

**Decision Report – Executive  
Forward Plan Ref n/a urgent item  
Decision Date – 10 July 2023  
Key Decision – Yes**



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## **Mendip Local Plan - Variation to Order of 16 December 2022**

Executive Member(s):

Cllr Ros Wyke Executive Lead Member for Economic Development, Planning and Assets

Local Member(s) and Division: All

Lead Officer: Paul Hickson, Service Director for Economy, Employment and Planning

Author: Alison Blom-Cooper, Assistant Director Strategic Place and Planning, Andre Sestini, Principal Planning Policy Officer – Somerset East.

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### **Summary**

1. This report has been brought under urgency provisions agreed by the Service Director – Democratic and Legal services and in consultation with the Lead Member.
2. Following a Judicial Review (JR) challenge to the Mendip Local Plan Part II (Site allocations and policies), the former Mendip District Council was made subject to a Court Order (made on 16 December 2022) and attached at Appendix 1. This required immediate changes to be made to the Local Plan Part II and included steps to undertake a site allocation review as specified in Paragraph 6 of the Order.
3. Justice David Holgate upheld a challenge that Mendip District Council had been mis-directed by the appointed Local Plan Inspector during the Mendip Local Plan Part II examination. Further information on this case is set out in Appendix 2.
4. Para 6 of the Order sets out specific ‘directions’ given by the judge to address the legal flaws upheld against the conduct and report of the examining Inspector. It requires reconsideration of the housing sites struck out of the Mendip Local Plan Part II and for the Council to identify these or alternative sites across the Somerset East area to meet a total of 505 dwellings. Without these directions, there was a risk that the Mendip Local Plan Part II could have been quashed entirely.
5. The implications of the Judicial Review were reported to Mendip District Council in February 2023 which advised that this obligation would need to be addressed after vesting day. Policy officers considered at this time that it would fulfil the Order through the forthcoming Somerset-wide Plan review as there was no specific timescale attached to the Order. The legal obligation to comply with the Order has now passed to Somerset Council.
6. Changes made to the Mendip Local Plan Policies map in compliance with the Order in January 2023 were subject to a separate Judicial Review challenge which was heard in

the High Court on 29 June 2023. Judgment was reserved and is expected shortly. Although not directly related to the challenge, the same judge was presiding, and he raised questions immediately prior to the hearing at the apparent lack of progress in complying with Paragraph 6 of his Order. The judge is now seeking a formal commitment from the Council to make urgent progress.

7. A preliminary view of dates for compliance was offered to the Judge at the hearing held on 29 June 2023 subject to authorisation by the Executive. The dates relate to the statutory development plan stages<sup>1</sup> as specified in the Order which would lead to the submission and examination of proposals.
8. Officers have reviewed the dates offered in Court and made amendments to include lead-in times for committee reports and to avoid consultations taking place over holiday periods. The dates also reflect additional time to undertake the necessary consideration of reasonable alternative options and the sustainability appraisal process necessary for the amendments to the plan to be found sound.
9. A project plan setting out tasks and consultations to undertake the site allocations review is set out in Appendix 3. While adjustments have been recommended, Officers are still reviewing the timetable with the Council's barrister to see if it can be shortened to meet the judge's expectations. Officers will update Members ahead of or at the Executive meeting.
10. The Executive is recommended to agree a timetable as an urgent matter. The judge is awaiting confirmation of the Council's commitment to the timetable as this is likely to be referred to in his Judgment.
11. The confirmation is considered necessary as without the Council's commitment in this report, there is a risk that the Judge could consider Somerset Council in breach of the Order and at risk of contempt.

## **Recommendations**

12. That the Executive:
  - (a) confirms a commitment to commence the Mendip Local Plan Part II site allocations review specified in the Order to the following timescales
    - To undertake a call for sites limited to the 505 dwellings within 28 days of the amended order, commencing on 24 July 2023 for 6 weeks until 4 September 2023
    - To publish a Regulation 18 consultation with proposed allocations by 8 January 2024 (for 6 weeks consultation as required by the Regulations)
    - To publish a Regulation 19 statement seeking representations for a 6 week period as required by the regulations by 13 May 2024

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<sup>1</sup> Town and Country Planning (Local Plan) (England) Regulations 2012.

