IN THE MATTER OF THE OUNDLE NEIGHBOURHOOD PLAN

ADVICE

---

1. I am asked to advise in relation to the process surrounding the production of the Oundle Neighbourhood Plan ("ONP") in particular in light of two advices from counsel raising points about whether the ONP could lawfully be made.

Summary

2. For the reasons set out below there is no bar in law to the ONP being made.

Discussion

Introductory observations

3. It is important to approach the criticisms made by those with sites which are now omissions sites in light of the overarching principles which apply to the making of neighbourhood plans.

4. The examiner is concerned with whether the statutory requirements in para 8 of Schedule 4B TCPA 1990 have been met. For present purposes focus is upon whether the Basic Conditions in para 8(2) have been met.

5. The broader tests of soundness which apply to emerging local plans do not apply here. It would not be appropriate to introduce them, or criteria related to them, by the back door.

6. Whether the Basic Conditions have been met is largely a matter of planning judgment for the examiner. Those questions are to be answered at the conclusion of the examination, and not at any earlier point in time.

7. The principles of localism and the introduction of the Neighbourhood Planning ("NP") process presuppose that there may from time to time be substantial differences of view, and differences of approach, between a qualifying body and the relevant local planning authority. Legislation specifically provides for the most uptodate adopted or made planning documents to have sway where such differences arise.

8. It is clearly contemplated by the statutory scheme that significant changes may be made to a NP between the Reg 14 and Reg 15 stages.[1] Self-evidently, the purpose of consultation at the Reg 14 stage is so that representations may be both made and considered in the making of the Reg 15 submission NP. Any individuals who may not agree with the changes in arriving at the Reg 15 submission NP are protected by their ability to make representations to the examination in accordance with Reg 16(a)(iii) and Reg 17(d); and by the need for the NP to meet the Basic Conditions.

9. Of course, both Persimmon and Gladman have taken full advantage of that ability, and, accordingly, their cases are before the examiner for consideration.

<u>The criticisms of the process</u>

10. Three main criticisms are made by bullet points at para 4 of the joint opinion. The first suggestion is that the amendments between the Reg 14 and Reg 15 stage were *"material"* and *"changed the nature of the Plan"* such that, as a matter of law, the

[1] See The Neighbourhood Planning (General) Regulations 2012 S.I. 2012 No. 637 ("the General Regulations")

qualifying body – here Oundle Town Council ("OTC") was essentially required to start again at Reg 14 stage. The second, which follows directly on from the first, is that the mischief which it is said this failure has created is, simply, a failure to consult. The third point is a suggestion that the Sustainability Appraisal ("SA") process was legally flawed, such that the ONP could not now lawfully be made.

11. For ease of reference this Advice takes the points from the joint advice broadly in the order in which they arise in the discussion section of that advice (para 39 onwards).

Consultation

12. It is accepted by all, as I understand it, that ONC complied with Reg 14 consultation requirements (save in relation to the SA point, which I deal with separately below). The Reg 14 consultation contained the then preferred approach. There is nothing in the General Regulations to prevent a change in approach before examination, and it would be strange if that could not be done in response to consultations. All PPG ID41-049 is requiring, is that by Reg 14 stage those making representations are not confronted by a range of potential options, or a drip-feed of individual policy announcements; but rather a clear set of policies to which their representations can be directed. That was the case here. The Reg 14 NP contained all the proposed policies, setting out the preferred approach.

13. **The central fallacy in the joint advice is that it requires the substantial reading in to the General Regulations of words that are not there.** The General Regulations could have made specific provision for a *"material"* change, or some other level of change, to require reconsultation under Reg 14, but they deliberately did not do so.

They could have made express provision for reconsultation if the *"preferred approach"* changed as a result of consultation, but they did not do so.

14. This position may be contrasted with the situation in relation to modifications, where para 10 of Sch A2 PCPA 2004 does contain explicit provision requiring the examiner to consider whether the modifications contained in the draft plan are so significant or substantial as to change the nature of the plan. The examiner's decision on that issue decides whether the procedure in para 10 or para 11 of that schedule falls to be applied. Accordingly, where the draftsman of these procedural provisions wanted to make provision for such matters, it was done expressly.

15. There is simply no basis for the key assumption made in the joint advice that consultees, in particular statutory consultees, would assume that the document emerging after a consultation process is materially the same as the one which entered the consultation process. Rather, any sensible consultee would be alive to the fact that it is highly likely that some changes would be made as a result of the consultation process, bearing in mind the fundamental objectives of a consultation process. The obligation to notify *"any consultation body which is referred to in the consultation statement submitted in accordance with regulation 15, that the plan proposal [or modification proposal] has been received"* was plainly drafted with that likely approach in mind. It is a matter of fact that statutory consultees did respond to the Reg 16 consultation. In any event, it is this legislation which sets out what must be done, and it was done.[2]

[2] It is therefore of limited assistance in considering compliance with the Basic Conditions for ENC, as they have done, to refer to the *"spirit"* of the SCI. They do not allege an actual failure to comply with the SCI.

