BUCKLAND NEWTON NEIGHBOURHOOD PLAN

O P I N I O N

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BACKGROUND AND INSTRUCTIONS

1. I am instructed to advise the Buckland Newton Parish Council ("the PC") in respect of their neighbourhood plan that was submitted to West Dorset District Council ("the DC") in November 2015 ("the NP").

2. The PC carried out it pre-submission consultation pursuant to regulation 14 of the Neighbourhood Planning (General) Regulations 2012 ("the 2012 Regulations") in May to July 2015. On 31 July 2015, the High Court quashed the affordable housing thresholds in *West Berkshire v Secretary of State for Communities and Local Government* [2015] EWHC Admin 2222. That decision was reversed by the Court of Appeal on 11 May 2016 ([2016] EWCA Civ 441).

3. As a result of that High Court decision, the Local Plan was amended (through the Local Plan Inspector's recommendations) to revert back to requiring all sites to contribute to affordable housing. It was therefore considered appropriate by the PC to consult on further changes to bring the NP into conformity with Local Plan ("the supplementary consultation"). In addition, this provided an opportunity to consult on the suggestion made by Dorset County Council requesting that the removal of policy C4 applying to the allotments site owned by them.

4. All the parishioners were made aware of the supplementary consultation and those that had commented on the draft plan were individually

notified of these changes and invited to comment. The only statutory consultee consulted was the County Council, who were supportive of the change regarding their allotments site. Only one person responded and that response was not directly related to the changes proposed and consulted upon.

5. The PC held a special meeting on the 14 December 2015 at which these changes to the pre-submission draft were approved and incorporated into the submission draft plan. The draft NP was then submitted to the DC pursuant to regulation 15 of the 2012 Regulations.

6. By a letter dated 25 January 2016, the DC notified the PC that it considered that the pre-submission consultation and publicity carried out were in accordance with regulation 14. No concern was expressed in respect of the supplementary consultation.

7. The NP was then publicised by the DC in accordance with regulation 16 and then submitted to Ann Skippers ("the Examiner") for independent examination as provided for under the legislation. On 27 July 2016 the Examiner wrote to the DC raising certain concerns. In particular, she stated:

"*I am sure that you will appreciate it is necessary to be sure that the regulation 14 period of consultation has been carried out in accordance with the relevant Regulations i.e. a period of six weeks on a complete draft plan without any options in it and that the submitted documents meet the requirements of the regulations."*

For that reason, along with two others, the Examiner further stated in that letter that her preference was for the NP to be withdrawn.

8. On the 12 September 2016, the Examiner wrote to the DC that due to a family bereavement she was unable to continue with the Examination. She also stated:

"….In order to be helpful to you, whilst writing, I must express some surprise and dismay that my advice that the Plan be withdrawn was not taken up. The combination of concerns being raised by a number of representors at the Council's regulation 16 consultation period, my doubt that the documents submitted to the local planning authority, and in particular the various documents submitted as the Consultation Statement, met the requirements of the Neighbourhood Planning (General) Regulations 2012 and then concern over engagement with landowners led me to suggest that all these matters may point to a Plan that should not have been accepted for submission or progressed to examination by the local planning authority. I therefore strongly suggest that the local planning authority resolve these matters satisfactorily before putting the Plan before another examiner so that the local planning authority can be satisfied that the plan making process was robust and not vulnerable to successful challenge."

ADVICE SOUGHT

9. In these circumstances, I am asked to provide my opinion on the best way for the PC to proceed. In particular, I am asked to address four specific matters, each of which I consider below.

10. I should make it clear at the outset that some of the neighbourhood planning legislation is far from clear and until there has been relevant determinations by the courts there will inevitably be a degree of uncertainty. Therefore, as the matters that arise are not entirely straightforward and I have found it necessary to deal with some of them in detail, I provide an overall assessment by way of summary of my views at the end of this Opinion (pages 14-17). I hope that this will assist.

ASSESSMENT

11. Before addressing the issues that do arise, I briefly outline the legal principles that apply.

The Legal Framework

12. In addition to the 2012 Regulations referred to above, the relevant legal framework for the preparation and making of Neighbourhood Development Plans ("NPs") is provided by the Localism Act 2011, which amended existing legislation as follows:

- Town and Country Planning Act 1990 ("TCPA 1990"): ss. 61F, 61I, 61M-P and Schedule 4B
- Planning and Compulsory Purchase Act 2004 ("PCPA 2004"): ss. 38A-C.

13. A local planning authority ("lpa") must give such advice or assistance to qualifying bodies as, in all the circumstances, they consider appropriate for the purpose of, or in connection with, facilitating the making of proposals for neighbourhood development orders in relation to neighbourhood areas within their area, although they are not required to give financial assistance (Schedule 4B para. 3 to the TCPA 1990).

14. The key steps for the making of a NP can be summarized as (see also PPG at ID 41-080-20150209):

(1) Preparation of the pre-submission NP by the qualifying body.
(2) Pre-submission publicity and consultation by the qualifying body on the proposals (regulation 14).
(3) Submission of the Draft NP to the lpa (regulation 15), consideration of whether it should progress (Schedule 4B, para 5, 6) and invitation by the lpa to make representations (regulation 16).

(4) The draft NP is submitted by the lpa to an independent examiner (Schedule 4B, para 7; regulation 17 of the 2102 Regulations).

(5) Consideration of the draft NP by the lpa, having regard to the Examiner's report.

(6) The holding of the referendum.

(7) The making of the NP (i.e. bringing it into force) if supported by the referendum.

