

Specific questions from the Examiner:

Was the word “windfall” included in earlier versions of the Policy SS2 including the version that was the subject of public examination by the Local Plan Inspector? Can I be provided with copies of the respective paragraph as the plan evolved. Did Marronss make representations on the wording of that policy during public consultation?

The response to the last question is that Marrons did not make representations in relation to the proposed modifications associated with policy SS2 (comments invited until the 2nd of August 2018). The only representation from Marrons that MBC received referred to one allocation in Melton Mowbray and did not relate to SS2 in any shape or form.

In relation to the versions of the Local Plan: the examined version of the policy did not include the word ‘windfall’. This only arose after modifications were considered and it was at the ‘main modifications stage’ when the word came to be in the Local Plan.

More critically, the word ‘windfall’ was included in the policy as adopted by the Council on 10th October 2018, although it is unfortunate that the adopted Local Plan was not published on the internet. As a matter of law the version of the plan which included the word ‘windfall’ is the adopted plan – see [judgement](#) paragraphs 2 to 13.

In terms of the details behind the Local Plan, these are detailed in full in the [second witness statement](#) (including the [exhibits bundle](#)) of Jim Worley should the inspector wish to review it.

Did the specific reference to “windfall” appear in the version of the document that was approved by Full Council, when it was resolved that the plan be adopted?

Yes, it does. Using the [Agenda and minutes](#) of the Full Council on Wednesday, 10th October, 2018 as evidence we can see the word included in the ‘[Public Pack document](#)’ (pages 74 and 163 of the pdf). This wording appears on [item 12 appendix 2 – Full Local Plan Document](#) (page 32 of the document). To be clear, the paragraph says the following:

Service Centres and Rural Hubs will accommodate approximately 35% of the Borough’s housing residual requirement (1822) on a proportionate basis. This will be delivered by planning positively for the development of sites allocated within and adjoining the Service Centres and Rural Hubs by 2036, and by encouraging small scale residential ‘windfall’ development, where it would represent sustainable*

development under Policy SS1 above or would enhance the sustainability of the community in accordance with Policy SS3 - Sustainable Communities.

Has the Borough Council has received any legal advice as to the status of the omission and its subsequent re - insertion via a note on the Local Plan website?

Yes, the Full Council version of the Local Plan is the correct version as it is the one that was adopted. The outcome of the section 288 reinforces this statement. Please see section 23(5) of the Planning and Compulsory Purchase Act.

Is the inclusion of the “windfall” into Policy SS2 material to the Borough Council’s Section 288 challenge to the planning appeal decision.

It is, centrally, and has been considered as one of ‘The relevant provisions of the Local Plan’ and presented as follows:

Policy SS2 of the Local Plan provides that most new homes will be built in the market town of Melton Mowbray. The next level of the settlement hierarchy is comprised of “Service Centres” and “Rural Hubs”. The relevant part of SS2 states in respect of these:-

“Service Centres and Rural Hubs will accommodate approximately 35% of the Borough’s housing residual requirement (1822) on a proportionate basis. This will be delivered by planning positively for the development of sites allocated within and adjoining the Service Centres and Rural Hubs by 2036, and by encouraging small scale residential “windfall” development, where it would represent sustainable development under Policy SS1 above or would enhance the sustainability of the community in accordance with Policy SS3 - Sustainable Communities.”

[Underlining supplied]

Further consideration is given in the 288 challenge:

The source of the confusion related by the Inspector is set out in a witness statement prepared by the Claimant’s Assistant Director for Strategic Planning and Delivery, James Worley. The root of the problem that emerged is that at the date of the hearing there were two versions of the adopted Melton Borough Local Plan in the public domain. The first is the version that was formally adopted by the Claimant’s full Council on 10th October 2018. That is the correct version of the Plan and is published in paper copy. The second is a prior version of the same Plan, which differs from the adopted Plan in at least one important respect, viz. the wording of Policy SS2, which was one of the two most important development plan policies in this appeal. The incorrect version of the Plan was uploaded in error onto the Council’s website. The error was first discovered at the hearing before Inspector Forrett. The confusion arose and was subsequently compounded as follows [...]

