Kettering Site Specific
Part 2 Local Plan
Examination: Matters Statement
Matter 1: Legal and Procedural Requirements

Prepared by Fisher German LLP on Behalf of the Thorpe Malsor Estate
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Thorpe Malsor

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Introduction

1.1 These representations have been prepared on behalf of Thorpe Malsor Estate in respect of their land interests at land west of Short Lane, Thorpe Malsor (Figure 1). This land is a proposed ‘Open Space’ designation within the publication draft Part 2 Local Plan.

![Figure 1 – Land at Short Lane](image)

1.2 Whilst the Council have proposed the removal of much of the Open Space designation on the land (Figure 2) within their main modifications (MM50), something which is supported, we consider that the entire designation is unsound and thus should be removed, for reasons set out in the below representations.
1.3 We have significant concerns in the process undertaken by the Council, in terms of the lateness of the introduction of the designation, which was not included until the submission plan, and the lack of published supporting evidence during the Regulation 19 consultation, and as such are very concerned as to the prospect of judicial review if the Plan continues in its current form.

1.4 Moreover, we do not consider that our client’s land, being formed of a small number of private allotments, should be allocated as Open Space, having regard for the now published Open Space Audit and Needs Assessment (March 2020) methodology. This document has not fairly and accurately considered the site’s status as private allotments. The allotments are currently retained on the basis of ongoing lease arrangements; albeit there are vacant plots as there is little demand for them. Should ongoing terms not be agreed and existing leases end, the land will likely revert back to agricultural land, which does not require planning approval. On this basis, we consider the designation of the land as arbitrary, as it offers no tangible protections and is thus not effective.

1.5 On the basis of the below representations, we request that Main Modification proposed by the Council is retained, but also increased to remove the entire Short Lane Open Space designation.
Matter 1 – Legal and Procedural Requirements

Has the Plan been prepared with due regard to the appropriate procedures and regulations?


2.1 The Council published the Publication version (Regulation 19) Kettering Site Specific Part 2 Local Plan in December 2019, for consultation up to February 2020. This is, by definition, a completed plan which the Council considered was sound and ready for submission to the Secretary of State for Examination. Following the close of the consultation, the Council considered the representations and submitted the Plan for Examination, including a list of proposed Main Modifications for the Inspector to consider.

2.2 In relation to the preparation of new development plan documents, the National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG) outline the expected approach to be adopted, while the Town and Country Planning (Local Planning) (England) Regulations 2012 sets the legal framework with associated legislation.

2.3 The NPPF sets out at paragraph 16 that Plans should “be shaped by early, proportionate and effective engagement between planmakers and communities, local organisations, businesses, infrastructure providers and operators and statutory consultees”.

2.4 Paragraph 31 states “The preparation and review of all policies should be underpinned by relevant and up-to-date evidence. This should be adequate and proportionate, focused tightly on supporting and justifying the policies concerned” [our emphasis].

2.5 Paragraph 35 states “Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are ‘sound’ if they are:
a) **Positively prepared** – providing a strategy which, as a minimum, seeks to meet the area’s objectively assessed needs; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;

b) **Justified** – an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;

c) **Effective** – deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and

d) **Consistent with national policy** – enabling the delivery of sustainable development in accordance with the policies in this Framework.

2.6 When submitting a Local Plan, the PPG (Plan Making – Paragraph 034) states “Local planning authorities must make available each of the **proposed submission documents** that they intend to submit to the Planning Inspectorate for examination to enable representations to come forward that can be considered at examination, under regulation 19 of the Local Plan Regulations” [our emphasis]. This point is also raised at 1.21 of the Procedure Guide for Local Plan Examinations (June 2019).

2.7 The Town and Country Planning (Local Planning) (England) Regulations 2012 Part 6 Section 17 sets out that proposed submission documents encompasses the following:

e) “**such supporting documents as in the opinion of the local planning authority are relevant to the preparation of the local plan**”

2.8 Regulation 19 (Publication of a Local Plan) of the aforementioned legislation states that “**before submitting a Local Plan to the Secretary of State under section 20 of the Act, the local planning authority must** –

a) **make a copy of each of the proposed submission documents and a statement of the representations procedure available in accordance with regulation 35, and**

b) **ensure that a statement of the representations procedure and a statement of the fact that the proposed submission documents are available for inspection and of the places and times at which they can be inspected, is sent to each of the general consultation bodies and each of the specific consultation bodies invited to make representations under regulation 18(1)”**
2.9 Section 35 sets out that a document is taken to be made available if it is made for available for inspection in person or by being published on its website.

