

**IN THE MATTER OF THE RE-SUBMITTED LOXWOOD
NEIGHBOURHOOD PLAN**

A D V I C E

**Nicola Golding
Principal Solicitor
Chichester District Council
East Pallant House
1 East Pallant
Chichester
West Sussex
PO19 1TY**

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BACKGROUND AND INSTRUCTIONS

1. I have previously advised in this matter. I am now asked to advise the Council in respect of the resubmitted for examination of the Loxwood Neighbourhood Plan (“the LNP”).

2. Crownhall Estates have submitted a Joint Advice, which concludes (at paragraphs 49 and 50) that the LNP fails to comply with the basic conditions in respect of national policy by:
 - (1) failing to make an appropriate contribution to housing supply;
 - (2) being based on a deeply flawed site selection exercise;
 - (3) additionally, it fails to appreciate the correct role of windfall sites.

It is alleged that the LNP is therefore not in accordance with national policy as outlined in the NPPF nor is it in accordance with the emerging Local Plan as it stands.

3. The Examiner has indicated that she is prepared to allow Chichester District Council to respond to the points raised in the legal opinion accompanying the representations submitted by Planit Consulting, particularly with regard to objectively assessed needs in relation to the emerging Local Plan, as she has limited information on that matter.

ADVICE SOUGHT

4. This Advice therefore addresses in particular that aspect of the Joint Advice that relates to the contribution of the LNP to the housing land supply. I trust this will assist the Examiner when considering the Joint Advice and related representations. I also briefly comment on the criticisms of the LNP Site Assessment Methodology but only with regard to the approach that should be adopted to the consideration of such criticisms.

5. It is worth at the outset remembering the stated objectives of the neighbourhood planning regime and for example recalling that in the Plain English Guide to the Localism Act it is stated:
“Neighbourhood planning will allow communities, both residents, employees and business, to come together through a local parish council or neighbourhood forum and say where they think new houses, businesses and shops should go and what they should look like”¹
Neighbourhood planning is a new, community-led, level of planning. Our aim is for an effective and transparent system which inspires communities to get involved, gives communities confidence that their views will have real influence, and delivers the growth the country needs.²

6. As indicated below, that underlying approach, and the difference between neighbourhood and local plans, has been reflected in decisions of the High Court so far on challenges on neighbourhood plans.

ASSESSMENT

Contribution to Housing Supply

7. In light of the Joint Advice, I should also set out at the outset the requirements that arise under the Basic Conditions. In particular:

¹ Page 15 of the Plain English Guide.

² Page 10 of DCLG’s Consultation document on Neighbourhood Planning Regulations.

- (1) There is no specific requirement that a neighbourhood plan has to be in accordance with national policy as outlined in the NPPF.
 - (2) Nor is there any specific requirement that a neighbourhood plan has to be in accordance with an emerging Local Plan. Paragraph 36 of the Joint Advice (as well as the concluding paragraphs) needs therefore to be read with caution.
8. The Basic Conditions that have to be considered are set out in Schedule 4B to the Town and Country Planning Act 1990 (“TCPA 1990”) as follows (with my emphasis):

8 (1) The examiner must consider the following—

(a) whether the draft neighbourhood development order meets the basic conditions (see sub-paragraph (2)),

(b) whether the draft order complies with the provision made by or under sections 61E(2), 61J and 61L,

(c) whether any period specified under section 61L(2)(b) or (5) is appropriate,

(d) whether the area for any referendum should extend beyond the neighbourhood area to which the draft order relates, and

(e) such other matters as may be prescribed.

(2) A draft order meets the basic conditions if—

(a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,

(b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,

(c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,

(d) the making of the order contributes to the achievement of sustainable development,

(e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),

(f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and

(g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order.

Section 38A(3) of the Planning and Compulsory Purchase Act 2004 Act provides that the references in Schedule 4B to the 1990 Act to “Neighbourhood Development Orders” are to be read as if they were references to “Neighbourhood Development Plans”.

9. Therefore, it will be seen that meeting the Basic Conditions requires the following considerations:

- (1) The appropriateness of a neighbourhood plan, having regard to national policies and advice (paragraph 8(2)(a)).