The difference between the adopted version of the policy and the version relied on by the Inspector is that the adopted plan only admits development on allocated sites and windfall1 sites. So far as allocated sites are concerned, their development is governed by the provisions of Policies C1(A) and C1(B). Thus, read objectively in its proper context, it is impossible to construe Policy SS2 as authorising a proposal for the development of all or part of a reserve site unless it also complies with Policy C1(B).

This consideration is addressed in the [section 288 appeal judgement](#).

Section 288 Challenge

20. The submission of the challenge to the planning appeal decision could have important implications to my examination. Is the Borough Council prepared to share the grounds of this legal challenge, so I that I can understand the extent to which it is material to my examination?

A copy of the material of the section 288 challenge was sent to the examiner by the Neighbourhood Plan group the 5th May 2021 which contains the full case. Also, the Borough Council shared the [section 288 judgement](#) with the examiner.

21. Secondly, I would like to understand the timetable for the case's consideration, if, as Marrons Planning's letter indicates, the challenge by the Borough Council is contested. Can the Borough Council give any indication of a likely timescale of any hearing in court?

We believe this is now covered by the [programme](#) as suggested by the examiner and published in our website the 11th November 2021. [The judgement](#) was delivered on 29 November 2021.

22. If my recommendations were to reflect the granting of the planning appeal at Blacksmith End, in terms of say, the Limits of Development, does the Borough Council have a view on whether I should be considering placing the examination in abeyance, until the challenge has been heard. Whilst this question is directed to the Borough Council, I appreciate that the Parish Council may have a view as to whether the legal challenge should impact on the timing of its neighbourhood plan examination.

The decision associated with the section 288 challenge confirms that the decision of the Inspector dated 11th February 2021 is quashed and remitted back to the Secretary of State for a re-hearing. We await arrangements and a timetable for the remitted appeal from the Planning Inspectorate.

The section 288 appeal determination clarifies the policy framework in respect of Policy SS2 and to an extent C1(B), but there will not be a resolution of the implications for the site until the remitted appeal is re-determined. Most

importantly it does not address the question of how policies C1(A) and C1(B) should be read with H1 and H2.

Issues raised by Marrons (up to para 36)

1. We act for Mr Matthew Atton, the owner of land at Blacksmith End.
2. We write further to your Initial Comments letter (dated 16 March 2021), in which you asked for comments from Melton Borough Council and Stathern Parish Council, including responses to Regulation 16 representations, and the subsequent issue of a document from the Borough Council (dated 12 April 2021) and two documents from the Parish Council (dated 13 April 2021).
3. The NPIERS Guidance to Service Users and Examiners identifies that circumstances may arise where representations may be permitted from participants after Regulation 16 (termed formally “late representations”) in various circumstances including “A change in policy”; “The handing down of a relevant judgment”; “A relevant factual development (such as the grant of a substantial planning permission)” (Paragraph 1.12.1).
4. Paragraph 2.8.5 confirms that such a representation should be accepted where there has been “a material change in circumstances, including “a change in the status of a document the representation has relied on or a judgment from a Court case that has been handed down.”
5. The Borough Council’s and Parish Council’s representations refer to several new matters, which, in our submission, would merit a further exchange of written representations (on a consecutive basis: initially from the Borough Council, followed by consultees such as our client):
 - 1) A new version of the Melton Local Plan (dating from 11 March 2021), published on its website in a manner contrary to the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning (Local Planning) Regulations 2012;
 - 2) The Appeal Decision in APP/Y2430/W/20/3256174 Land at Blacksmith End (11 February 2021);
 - 3) The subsequent section 288 challenge to that appeal decision which has not yet reached the deadline for Acknowledgements of Service/Summary Grounds of Defence (28 April 2021), nor any decision of the Court on whether to grant/refuse permission to proceed;
 - 4) Various statements in the Borough Council and Parish Council Responses on Policy C1(B), SS2 and SS3 and Neighbourhood Plan Policies H1, H2 and ENV9;

5) Statements by the Parish Council referring to Housing Needs Assessment and to Housing Land Supply in the same 13 April 2021 document;

6) The Borough Council's explanation of the SEA and HRA Screening process in its 12 April 2021 document.

