West Monkton & Cheddon Fitzpaine
Revised Neighbourhood Development Plan

PART A

Please complete Part A in full, in order for your representation to be taken into account at the Neighbourhood Development Plan examination. This information will not be made public and will only be used if we need to contact you.

Full Name	Nicholas James Wilson
Address	[redacted]
Postcode	
Telephone	
Email	
Organisation (if applicable)	n/a
Position (if applicable)	n/a
Date	15/12/2021

PART B

Please complete Part B to tell us what parts of the neighbourhood plan you wish to comment on. Your representation should cover succinctly all the information, evidence and supporting information necessary to support/justify the representation and the suggested change, as there will not normally be a subsequent opportunity to make further representations at a later stage. Further submissions will be only at the request of the Independent Examiner, based on the matters and issues he/she identifies through the examination.

The majority of examinations are expected to be through written representations. However, should the Inspector decide there is a need for an oral examination, please state below whether you would like to participate.

- [x] No, I do not wish to participate at an oral examination
- [ ] Yes, I wish to participate at an oral examination

Please note the Inspector will determine whether an oral examination is necessary. If an oral examination is require, please outline why you consider that your participation is necessary.

Which part of the Neighbourhood Development Plan document is your representation about?

Paragraph Number	P31 para 2	Policy Reference:	3. i.)	Map	

Do you support, oppose, and/or wish to comment

- [ ] Support
- [ ] Support with modifications
- [x] Oppose/Object
- [ ] Have Comments (about The Plan, Examination or Referenda)

Please give details of your reasons for support or opposition, or make other comments here: Please be as precise as possible

For clarity, the paragraph being discussed starts - "In exceptional circumstances, proportionate new housing development across the Neighbourhood Plan…"

The insertion of the paragraph would be contrary to established case law and the relevant statutory provisions. It is also neither sufficiently precise nor readily understandable, and is vague as to its geographic scope.

1. Contrary to established caselaw and relevant statutory provisions

The paragraph is within the Objectives section of the draft NP. However, as the NP will need to be read as a whole, and the interpretation of its policies will be informed by the applicable explanatory text and its Vision and Objectives, the paragraph will be influential in the determination of planning applications under the revised NP.

The paragraph (as drafted) would necessitate the completion of a planning obligation under section 106 of the Town and Country Planning Act 1990 (as amended), as that would be the only means for effectively controlling the provision of the "wider community aspirations", given that such provision would require the transfer of land and/or financial contributions for its delivery.

It is trite law that planning obligations which seek to "buy a planning permission" are unlawful, and the Court has been consistent in its approach to such obligations since the case of *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All E.R. 636. In Tesco, the Court stated as follows: "Against the background that it is a fundamental principle that planning permission cannot be bought or sold, it does not seem unreasonable to interpret subsection [106] (1)(d) so that a planning obligation requiring a sum or sums to be paid to the planning authority should be for a planning purpose or objective which should be in some way connected with or relate to the land in which the person entering into the obligation is interested."

The decision in Tesco was considered and approved by the Supreme Court in *Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Ltd* [2017] P.T.S.R. 1413. In that case (which was a case on the equivalent Scottish provisions to s106), the Court stated as follows: "Were such a restriction lawful, a planning authority could use a planning obligation in the context of an application for planning permission to extract from a developer benefits for the community which were wholly unconnected with the proposed development, thereby undermining the obligation on the planning authority to determine the application on its merits. Similarly, a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development. This could amount to the buying and selling of a planning permission...An ulterior purpose, even if it could be categorised as a planning purpose in a broad sense, will not suffice. It is that implicit restriction which makes it both ultra vires and also unreasonable in the Wednesbury sense for a planning authority to use planning obligations for such an ulterior purpose."

The Court in Aberdeen went on to consider the lawfulness of such policies in development plans. It confirmed that "the inclusion of a policy in the development plan, that the planning authority will seek such a planning obligation from developers, would not make relevant what otherwise would be irrelevant... If a planning obligation, which is otherwise irrelevant to the planning application, is sought as a policy in the development plan, the policy seeking to impose such an obligation is an irrelevant consideration when the planning authority

considers the application for planning permission. For a planning obligation, which is to contribute funding, to be a material consideration in the decision to grant planning permission, there must be more than a trivial connection between the development and the intervention or interventions which the proposed contribution will fund."