- To submit for examination by 1 September 2024.
- (b) agrees the proposed approach to the review as set out in the report and notes the site allocations review for the Mendip Local Plan will be subject to Member and community consultation;
- (c) Notes the resource and financial implications of the Order and project plan and that further reports will be made to Executive prior to the Regulation 18 consultation on the preferred option for allocation of the additional 505 homes and the Regulation 19 publication prior to submission to the Inspectorate;
- (d) That delegated authority be given to Service Director – Governance, Democratic and Legal Services to apply to the Court to seek to vary the Court Order should circumstances beyond the Council’s control mean that the timetable set out above cannot be achieved.

### **Reasons for recommendations**

13. To enable the Council to demonstrate compliance with a High Court Order and avoid the risk of the Council being held in breach of the Order. Agreement to the Mendip site allocations review as set out in Para 6 of the Court Order seeks to mitigate this risk.
14. Following the Statutory Review hearing on a separate matter involving the Order, Justice Holgate has sought a commitment from the Council for agreed dates and timescales for compliance. Further delay or failure to comply with the Order would place the Council in breach of the Order and a potential for contempt of Court. The recommendations are made to avoid a risk of significant reputational damage and potentially financial penalties.
15. Proceedings for contempt of court are intended to uphold the authority of the court and to make certain that its orders are obeyed. Any contempt of court is a matter of the utmost seriousness, especially when it concerns a public authority.

### **Somerset East - site allocations review process**

16. The Mendip Local Plan Part II (LPP2) is an adopted development plan document identifying housing and employment allocations for the Somerset East Area. Apart from the five housing allocations struck out of the Plan to provide 505 dwellings – located in the northeast of the former Mendip District - the remainder of policies and development allocations remain in effect.
17. The original JR challenge confirmed that Council was mis-directed by the Inspector during the examination to focus only on one part of Mendip District (the north and northwest). Paragraph 6 of the Order sets out the steps to enable re-consideration of these sites on the former Mendip District wide basis against the spatial strategy in the adopted Local

Plan Part 1. Existing or alternative sites would need to be deliverable within the Mendip Local Plan period to 2029 and on adoption would be a partial update to LPP2.

18. Officers consider that the review process will require a fresh 'call for sites' for Somerset East only to establish an up-to-date land availability position (there has not been a Mendip-wide call for sites since 2015) from which to assess and develop preferred options prior to the Regulation 18 consultation. The struck-out sites would also be considered in this process. Land promoted as available for development would come forward in a longer timescale would be carried forward for consideration in the Somerset Development Plan process.
19. Following agreement by the Executive of the draft proposals for provision of the additional 505 homes, identification of the preferred option will form the basis of the Regulation 18 consultation. Details of alternative options considered, the site selection process and sustainability appraisal of existing or new sites district-wide will form part of the supporting documents.
20. After the 6-week Regulation 18 consultation, officers will consider the responses and propose amendments as necessary for inclusion in the Regulation 19 publication plan which will come back to the Executive for agreement. This will be subject to a 6-week period seeking representations on soundness of the proposed allocations to meet the requirement, prior to submission to the Inspectorate. It is then for the Inspector appointed to consider the representations which have been made as part of the examination process.
21. Members will note the project plan identifies an early need to establish a process for Member, stakeholder and community engagement and the requirement to meet the duty to cooperate. Officers will also have regard to communications and publicity and the need to brief members to ensure that it is clear this work is for Somerset East only.

### **Implications for the Somerset Development Plan**

22. The legal requirement to progress the site allocations review will impact on the officer resources available and draw on the budget for bringing forward the Somerset Development Plan. While officers will seek to make the maximum use of Somerset- East officer availability, it will explore opportunities to use external support and collaborative working to minimise risk.

### **Other options considered.**

23. There are no alternative options at this stage. The judicial review hearings have clarified that the option to integrate the Somerset East review into progressing the Somerset-wide development Plan will not satisfy the Order and the Council is at risk of being in breach. The Council can seek to amend the Order (e.g. if circumstances beyond its control means that committed dates cannot be met) but will need to identify exceptional circumstances for doing so.

## **Links to Council Plan and Medium-Term Financial Plan**

24. Compliance with the Order will commit the Council to expenditure in the current and next financial year which is additional to the current budget for the planning service. The work will ensure that the Council meets its objectives in the corporate plan to ensure a greener more sustainable Somerset.