6. These matters have emerged following our Regulation 16 representations in circumstances in which we have not had an opportunity to address them at that statutory consultation stage.

7. There are also significant gaps in the published information by the Borough Council, on various of the above matters.

8. As we shall set out below, we are therefore requesting the right to make further written submissions following (a) a specific explanation by the Borough Council and (b) further developments (for example in respect of the section 288 claim). At the present time, we would respectfully submit that the new matters listed above raise a number of significant issues which would impact on the lawfulness of the examination procedure and any consequent decision.

9. We would also submit that the matters are also of sufficient complexity that a hearing or exploratory meeting would be merited under paragraph 9 of Schedule 4B, and the respective parts of the NPIERS Guidance (for example paragraphs 1.17.2).

10. We have copied the Borough Council and Parish Council.

11. In the text below, we shall refer to the Examiner's Questions by the notation "Q5" (i.e. Question 5) to denote the relevant paragraph in the Initial Comments.

No comment required.

Q5: The Correct Version of Policy SS2 of the Melton Local Plan and Paragraph 8(2)(e) of Schedule 4B of the Town and Country Planning Act 1990

Regulation 16 Representations

12. In December 2020, we issued Regulation 16 representations which referred to the published version of the adopted Melton Local Plan, which we attach as Appendix 1 to this representation: see notably page 29.

13. Paragraphs 39 and 55 of those representations referred to the wording of the Policy SS2 as follows (with our underlining):

Service Centres and Rural Hubs will accommodate approximately 35% of the Borough's housing residual requirement (1822) on a proportionate basis. This will be delivered by planning positively for the development of sites allocated within and adjoining the Service Centres and Rural Hubs by 2036, and by encouraging small scale residential development, where it would represent

sustainable development under Policy SS1 above or would enhance the sustainability of the community in accordance with Policy SS3 - Sustainable Communities.

This was an important part of our representations in respect of whether Policies H1 and H2 met the basic conditions, including notably basic conditions 8(2)(a), (d) and (e), and the extent to which these policies were in conformity with strategic policies in the development plan, and thereby had correct regard to national policy and contributed to the achievement of sustainable development, having regard to the NPPF.

Publication (October 2018)

14. The Published Version was published prominently on the Council's website as a full PDF in October 2018. It was expressly referred to through a weblink in the Adoption Statement. We have attached the Adoption Statement as our Appendix 2.

See explanation provided above.

15. Our client's position is that this is the correct version of the adopted plan, in light of its publication under Regulation 26 and 35 of the Town and Country Planning (Local Planning) Regulations 2012.

The Full Council version, the one that is now uploaded in our website, is the correct version.

16. Following publication, a development plan document cannot be removed from a Council's website, pursuant to Regulation 35, nor can it be withdrawn, revoked or modified after such publication, save under Sections 22, 25 and 26 of the Planning and Compulsory Purchase Act 2004 – none of which were applicable in this case. For the purposes of paragraph 8(2)(e), that is the only version that can be used in a neighbourhood plan examination.

See explanation provided above.

Officer's Report (23 January 2020)

17. In our Regulation 16 representations, we referred to the Council's own Officer's Report (dated 23 January 2020) at Appendix 3.

18. In that Report, the Council's Officer's Report stated that Policies SS1 and SS2 read together provided a clear basis for permission on sites such as that owned by our client, adjacent to Stathern (see pages 9 and 10). The Council used the Published Version of SS2:

"The application ...accords with Policy SS2 of the adopted Melton Local Plan and there are insufficient grounds to indicate this should be departed from."