16. It is simply not correct to assert that the final revisions to the SA and the present version of the plan have not been consulted upon. They have, as a result of the operation of Reg 16 and the examination process itself. Accordingly, the criticism that there has been a breach of Reg 13 of the SEA regulations has no merit. Further, as I understand it, in June 2019 ENC arranged a further separate consultation on the SA in any event specifically with a view to overcoming any complaints about a previous failure to consult. As a separate point, it is also interesting to note that the statutory consultees that they confirmed that the SA fulfils the statutory requirements.[3]

17. Any comment in the SA to the effect that there would be consultation on the SA (a) could not, and does not, add any statutory requirement for further consultation; and (b) is materially correct in any event, as the SA is open for comment as part and parcel of the examination, as the Reg 16 representations demonstrate very well. There is no evidence of any prejudice arising whatsoever as a result of that statement in the SA. Nothing in these allegations supports a conclusion that OTC has failed to comply with the Basic Conditions. In this respect, there is no need to refer back to para 4 of Schedule 4B TCPA 1990, because it is not suggested that the Government acted outside the powers conferred by para 4 in enacting the consultation provisions contained in the General Regulations.

18. It follows from the above that OTC has not failed to follow the General Regulations in the consultation process which has been undertaken.

---

[3] ENC PPC Report 30.9.19 at para 2.1

19. Moreover, the requirement for consultation on an SEA/SA point raises nothing further for the following reasons. First, it is well established that (a) the purpose of SEA/SA is to *inform* the plan making process. It is the plan which is being examined, not the SEA/SA. The tail must not be allowed to wag the dog. Second, SEA/SA production is an iterative process, and (for example) in the case where errors are identified in SA documentation, they can be cured by later correction.[4] Similarly, existing SA analysis can lawfully be (substantially) supplemented through a plan process, as commonly happens when main modifications are made to emerging local plans including, for example, the addition of substantial new allocations of land. Third, there is an SA accompanying the ONP before the examination. Therefore, that material can be taken into account in deciding whether the Basic Conditions are met.

20. I would add that it seems to me that the changes by way of housing site allocations made between the Reg 14 and Reg 15 versions of the plan were not changes to strategic policy, or at least not such as to bring the ONP out of general conformity with the development plan. I say that in light of the fact that substantially the same provision numerically[5] was being made, it was being made within the same settlement, and PPG ID:41-076-20190509 specifically indicates that in relation to site allocations it is useful to consider *"whether bringing the site forward is central to achieving the vision and aspirations of the local plan or spatial development strategy"*. That guidance was only promulgated on 9 May 2019, and so would not have been available to previous decision makers.

---

[4] See, for example, *No Adastral New Town Ltd v. Suffolk Coastal DC* [2015] EWCA Civ 88; [2015] Env LR 28 at paras 54-57, 59-60.

[5] Option 1 made provision for delivery of 312 new homes across 7 sites; whereas Option 3 made provision for c. 324 homes across 5 sites. Therefore, in fact, the level of provision was modestly greater under Option 3.

21. It has not been suggested, as far as I am aware, that these limited changes to allocations have made changes which are central to achieving the visions or aspirations of the adopted local plan. It is not easy to see how the removal of two modest sites of 45 units (St Christopher's Drive) and 30 units (Cotterstock Road) respectively, with appropriate compensatory changes being made elsewhere, could have that effect. The ability to make those compensatory changes essentially arose from observations made by ENC about site densities[6], which resulted in the site yield for Herne Road being increased from 45 units to 120 units; a yield I understand the site owner supports. Accordingly, the size of the allocation at Herne Road did not change. I also understand that ENC had an objection to the allocation of only part of a potential allocation, and this was one of the reasons for St Christopher's Drive being removed.

22. At all events, certainly ENC expressed the view in their legal check letter dated 9 July 2019 that the ONP was in general conformity both (a) with relevant national and (b) local strategic policy. The schedule attached to the letter must be read with that conclusion in mind. Accordingly, I read the references to policy O15 in that table as referring to what ENC consider to be a significant change to the strategy of the Neighbourhood Plan, not the (adopted) Local Plan. Even if they were such a change considered at the NP level, that does not indicate any failure to meet the Basic Conditions, but it might be thought that even in respect of the NP, it is overstating the matter to describe these changes as ones of a strategic nature.

[6] Of course, the effect of applying those density observations to the other sites would have also increased the number of units on those sites, leading to what might be thought to be significant overprovision locally.