## **Financial, Legal and Risk Implications**

25. The need to undertake a focused but separate development plan review of the Mendip Local Plan involving submission of additional housing sites for examination has direct resource and financial implications. There are external costs which relate to the need to meet the statutory plan making process set out in the Order. It will also impact on the officer resource and budget available to progress the Somerset wide Local Plan. Initially the budget agreed for planning policy and the development of the Somerset wide Local Plan will be used to facilitate the work required. The work undertaken on the call for sites in the Somerset East area necessary for this review will feed into the wider work which will be undertaken for the Somerset wide plan.
26. Officers have made a provisional expenditure estimate for the review process of around £111,000 in 2023-24 (Year 1) and £214,500 (Year 2) in 2024-25. This includes the use of external consultants in Year 1 to undertake technical, evidence base work, site assessment and sustainability appraisal work. Additional external support will help maximise the in-house officer resource to progress Somerset Development Plan. The higher costs in Year 2 relate to the costs of submission and examination of proposals by the Planning Inspectorate.
27. These estimates remain to be confirmed and are subject to clarification of the scope and extent of new site assessments that will be required. The costs of external work will also depend on the number of additional sites to be assessed. This will not be clear until a new 'call for sites; exercise is undertaken for the Somerset East area.
28. Given the timing of the Order close to vesting day and recommendation to review implications in the context of a new planning authority, the former Mendip Council did not earmark or allocate a specific budget to undertake the review and as set out above initially the policy budget agreed will be used to meet the costs.

## **Risk Implications**

29. This is covered in the main report. The risk associated with the Order was identified in the LGR process for planning services but may not be a specific risk identified in the

Corporate Risk Register. The recommendations in this report will mitigate a high risk to the Council and will need regular monitoring.

Without agreement to the project plan and timelines in the report, officers have identified the following risks in its discussion with Counsel.

- (1) That the judge may determine the current JR claim against the Council with legal costs.
- (2) The adopted status of the whole local plan part II could be questioned
- (3) The Council may be required to return to the Court to provide further explanation of its position before the judge and runs a reputational risk.

### **HR Implications**

30. There are no direct HR Implications

### **Equalities Implications**

31. There are no direct equalities implications. The recommendations endorse a review process which involves consideration of options including stages of public consultation. An equalities impact assessment form part of the statutory process and documents submitted for examination.

### **Community Safety Implications**

32. There are no community safety implications

### **Climate Change and Sustainability Implications**

33. The recommendations initiate a partial development plan review update which will have climate and ecological implications. Assessment of impacts and mitigation/adaption is embodied in the process and will be tested through consultation and at examination.

### **Health and Safety Implications**

34. There are no Health and Safety Implications arising from this report

### **Health and Wellbeing Implications**

35. There are no direct health and well-being implications

## **Social Value**

36. Not applicable

## **Scrutiny comments / recommendations:**

37. This is an urgent item and has not been considered by a Scrutiny Committee.

## **Background Papers**

Report to Mendip Full Council - 9<sup>th</sup> February 2023

Court Judgment - [Adopted Local Plans \(somerset.gov.uk\)](https://www.somerset.gov.uk/adopted-local-plans)

## **Appendix 1 Order made against Mendip Council – 16 December 2022**

### **Claim No: CO/323/2022 - IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION** **ADMINISTRATIVE COURT PLANNING COURT**

**BETWEEN: NORTON ST PHILIP PARISH COUNCIL (Claimant) -and- MENDIP DISTRICT COUNCIL (Defendant) -and- SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES, LOCHAILORT INVESTMENTS LIMITED and REDROW HOMES LIMITED (Interested Parties)**

#### **ORDER**

**UPON HEARING** Alexander Greaves for the Claimant; Hashi Mohamed for the Defendant; Robert Williams for the First Interested Party; and James Findlay KC and Ben Du Feu for the Second and Third Interested Parties

#### **IT IS ORDERED THAT**

1. The claim for statutory review be allowed.
2. Policies MN1, MN2, MN3, NSP1 and BK1 of Mendip District Local Plan 2006-2009 Part II: Sites and Policies ("LPP2"), their supporting text and other related text, tables and diagrams, as set out in Schedule 1 to this order, shall be remitted to the Defendant.
3. The remitted parts of LPP2 shall be treated as not having been adopted as part of the local development plan. The rest of LPP2 is unaffected by this order.
4. The Defendant shall publish a revised version of LPP2 on its website within 28 days, which explains the effect of this order, and shows the remitted parts of the plan as being struck through. <sup>2</sup>
5. The Defendant shall amend the Policies Map within 28 days so that it properly reflects the terms of this order and any consequential changes to LPP2 as set out in Schedule 1. <sup>3</sup>
6. The Defendant shall:
  - a. review and reconsider allocations to meet the district wide requirement for an additional 505 dwellings in accordance with Core Policies 1 and 2 of Mendip District Local Plan 2006-2029 Part 1: Strategy and Policies and the judgment of the court;
  - b. in light of their review, prepare and publish modifications to LPP2 which allocate sites to meet the additional requirement. The preparation and publication of these modifications shall be in accordance with requirements of section 19 of the Planning and Compulsory Purchase Act 2004 ("2004 Act"), and Regulations 18 and 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012;
  - c. submit the proposed modifications to LPP2 to the First Interested Party, who shall appoint an Inspector to carry out and report on an independent examination of them, which shall be carried out in accordance with section 20 of the 2004 Act; and

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<sup>2</sup> Plan republished in December 2022.