*“Policy SS2 provides support to sustainable development within Service Centres and Rural Hubs: i.e. that housing needs will be met by "planning positively for the development of sites allocated within and adjoining the Service Centres and Rural Hubs by 2036, and **by encouraging small scale residential development where it would represent sustainable development under Policy SS1 above** or would enhance the sustainability of the community in accordance with Policy SS3’*

Thus Policy SS2 allows for small scale development in service centres such as Stathern either as sustainable development OR under the additional provisions of SS3 based on fulfilling a specifically identified need (and subject to meeting the relevant criteria). This is reiterated at para 4.2.17 which states : Where no sites are allocated for new housing, schemes may be permitted where they represent sustainable development or demonstrably meet identified needs and/or help to sustain local services or facilities. Schemes of up to about 10 dwellings may be appropriate within or on the edge of Service Centres, schemes of up to about 5 dwellings for Rural Hubs, and schemes of up to about 3 dwellings for Rural Settlements.” [underlining in original] Appeal Decision: Land at Blacksmith End (11 February 2020).

19. In Appeal Reference APP/Y2430/W/20/3256174, Inspector Forrett allowed our client’s appeal and granted permission, identifying that the correct version of the Local Plan was the Published Version of Policy SS2. He identified that this supports “small-scale residential development” where it would comply with Policy SS1. This version was expressly agreed by the Council’s Officers: see DL3.

20. We further draw attention to the following paragraphs:

DL14: The Inspector identified that the Melton Local Plan does not set a cap on development for Stathern. Nor does the National Planning Policy Framework;

DL20: Melton Local Plan’s Policy SS2 “sets out very clear support for small scale residential development where it would represent sustainable development under Policy SS1, for which the Council have confirmed the appeal proposal would accord with.”;

DL23: “There is clear and overriding support for a small-scale scheme through Policies SS1 and SS2. In my view, this support, together with the fact that the housing targets are minimum targets and not a ceiling for development”

Housing targets may be minimum housing targets, but the exceedance of the minimum housing target by the development of reserve sites is not permitted in circumstances under which the provisions of Policy C1(B) continue to apply.

Also, we consider that the conclusion reached at DL20 is an unfortunate misinterpretation of Policy SS2. The last sentence of the paragraph states:-

In my view, this [a concession that the scheme would accord with Policy SS1] is the most significant factor as the proposal is only for nine

dwellings, and this scale of development is clearly supported by Policies SS1 and SS2 in particular.

This conclusion was founded upon an understanding that SS2 did not include the word 'windfall'. As the s288 appeal has exposed, the inclusion of that word creates a mutual exclusion to allocated sites including this one in question. Also it does not address the consequences of a decision that allows a reserve site to be divided into small parcels and consumed immediately even if the limitations which govern its release continue to apply. This decision would undermine Local Plan's approach to reserve sites.

21. We shall address the section 288 challenge to that decision below, in a focussed manner bearing in mind the early procedural stage which the claim has reached.

22. However, in accordance with the presumption of regularity, Inspector Forrett's decision remains valid. It has not been quashed. It is a material consideration for the purposes of this examination.

It has been quashed now.

23. We refer to the judgment in *Stonegate Homes v Horsham DC* [2016] EWHC 2512 (Admin) (Appendix 4) in which the High Court (Patterson J) emphasised that decisions by Inspectors on s78 appeals are capable of amounting to material considerations for Examiners, see [80]-[84], drawing in part on conclusions reached at [66] onwards in the SEA context.

24. At the core of the Inspector's reasoning is the recognition that there is clear development plan support for "small-scale development" at Service Centres, where this complies with Policy SS1.

25. We have addressed this principle in our Regulation 16 representations, and it is a matter which a number of other participants have referred to in their Regulation 16 submissions.