2.10 The Procedure Guide for Local Plan Examinations at 1.8 states "as a minimum, the evidence base should include all documents referenced in the submitted plan" [our emphasis].

2.11 Submitted Policy NEH4: Open Spaces makes explicit reference to the Open Space Strategy for Kettering Borough (2019). Despite this, no such document was published alongside the Local Plan, and, remains unsubmitted to support the Local Plan. Procedurally therefore, we are unclear how the Local Authority can consider the Local Plan has satisfied the requirements of Regulation 19, given a fundamental piece of evidence which support a key policy has not been made available during this consultation.

2.12 We were informed in January 2020 that this document should be published in a number of weeks, albeit this would be beyond the deadline for comments under Regulation 19. A Planning Policy Officer confirmed "beyond the Open Space Strategy, there is only the Green Infrastructure Delivery Plan, as referenced in Policy NEH4. No further evidence has been produced or published for this policy". Having considered the Green Infrastructure Delivery Plan, we conclude comprehensively that many aspects delivered through the policy, including the designation of specific sites as 'Open Space', had no legitimate evidence to support it through Regulation 19. This is clearly in contradiction to the Town and Country Planning Regulation, not least Part 6 Subsection 17. We do not see how key evidence which underpins a policy could not be seen as relevant to the preparation of the Local Plan, particularly having regard for Paragraph 8.47 of the reasoned justification, which states “The Open Space Strategy (OSS) provides the Council with a robust evidence base”. This document remains unpublished.

2.13 On publication of the Open Space Audit and Needs Assessment (March 2020), it is clear that this document does reference the designation of our Client’s Land at Thorpe Malsor as Allotments. Whilst we discuss this in our response to Matter 12 Question 20, in terms of process we feel this is unacceptable. Clearly this document should qualify as a Submission Document, as it is now being used to support designations made within the Plan, although this document should have been made available at Regulation 19. Whilst the Council have seemingly had access to early

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1 Email exchange between James Beverley (Fisher German) and Andrew Needham (Kettering Borough Council) – Appendix 1
iterations of this report, and utilised the findings in its Publication Plan, including the designation of land as Open Space, it did not publish the document itself for reasonable and fair comment. This has severely prejudiced interested parties during a statutory consultation. There is little merit commenting on a designation, where the rationale for the site's designation is unknown. We have set out to the Council directly, and also through our Regulation 19 representations, that if the Council wished to retain the designation, the correct process would be to repeat the Regulation 19 consultation, allowing fair comment on any supporting documentation. These comments have gone ignored, with Officers submitting the Plan for Examination without due consultation.

2.14 The designation itself did not exist in any previous iteration of the Plan, and has been included at the final possible moment. There is no such policy included in the 'Draft Plan for Consultation', which was consulted upon between June and July 2018. It is not considered that the introduction of an entirely new policy and designation at publication stage is appropriate, particularly having regard for paragraph 16 of the NPPF which advocates "early, proportionate and effective engagement". By definition, the Publication Plan is the Council intend to submit for Examination and as such it is not clear how the introduction of such a policy late in the Plan making process can allow for proper engagement, not least for landowners who's land is set to be affected by such a designation. This issue was further exasperated in that the Plan was published without the requisite supporting evidence.

2.15 Perhaps even more concerning than the above, is that the document history section on the title page (extract below at Figure 3) shows that the Council in February 2020 made revisions to the Open Space Audit and Needs Assessment Report to be agreed in February/March 2020. The close of the Regulation 19 consultation was 12th February 2020. This means that the Council could have considered representations made during the consultation and sought to alter the evidence document to respond to them, despite not formally consulting on the documentation itself. Clearly, this is not appropriate. As yet, this document has not gone through formal consultation and as such cannot be used to support the designation of land as Open Space, without leaving the plan at severe risk of judicial review.
Furthermore, we are extremely concerned that the Council has published a number of further documents beyond the Regulation 19 consultation. Namely:

- Playing Pitch Strategy (June 2020)
- Sports Facilities Audit and Needs Assessment (June 2020)
- Sports Facilities Strategy (June 2020)
- Open Space Standard Paper (July 2020)

Whilst we do not consider the above to directly relate to our representations, we do not believe publishing so many fundamental documents following Regulation 19 is consistent with the Local Plan Regulations, nor is in the spirit of the Framework which promoted early consultation on key matters.