<sup>3</sup> Policies Map published in January 2023



- d. once it receives the Inspector's report, the Defendant must make a decision in accordance with section 23 of the 2004 Act.
7. The Defendant shall pay the Claimant's costs in the sum of £35,000.
8. All parties shall have liberty to apply to vary or modify this order on notice.

**Signed: Sir David Holgate**

**Dated: 16 December 2022**

## **Appendix 2 – Legal Background to the Court Order**

1 Copies of the judgment and legal documents are online at [Adopted Local Plans \(somerset.gov.uk\)](https://www.somerset.gov.uk).

A JR claim was lodged against the adoption of the Mendip Local Plan Part II (LPP2) in January 2022. The claim – made by Norton St Phillip Parish Council – focused on the misdirection of the Council by the LPP2 Inspector during the examination leading to adoption of five housing sites to address a requirement for 505 dwellings in the northeast of the district. The '505 dwellings' formed part of adopted Plan target of 9,635 dwellings from 2006-29 which had not been allocated to a specific settlement.

- 4 The main ground of the claim argued that the LPP2 Inspector mis-interpreted policy CP2 and supporting text in Mendip Local Plan Part I (LPP1) It contested his view that the northeast was a strategic direction for growth exclusive to this area. On this basis, his interim examination note (ED20) to request modifications to LPP2 and the subsequent allocation /adoption of five housing sites was unlawful. The claim also challenged the Council's sustainability appraisal as also being misdirected and failing to assess reasonable alternatives in the rest of the district. The Council's defence of the

claim highlighted the extensive evidence and SA supporting modifications and consideration at six days of examination hearings.

- 5 The claim was heard in the High Court in October 2023 before Mr Justice Holgate with judgement handed down on 16<sup>th</sup> December 2023. The Secretary of State were a third party and appointed counsel to defend the Inspector's conclusions as well as two developers of sites BK1 (Redrow) and NSP1 (Lochailort Developments). Both the grounds around misdirection were upheld, with the judge agreeing with the claimant on the flaws in the Inspector's interim note, examination report and process. This resulted in the five housing sites allocated in modifications being quashed.
- 6 Judgment was accompanied by an Order of the Court directing Mendip Council to make revisions to the Plan and Policies Map and reconsider the deleted sites. The form of the Order reflects exchanges between the parties at the hearing; with the main objective of Mendip District Council to avoid LPP2 being remitted or quashed in its entirety. The claimant's position was to ensure no advantage should be given to the deleted allocations.
- 7 Paras 2,4 and 5 of the Order detail the changes required to LPP2 and the Policies Map. The Council re-issued LPP2 and Policies Map reverting the notation of the deleted housing allocations to open countryside. This revision was the matter being contested in a separate JR challenge by Locahilort Developments.
- 8 Para 3 confirms that policies and sites in the rest of the LPP2 to remain as adopted on 20<sup>th</sup> December 2021.
- 9 Para 6 of the Order gives specific directions to Mendip Council to *review and reconsider* the allocations to meet the Mendip-wide requirement for 505 dwellings, publish modifications, undertake consultation under Regulations 18 and 19 and submit the proposed allocation sites as modifications for examination to PINS.
- 10 Para 8 of the Order allows for changes to the Order to be made on application to the Court.