In *BDW Trading Limited, Wainholmes Developments Ltd v Cheshire West & Chester BC* [2014] EWHC 1470 (Admin) it was held (at paragraph 81) that basic condition (a) required the Examiner to have regard to national policy and then consider whether it was appropriate that the Plan should proceed. Further, in that case it was held (at paragraph 83) that the role of the Examiner is limited to having regard to national policy in considering a Policy applicable to a small geographical area and should not be confused with the more investigative scrutiny of a local plan Inspector charged with determining whether the Local Plan as a whole is or is not sound. Whereas a local plan has to be consistent with national policy, by contrast the function of an Examiner in relation to a neighbourhood plan is to determine whether the plan meets the “basic conditions” (see paragraph 84 of the *BDW* case). As that Judgment goes on to say:

.....In that regard the Examiner has a discretion to determine whether or not it is appropriate that the Plan shall proceed “having regard to national planning policy and guidance and has to make a judgment whether or not the Neighbourhood Plan is “in general conformity with the strategic policies contained in the development plan”.

Therefore, I do not accept as correct the Joint Advice’s assertion (at paragraph 41) that the LNP should meet the full, objectively assessed needs as far as is consistent with the requirements of the NPPF (para. 47). This, in my view, falls into the error of treating the LNP as a local plan and subject to the test of “soundness”. As set out above, the High Court has confirmed that such an approach is incorrect.

- (2) Whether the plan contributes to the achievement of sustainable development (paragraph 8(2)(d)).

Thus, there is no direct requirement that a neighbourhood plan must meet the objectively assessed needs. As returned to below, the approach to taking that into account is very different to that required for a Local Plan. The draft LNP does include residential allocations, as it is entitled to do, and it would seem reasonable to conclude that these assist in contributing to the achievement of sustainable development.

- (3) The plan is required to be in general conformity with the strategic policies contained in the development plan (paragraph 8(2)(e)).

The emerging Local Plan is not part of the development plan and this requirement does NOT apply in respect of that (cf. paragraph 36 of the Joint Advice).

Thus, although paragraph 184 of the National Planning Policy Framework states that neighbourhood plans and Orders should not promote less development than set out in the Local Plan or undermine its strategic policies, this does not apply to the emerging Chichester Local Plan.

As the Planning Practice Guidance advises (at paragraph 009 ref ID: 41-009-20140306, with my emphasis):

The Planning Practice Guidance, in relation to Neighbourhood Planning (latest revision 6 March 2014) answers the question “Can a Neighbourhood Plan come forward before an up to date Local Plan is in place?” as follows:

“Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.

A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. A draft Neighbourhood Plan or Order is not tested against the policies in an emerging Local Plan although the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which a

neighbourhood plan is tested.”

In *BDW Trading Limited, Wainholmes Developments Ltd v Cheshire West & Chester BC* [2014] EWHC 1470 (Admin) it was held (at paragraph 82) that the only statutory requirement imposed by condition (e) is that the Neighbourhood Plan as a whole should be in general conformity with the adopted development plan as a whole.

10. Thus the reasoning in the emerging Local Plan (“ELP”) should be taken into account but the provisions of the LNP do not necessarily have to follow this to make it appropriate to proceed with the plan. However, the PPG also advises that “ *The local planning authority should work with the qualifying body to produce complementary neighbourhood and Local Plans. It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging Local Plan. This is because section 38(5) of the Planning and Compulsory Purchase Act 2004 requires that the conflict must be resolved by the decision maker favouring the policy which is contained in the last document to become part of the development plan.*” Therefore, there would need to be justification/explanation as to why an approach that conflicts with that in an emerging LP was being applied in the neighbourhood plan. However, I would emphasise the PPG advice that there is no requirement to “test” the policies in a draft NP against the policies in an ELP (see paragraph 9(3) above of this Advice).
11. Thus the Council and/or the qualifying body needs to be able to explain the basis for the current approach to assist the Examiner in assessing whether, when properly interpreted and applied, the basic conditions are met. With regard to the points made in this respect in the Joint Advice which require addressing, I would note the following:
 - (1) The Joint Advice points out (at paragraph 14) that the ELP policy 5 provides for 339 dwellings within the North of Plan Area, within which Loxwood is included.