The 11 March 2021 Version of Policy SS2

26. In their response to Q5, the Borough Council have now separately referred to a new and, in our submission, incorrect version of the Melton Local Plan, for the purposes of paragraph 8(2)(e) of Schedule 4B of the Town and Country Planning Act 1990.

27. This version was only published online on 11 March 2021 – after the Regulation 16 representations period and in a manner that is not in accordance with the Planning and Compulsory Purchase Act 2004 or the Town and Country Planning (Local Planning) Regulations 2012.

These paragraphs link to the outcome of the section 288 appeal decision.

28. The Council's response to Q5 however makes no reference to this change of circumstance.

Our response included a reference to s288 at the very end of the document: *'Finally, the Council would like to highlight the position regarding the Blacksmith's End appeal decision. Melton Borough Council has applied to appeal this appeal decision under s288 of the Town and Country Planning Act 1990 and the Examiner will be advised as to progress and the eventual outcome'*.

The section 288 appeal centred almost entirely on the change of circumstances brought about by the discovery that the parties and Inspector were relying upon an incorrect version of the Local Plan. This is explained clearly in submissions and [the judgement](#) and there is no need rehearse the arguments again here.

29. In at least one other case (the response to Mr Bell's Regulation 16 submissions), the Parish Council have cited this different wording, to support submissions on Policy H2.

Statutory Power

30. The Borough Council must explain now publicly under what statutory power they have purported to publish a new version of the Melton Local Plan to that which was published on the website at the time of adoption and was present there for a period of more than 2 years between October 2018 and 11 March 2021, including during the Regulation 16 period for this draft Neighbourhood Plan.

31. Our position is that there is no such power, whether under the Planning and Compulsory Purchase Act 2004 or the Town and Country Planning (Local Planning) Regulations 2012.

32. The Borough Council's online explanation is entirely opaque and of questionable relevance in legal terms. It is merely said that: *"This error occurred between the adoption of the Plan by the Council on 10th October 2018 and it being sent to the printers."*

There are not legal concerns in this regard. The right version was uploaded to the website and a notice was included. As the incorrect omission of the word 'windfall' was not noticed until the claimant's appeal and this error does not relate to a minor or typographical error the Council has published the correct version of the Local Plan, the one with the word 'windfall' in the relevant paragraph of policy SS2 along with explanatory note.

33. The Council have provided no explanation of why an "error" in printing, could lead to an error in an electronic version. Nor have they provided any explanation as to how the relevant Officers of the Council discharged their duties consistent with the terms of any delegation by the Full Council.

The notice does not state that it is an error in printing but provides a context of time and period to the error: *'This error occurred between the adoption of the Plan by the Council on 10th October 2018 and it being sent to the printers'*.

34. We would respectfully request that the Council should provide their explanation to the examination, and provide their response to consultees.

This has been addressed in the section 288 appeal decision.

35. Thereafter, we would request an opportunity to provide further submissions of our own as to the Council's stated position. We respectfully submit that this is essential for the lawful progress of this examination, and a correct consideration of basic condition 8(2)(e) in particular.

We agree and that is why we have not objected to the consideration of the late representation in the examination process or the opportunity for Marrons to respond to this letter once it is published. Additionally, the examiner is giving further opportunities to comment as stated in the recently published [programme](#) that was sent to Marrons the 11th of November when it was uploaded to the website.

36. The fundamental point is that a consultee cannot be expected to address two separate versions of a development plan policy. The Council must explain their actions in a manner that is transparent and which properly addresses the legal basis for a step of this nature.

We hope that the above responses provide the necessary clarification and are transparent. The section 288 appeal proceedings bring clarity to the policy context; however we still have concerns about the implications associated with the unknown outcome of the new appeal for the site.

The hearing determined the question, 'adopting the erroneous construction of the inspector, did he interpret policy C1(B) correctly?' The judgement concludes that the Inspector was entitled to construe the incorrectly worded policy as he did.

The application has been remitted back for re-hearing which will establish if an Inspector would, provided with a correctly worded policy, interpret it in the same way.