**APPENDIX 3 SOMERSET EAST: MENDIP LPP2 SITE ALLOCATIONS REVIEW (SAR) DRAFT TIMELINE TO SUBMISSION 2023 - 2024**

Version 1.3

		Target Date	Closing Date	July	August	September	October	November	December	January	February	March	April	May	June	July	August	Sept
				26 3 10 17 24 31	7 14 21 28 4 11 18 25 2 9 16 23 30	5 12 19 26 6 13 20 27 4 11 18 25 1 8 15 22 29 5 12 19 26	3 10 17 24 1 8 15 22 29 5 12 19 26	4 11 18 25 1 8 15 22 29 5 12 19 26	2 9 16 23 30 6 13 20 27 4 11 18 25 1 8 15 22 29 5 12 19 26	3 10 17 24 1 8 15 22 29 5 12 19 26	4 11 18 25 1 8 15 22 29 5 12 19 26	5 12 19 26 6 13 20 27 3 10 17 24 1 8 15 22 29 5 12 19 26	6 13 20 27 3 10 17 24 1 8 15 22 29 5 12 19 26	7 14 21 28 4 11 18 25 2 9 16 23 30 6 13 20 27 4 11 18 25 1 8 15 22 29 5 12 19 26	8 15 22 29 5 12 19 26 6 13 20 27 3 10 17 24 1 8 15 22 29 5 12 19 26	9 16 23 30 6 13 20 27 4 11 18 25 1 8 15 22 29 5 12 19 26	10 17 24 1 8 15 22 29 5 12 19 26	11 18 25 1 8 15 22 29 5 12 19 26
<b>Plan Regulation stage/ Work area</b>		High Court hearing and para 6 undertakings given to judge	29th June 2023															
		Executive Committee - agree milestones/ resources/deadlines	10th July 2023															
<b>Communications and Engagement</b>		Reg 18 - notification of stakeholders/ commencement of SAR																
		Develop/ agree consultation approach for SAR / comms plan																
		Develop member/ stakeholder engagement plan/ SAR working group	July/Sept															
<b>Scoping and soundness work</b>		Refine timetable/ workplan/ governance arrangements to PH																
		Scope likely evidence base updates/ major constraints																
		Update of 5YS/ housing trajectory position/ deleted sites	July-Aug 2023															
		Duty to co-operate meetings (to include SAR) Monthly as reqd	monthly															
		Confirm timetable to PINS and setup reg18 advisory meeting																
<b>Sustainability Appraisal (SA) /HRA</b>		Scope SAR SA requirements/ tasks - incl issues raised in JR																
		Review SA approach used in LPP1/2 & need for update																
		Review potential for external consultants for SA/ site assessment work																
		Updating SA templates for existing/ new sites to inform preferred options																
		Review of SA alternative options to inform Reg 18																
<b>Somerset east -call for sites / land availability update</b>		Agree shlaa approach (policy officers) & data collection	July 2023															
		develop/revise site selection methodology (policy officers)	July/Aug															
		Public call for sites (agents/ developers/others) NB Forum on 27/7	24th July 2023	4th September														
		Update existing site evidence and finalise SHLAA as evidence	august/sep															
		Draft Reg 18 options paper	sept/oct															
		Review of options/sites with member group / sub-committee																
		Review additional work/ evidence to allocations at Reg 19																
		Review and commission HRA for identified sites																
<b>Consultation on Preferred Site Options (Reg 18)</b>		Scrutiny - Climate and Place	22nd Nov 23															
		Executive - Review and reconsider sites/ approval of Reg 18 consultation	3rd January 23															
		Public consultation period	6 weeks	8th January 24	16th Feb 24													
		Compile responses to Reg 18 / options for working group	6 weeks															
		Member and working group meetings - review options	6 weeks															
		Finalise site allocations policies for new sites																
		Finalise Publication report	3 weeks															
<b>Publication Stage (Reg 19)</b>		Scrutiny - Climate and Place	20th March															
		Exec committee - submission proposals/ submit to PINS	8th May 2024															
		Period for formal representations to site options	13th may 24	29th June 2024														
		finalise / summarise list of reps and key issues for PINS																
		finalise SA statements and submission documents including equalities assessment																
<b>Submission &amp; Examination</b>		Submission of Plan to Inspectorate	w/c 1st Sept 2024															
		Examination Process (subject to appointed inspector)	6 months	1st Sept 2024	31st March 2025													
		Preparation of examination documents etc	Sept/Oct 2024															
		Key																

Key ■ Key decisions ■ Consultation stages ■ Review and technical work

## Report Sign-Off

	Officer Name	Date Completed
Legal & Governance Implications	David Clark	5 July 2023
Communications	Chris Palmer	Sent 5 July 2023
Finance & Procurement	Nicola Hix	6 July 2023
Workforce	Chris Squire	6 July 2023
Asset Management	Oliver Woodhams	N/A
Executive Director / Senior Manager	Mickey Green / Paul Hickson	5 July 2023
Strategy & Performance	Alyn Jones	6 July 2023
Executive Lead Member	Cllr Ros Wyke	5 July 2023
<b>Consulted:</b>		
Local Division Members	n/a	
Opposition Spokesperson	Cllr Mark Healey	Sent 5 July 2023
Scrutiny Chair	Cllr Martin Dimery, Scrutiny Committee Climate and Place	6 July 2023