- (2) 200 are allocated to the individual communities. Of this 200, there is an indicative figure of 60 dwellings for Loxwood parish.
 - (3) The remaining 139 dwellings are expected to be windfall sites.
 - (4) The Local Plan Inspector temporarily halted the examination on 8 October 2014, to give the District Council an opportunity to respond because she had not seen enough robust evidence concerning the housing need figure of 410 per annum over the 15-year period of the ELP.
 - (5) The District Council produced an audit figure raising the figure to approximately 435 per annum. The Council's Response to the Examiner's request to comment on the Crownhall Estate's representation explains the approach adopted by the Council in response to the Local Plan Inspector's comments.
12. Therefore it seems to me that to demonstrate to the Examiner of the LNP that the basic conditions are complied with it will be necessary for the Examiner to consider the points raised by Crownhall in light of the Council's response by applying the correct approach as set out in the legislation, the PPG and the relevant legal authorities. The Examiner will need to consider whether, having regard to national policy and guidance, the approach in the policies in the draft LNP is appropriate and not whether it is sound or whether it meets the full objectively assessed housing needs. It ought also to be remembered, as the PPG points out, that even if there were to be a conflict between a policy in a neighbourhood plan and a policy in a Local Plan, section 38(5) of the Planning and Compulsory Purchase Act 2004 requires that the conflict must be resolved in favour of the policy which is contained in the last document to become part of the development plan.
13. It should be noted that in the case of the Tattenhall NP (*BDW Trading Limited, Wainholmes Developments Ltd v Cheshire West & Chester BC* [2014] EWHC 1470 (Admin) referred to above) the TNP did not limit the eventual amount of development in Tattenhall (see paragraph 103 of the

Judgment). In that case it was said (at paragraph 103) that the outcome of the TNP process would have no effect on the eventual content of the Local Plan as regards the Borough-wide need for and approach to development. I do not see why that doesn't also apply in the case of the LNP.

Site Assessment Methodology

14. Clearly, this criticism may need responding to (see in particular paragraphs 43-46 of the Joint Advice). However, any response on the substance of the criticisms would more appropriately come from those who carried out the site selection exercise.
15. I presume that the assessment exercise (referred to now in 18.3.5 of the re-submitted LNP and previously in 17.3.5) is that which the Examiner would previously have considered. However, I do not think that this was specifically referred to or considered in the Examiner's Report.
16. However, again it is important to remember that the role of the Examiner for a neighbourhood plan is very different to that of a Local Plan Inspector. In *BDW Trading Limited, Wainholmes Developments Ltd v Cheshire West & Chester BC* [2014] EWHC 1470 (Admin) there was a policy limiting any housing site to a maximum of 30 dwellings to maintain the character of the settlement. The High Court held (at paragraph 85):
"Further I reject the Claimants' contention that it was incumbent upon the Examiner to enquire properly into the justification for the promotion of a 30-dwelling limit. This again....suggests a misunderstanding of a neighbourhood plan examiner's role; he is not considering the matter in the way that an Inspector would when looking at whether a local plan is "sound".

SUMMARY

17. In my view, the Joint Advice adopts an incorrect approach to the housing numbers issues. The approach adopted is more akin to a Local Plan examination applying the test of soundness. Such an approach does not apply to NLPs as confirmed in *BDW Trading Limited, Wainholmes Developments Ltd v Cheshire West & Chester BC* [2014] EWHC 1470 (Admin). It overlooks the role of a NLP and the importance of it being community based. That role has been endorsed by the Secretary of State and the Courts.

18. I hope that this Advice provides some assistance to the Examiner as to the correct approach to consideration of the housing need issues raised by Crownhall. The Council is, I am aware, responding to the housing numbers issue separately. I would just add that the more flexible approach to a neighbourhood plan than to a local plan, as explained above above, is also consistent with the fact that a neighbourhood plan is community based and neither has to wait for an up to date local plan nor be in conformity with an emerging local plan.

19. Further, the criticisms of the Site Assessment Methodology, need addressing if possible by the Parish Council if the Examiner requires assistance on that aspect. However, again these criticisms in any event need to be put into the context of the limited role of the Examiner of a NLP compared to that of a Local Plan Inspector as confirmed in the *BDW* case (see paragraph 14 above).

STEPHEN MORGAN

LANDMARK CHAMBERS
180 FLEET STREET
LONDON
EC4A 2HG

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