council may not share the Examiner's or this Council's judgement, it should not be surprised at the outcome. Officers advised consistently that this was an unsustainable proposal.
12. As regards the criticisms of the Examiner's recommended deletion of the policy, none of the points made by the Parish Council point to misunderstandings or oversights on his behalf. All the arguments being made now were before him. That he has focused in his report on the reasons for not supporting the proposal, rather than restate the arguments made in its favour, seems understandable. Legal opinion is that a court would not readily conclude that the Examiner had overlooked the argued "benefits"; nor would a court regard it as essential in the circumstances that he expressly refer to them.
13. Hence, the Examiner's recommendation to delete Policy 4 is seen as a sound planning judgement, properly considered, adequately explained, and should be accepted.

#### Land at Street Farm

14. Firstly, it is clear that the Parish Council sets substantial store in keeping this area open, as witnessed by its considerable efforts in objecting to the development of 18 dwellings at the recent appeal on the site, and has received strong local support.
15. The Parish Council has since commissioned a report that considers a number of other Local Green Spaces (LGS) that have been designated in neighbourhood plans, from which it concludes that the Street Farm site '*... compares very favourably with other Local Green Spaces that have been accepted by other Inspectors.*' The implication that is drawn is that it should not be regarded as an extensive tract of land and hence, can be so designated.
16. To directly contradict the Examiner's assessment, as the Parish Council seeks to do, is regarded as a high hurdle requiring a strong case if it is to be not liable to legal challenge. Hence, officers have carefully scrutinised the Parish Council's report to ascertain whether there is a convincing argument. The report does identify some larger areas, but more detailed analysis of these shows that their circumstances vary considerably from Street Farm, notably being recreational spaces, recognised wildlife areas and/or having extensive public access.
17. Of course, areas inevitably differ in their local context. This point is crucial, as all planning judgements must be seen in their unique local circumstances. In this case, the Examiner (who is experienced in dealing with such proposals) does not appear in doubt about its scale in the local context, observing that it '*is many times larger than Red Barn Field*' (the LGS designation of which he supports) and that '*several full size football pitches, with land around them, could easily fit into it.*' (last paragraph, page 22) and concluding that it '*can only be described as extensive*'.

18. Furthermore, while the Examiner notes that local support for keeping the area open is part of the test, he does not regard it as sufficient. In this respect, it is noted that a further test is that an area also '*holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field) tranquillity or richness of wildlife.*'
19. Legal advice confirms that if the District Council were to include the whole site as a LGS there would be a real risk that judicial review proceedings (which would fall to this Council to defend) would be successful.
20. Hence, it is not considered justified to reject the Examiner's conclusions on the LGS designation, having regard to the basic conditions.
21. As regards any development within the site, it should also be borne in mind that the modified Policy 1 does not presume the development of any of Street Farm. That would be subject to the tests of need and suitability.

#### Policy wording of sites in the countryside

22. The proposal to revise the wording of Policies 3-6, so they state that they are "allocations" also raises important legal issues. Of course, the submitted Plan stated that it "*deliberately stops short of allocating sites other than in Policy 2, as there is not yet the full evidence to support their allocation.*"
23. While the Parish Council has produced letters from landowners confirming their support for the respective proposals, this does not amount to sufficient evidence to demonstrate their deliverability. Counsel's advice is that allocations require greater certainty in terms of viability, as highlighted by paragraph 173 of the NPPF; hence, the suggested rewording is not regarded as necessary to meet the basic conditions and indeed would be contrary to them.