On the basis of the lack of compliance with the legal and procedural requirements and is not justified by evidence, we request that Policy NEH4 is deleted and the associated Open Space designation is removed. In the event the Inspector does not consider the policy should be removed, we request that Main Modification proposed by the Council is retained, but also increased to remove the entire Short Lane Open Space designation.
Appendix 1

Communications with Kettering Planning Policy Officers
Dear James,

Thank you for your e-mail. We note the concerns you have raised in your e-mail below, however we would recommend that you submit your comments through the current consultation on the Publication Plan so that these can be considered through this process.

Kind regards

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Good morning,

I am aware Andrew is away this week, but I was just wondering if the Council had any update from the below. The deadline for comments is one week tomorrow, so we are keen to understand the Council's position as soon as practicable. It would also be good to know who the best point of contact is in Andrew's absense.

I look forward to hearing from you,

Kind regards,

James
Hi James,

This is a matter that I will need to discuss with colleagues and potentially I won’t be able to get a response to you to today.

Unfortunately, I am not in next week, therefore if required I will pass on your query to another member of team to respond to your query as soon as possible.

I hope this is ok.

Kind regards,
Afternoon Andrew,

Having reviewed the Council’s evidence base in support of the proposed designation of land as ‘Open Space’ we are concerned that there is insufficient evidence to justify any designation. We do not consider that the Green Infrastructure Delivery Plan directly relates to the Council’s proposed Open Spaces. It appears that there is no published evidence that directly informs the designation of land as Open Space beyond the as yet unpublished Open Space Strategy. Planning regulations and guidance are very clear that any evidence relied on in support of a Local Plan must be published at Regulation 19 consultation stage. Paragraph 1.7 of the Publication Plan refers to this, stating “Regulation 19 of the Local Plan Regulations 2012 (as amended) requires that before submitting a plan to the Secretary of State, the local planning authority must make a copy of the proposed submission documents available for inspection”. The Procedure Guide for Local Plan Examinations at 1.8 states “as a minimum, the evidence base should include all documents referenced in the submitted plan”. The Open Space Strategy referenced in Policy NEH4 and at 8.45-8.47 cannot be submitted as evidence if it is not available at Regulation 19.

The above means that the Council cannot use the Open Space Strategy to support this Local Plan if it is submitted following this consultation as indicated by Table 1.1. The only options would be to reconsult on Regulation 19 following publication of this evidence, or continue on the basis of the consultation as it stands, utilising only the evidence available and published at this time. If you could please let me know as a matter of urgency whether the Council intend to proceed on the basis of the latter, as we will of course need to submit representations by the 12th February highlighting our concerns regarding the legal compliance and soundness of the submitted Plan. As written and without the requisite evidence base being published, we consider the Plan is unsound in that it is not justified or consistent with national policy in respect of proposed Open Space designations.

I trust the above is clear, however if it is not please feel free to contact me.

Kind regards,

James
Hi James,

To confirm beyond the Open Space Strategy, there is only the Green Infrastructure Delivery Plan, as referenced in Policy NEH4. No further evidence has been produced or published for this policy.

This document can be found here: https://www.kettering.gov.uk/downloads/file/18170/green_infrastructure_deliver_plan_march_2018

I hope this clarifies the matter for you.

Kind regards,
Morning

Many thanks for your below email. Just for clarity therefore can you confirm whether the Council has published any
evidence in support of Policy NEH4 beyond the as yet published Open Space Strategy?

Kind regards,

James

James Beverley MRTPI

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Good morning James,

Thank you for your call this morning.

Having looked into your query further, I can inform you that the Open Space Strategy has yet to be published and therefore is unable to view at this stage.

Policy NEH4 provides a hook as a general policy, with the Open Space Strategy providing more specific detail on locally derived standards as mentioned in paragraph 8.47.

Having discussed this matter with colleagues, the publication of the Open Space Strategy is likely to be only a matter of weeks away, although I am aware that this might be after the end of the consultation period on 12th February.

This is an issue you can raise through your representations to the consultation. If you get in contact with the Planning Policy, of which I am a part, in a week or so, we might have a better estimate on the publication date for this strategy.

I hope this assists with your query. If there is any further information or clarity required, please let me know.

Kind regards,

[Contact Information]

Kettering Borough Council