In *R. (on the application of Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 A.C. 437, the Supreme Court held that for an off-site benefit to be material (ie a lawful planning consideration in the determination of planning applications), it had to be related or connected to the development in question and that that connection had to be real rather than fanciful or remote. In *R. (Peter Wright) v Forest of Dean District Council* [2016] J.P.L. 1235, the Court confirmed that a proposed local community donation intended to provide a regular source of income to the local community from the profits made from a wind turbine was not a material consideration which the local planning authority was entitled to take into account when determining a planning application for the wind turbine as it was an off-site contribution which had no real connection with the development. The Court further stated that "the fact that a matter may be regarded as desirable (for example, as being of benefit to the local community or wider public) does not in itself make that matter a material consideration for planning purposes. For a consideration to be material, it must have a planning purpose (i.e. it must relate to the character or the use of land, and not be solely for some other purpose no matter how well-intentioned and desirable that purpose may be); and it must fairly and reasonably relate to the permitted development (i.e. there must be a real – as opposed to a fanciful, remote, trivial or de minimis – connection with the development)".

While off-site benefits are not necessarily immaterial in planning law, an off-site benefit may only be material if it satisfies the criteria in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578. These criteria are that the requirements imposed on the development must serve a planning purpose, must be clear, concise and measurable, must relate to the development, must be reasonable having regard for the scope of development and must be enforceable. If any of these criteria are not met, the off-site benefit will not be material and, as such, may not be lawfully imposed on a grant of planning permission.

Given all the above, it is clear that the paragraph in the draft NP fails to meet the established requirements for being lawful. The delivery of a Country Park is an aspiration which is unrelated to the delivery of new homes. The Country Park could just as reasonably be delivered through the donation of the necessary fields to the community, and without any new homes being permitted. Looked at from the other perspective, a developer could reasonably argue that the creation of a Country Park is not necessary for their development to be acceptable, as their development would be acceptable if it provides sufficient open space within its own redline boundary. The only exception to this argument would be if there was an extant shortfall of recreational space within the local area and contributions were needed to off-site spaces in order to remedy the shortfall. However, that is not the position in our area. The Country Park is not necessary, it is a 'nice to have'. By allowing new residential schemes to come forward if they contribute to an unnecessary but desired Country Park would be on all fours with the extensive caselaw which specifically proscribes such 'buying of planning permissions'.

2. Not sufficiently precise or readily understandable

Paragraph 16(d) of the NPPF requires plans to "contain policies that are clearly written and unambiguous". The draft paragraph is neither. The use of words such as "in exceptional circumstances", "proportionate" and "wider community aspirations" are vague and open to a multiplicity of interpretations. It also seems out-of-place with the rest of the section and (in reality) is in the wrong place, reading more as a policy than as an objective. In effect, the shortcomings of the draft paragraph are a symptom of the fact that the Country Park is not a necessity but a 'nice to have', as otherwise the draft objective could have been worded more precisely. As currently drafted, the draft objective would not be fit for purpose and would inevitably lead to arguments about the extent of the contributions which "help enable" the stated benefits, the scope of "community aspirations" and the test for "exceptional circumstances". In short, the draft objective would be an open invitation to all developers to submit applications across the area covered by the NP, without any regard for the geographic location of their development site, and offer what they consider to be community benefits, and (if necessary) then seek to argue their suitability on appeal. This would result in the whole area becoming a developer's charter, and would be the opposite of what we need to achieve in the NP.

Please set out what change(s) you consider necessary to enable the plan to proceed, including any suggested revised wording of any policy or text, related to the objection you have raised. You will need to say why this change will enable the plan to proceed. Please be as precise as possible.

What improvements or modifications would you suggest?
My suggestion is that the paragraph is deleted and a new draft policy is added instead, as follows: "Where it has been demonstrated that there is an existing shortfall in publicly-available recreational space within the vicinity of a proposed development, such development will be required to make a proportionate contribution towards the delivery of such publicly-available recreational space. Development which is proposed within the existing countryside will not be permitted to make such a contribution, as such development would itself be unacceptable in planning terms due to its location within the open countryside."

If you have additional representations this form can be reproduced for each item. Please make sure any additional pages are clearly labelled and attached.