23. Lastly, it is perhaps noteworthy that the advice from counsel submitted to the examination by Persimmon indicated (correctly) that any defect in the earlier stages of consultation could be remedied through the Reg 16 consultation.

24. It follows that there is nothing in the Basic Conditions or SEA/EA assessment which requires the examiner to conclude that OTC now has to go back and conduct a further Reg 14 consultation.

The evidence base

25. The Stonegate challenge succeeded, in essence, because the judge found that the examiner was satisfied the Basic Conditions were met based on material which was no more than *"guesswork"*.[7] That was an erroneous approach.

26. Plainly, *if* the examiner concludes that the material in this case is no more than guesswork, as a matter of planning judgment he should conclude that the Basic Conditions are not satisfied.

27. However, for reasons that have already been advanced at the examination, there is in this case material upon which the examiner can lawfully conclude that the Basic Conditions have been satisfied. The examination is not an examination into the relative merits or demerits of omission sites. Even at the local plan level, it is very clear that examinations are not into omission sites. Nor is it an examination into

[7] See para 74 of the judgment.

changes to the NP between the Reg 14 and Reg 15 stage. It is an examination of the Reg 15 submitted version of the NP.

28. As I have pointed out above, the examination is not an examination of the SA, which serves to *inform* the plan making process but, as I understand it, independent experienced consultants (CAG) appeared at the examination and robustly defended the SA. The SA followed a conventional approach and did, for example, give a proper outline of reasons relating to site assessment etc. in Appendix 8 to that document. The reasons for rejecting certain sites were also set out in Chapter 6. I do not consider there is any real basis for impugning the SA on the basis of the evidence available at the time.

29. There is a difference in preferred sites between the ONP and the sites identified in the emerging local plan ("eLP"). The prospect of such a difference arising, as I indicated above, is inherent in the concept of neighbourhood planning. Those differences are based on planning judgments, and it is entirely possible for two bodies to reasonably reach different views about those issues of judgment. It is no part of this advice to critique the eLP evidence base. However, the eLP, as I understand it, has not yet even been submitted for examination, which demonstrates quite serious slippage from the Local Development Scheme adopted in July 2018.

30. Accordingly, no part of the evidence base or policies has yet been the subject of independent examination insofar as ENC's area is concerned. As I understand it, both my clients and OTC have serious reservations about various elements of that evidence

base including, for example, the DLP material[8] which forms part of the eLP evidence base. There is no apparent basis, as matters stand, for elevating that untested evidence to a status of *"robust evidence"*. It is worth noting that the AECOM interim SA for the eLP specifically notes that it is not an SA for the purposes of the SEA/SA Regulations (para 1.1.5 of that document).

31. I also understand that, in least in relation to Cotterstock Road omission site, it was accepted at the examination by the promoter/owner that there are access issues in relation to that site, in that they had only tested vehicular access into a larger site which fell in part outside of the NP area; and that, therefore, the site promoter had not produced sufficient material to overcome the OTC assessments/evidence.

32. Nor would it be correct to imply that ENC's preferred emerging approach was left out of account, because it was assessed as Option 4 within the SA. I note parenthetically that Option 4 involved delivery of fewer units, 300 compared to 324. There is nothing before me to show that OTC could not rationally prefer Option 3, and take that option forward within the Reg 15 version of the ONP.

33. **In particular, but crucially, there is plainly material upon which the examiner can lawfully decide that *"having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the [plan]"*, *"the making of the [plan] contributes to the achievement of sustainable development"* and *"the making of the order is in general conformity with the strategic policies contained in the development plan for the area".***

[8] Which appears only to have been produced or made public in July 2019, thus postdating the Reg 15 submission in May 2019.

34. ENC have expressly stated that in their view the ONP is consistent with national policy. I have not seen anything to suggest, still less demonstrate, that it is not. The point lately raised at the examination about flood zones appears to be a red herring inasmuch as Herne Road does not include any FZ3 within the identified housing area.

35. It is clear that the provision of housing is at a level and following a spatial strategy which is in general conformity with the strategic policies contained in the adopted development plan. There appears no reason to doubt that the housing policies, and the other policies of the ONP, will contribute to sustainable development. Indeed, it might be thought difficult to come to a conclusion that the NP would not make any contribution in that regard.

36. The guidance of Government is that localism should be firmly promoted and carried into effect via, in important part, neighbourhood planning. Given the compliance with the other Basic Conditions I can see no reason why the examiner should nevertheless conclude that it is not appropriate for the plan to be made.

37. For the reasons already set out above, it is clear that the SA produced in this case was sufficient to serve its function in the neighbourhood plan making process. Therefore, the making of the order would not breach, or otherwise be incompatible with, EU obligations.

Conclusion

38. It is lawfully open to the examiner to conclude that the ONP meets the Basic Conditions.

WAYNE BEGLAN