15. With regard to step 3, the lpa must consider whether the qualifying body submitting the draft plan to it has complied with the requirements of the 2012 Regulations (paragraph 6(2)(d) of Schedule 4B to the TCPA 1990).

16. Those requirements include those under regulation 14 (pre-submission consultation and publicity) and regulation 15 (plan proposals).

17. With regard to step 4, the Examiner is not to consider any matter that does not fall within paragraph 8(1) of Schedule 4B which provides (as it applies to NPs):

8(1) The examiner must consider the following –

(a) whether the draft NP meets the basic conditions (see sub-paragraph (2)),

(b) whether the draft plan complies with the provisions made by or under sections 38A and B of the PCPA 2004,

(c) (does not apply to NPs)

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

(e) such matters as may be prescribed.

18. A qualifying body (in this case the PC) may withdraw a proposal for a NP at any time before a decision is made by the lpa at step 5 – that is consideration by the lpa of the Examiner's recommendations under

paragraph 12 of Schedule 4B of the TCPA 1990 (paragraph 2 of Schedule 4B as applied to NPs by section 38C(5) of the PCPA 2004).

The Issues

19. I now address in turn each of the four issues raised in my Instructions.

(1) Was the supplementary consultation undertaken by BNPC that followed the six week statutory pre-submission consultation (the supplementary consultation being basically to check whether or not changes to the draft plan likely to be suggested by BNPC, resulting from their consideration of representations received during the statutory pre-submission consultation, would be acceptable to local residents and other interested parties) unlawful or otherwise in contravention of the legislation regarding the preparation and making of Neighbourhood Development Plans? And if it was unlawful, does it invalidate the pre-submission consultation and require that stage to be repeated (or if not, how should this error best be remedied).

20. The 2012 Regulations do not expressly provide for the supplementary consultation that the PC carried out. However, neither do they expressly preclude a further stage to pre-submission consultation.

21. In her letter dated 27 July 2016 the examiner stated:

"*I am sure that you will appreciate that it is necessary to be sure that the Regulation 14 period of consultation has been carried out in accordance with the relevant regulations i.e a period of six weeks on a complete draft plan without any options in it and that the submitted documents meet the requirements of the regulations."*

22. The "requirement" for consultation on a "complete" draft that the Examiner may have taken into account comes from the advice in the Planning Practice Guidance ("the PPG"), rather than directly from the wording of regulation 14. The PPG advises (at Paragraph: 049 Reference ID: 41-049-20140306) that the pre-submission consultation should be based on a complete draft plan and that it is not appropriate to consult on

individual policies. The pre-submission draft plan did not in my view conflict with that guidance when it was submitted. The PC were not embracing or anticipating at that stage any "piecemeal" consultation process.

23. Further, the wording of regulation 14 does not in my opinion necessarily mean that the carrying out of this supplementary consultation was unlawful or that its effect is to invalidate the submission of the draft NP for examination and render that process unlawful. It would depend upon the circumstances and how it was carried out.

24. Indeed, one can see the logic for considering that a qualifying body is entitled, even if not strictly required, to seek views on an issue that has arisen too late to be considered previously. Qualifying bodies are usually commended rather than criticized for carrying out additional non-statutory consultation. That is provided that this is done openly, fairly and thus no one is prejudiced.

25. In my view therefore

(i) The supplementary consultation was not necessarily unlawful. On any interpretation, regulation 14 was substantively complied with.

(ii) Nonetheless, the risk that the supplementary consultation could be considered by the court to be unauthorised cannot be ignored, as it is not expressly provided for.

(iii) However, even if that were the case, the Court would in my view consider whether as a consequence anyone has been prejudiced by this stage and or any other harm has or would result to the plan process.

(iv) Further, I note that the consultation at the supplementary consultation stage was not as wide as the first consultation on the pre-submission draft plan. However, given the nature of the changes to that version, it is difficult to see that any prejudice could be identified as arising from this. Indeed the scope of those

consulted for the supplementary consultation appears to be entirely appropriate in the circumstances.

26. In summary, although it is difficult to be definitive on this issue in the absence of any direct legal authority, in my view there is a strong argument that the carrying out of the supplementary consultations does not invalidate the consultation carried out by the PC. Nonetheless, given the first Examiner's stance and the change in view of the lpa, the current element of uncertainty cannot be ignored. I address this further below.

(2) Can the District Council review their decision to proceed to examination (i.e. as taken under Schedule 4B to the Town and Country Planning Act 1990 para 6, and set out in their letter of 15 January 2016) or at a later date refuse to proceed for reasons based on taking a different view on the matters underpinning this earlier decision? And at what point can a judicial review be made by a third party in on this matter – for example could this still be accepted at the point the District Council decides to proceed to referendum, or to make the plan?

27. The lpa did originally accept that the NP had undertaken the correct procedures in relation to consultation and publicity. It is a formal determination to the extent set out in the 2102 Regulations. Nonetheless, I would be surprised if a court would consider that there were no circumstances in which such a statement could be reviewed and in some circumstances changed – for example the lpa may consider that in light of the view of the Examiner their original decision on this was incorrect.

28. In this case the Examiner has indicated non-compliance with regulation 14 and I think that it would be unreasonable to expect an lpa to ignore this and not take it into account. Nonetheless, the lpa should not in my opinion just simply follow the Examiner's view without careful consideration. They need to be able to explain why they reached the view in January 2016 that the consultation requirements had been met. They were aware of the supplementary consultation at that stage. Therefore, they concluded there was compliance on that basis.

29. Perhaps more important is the fact the original lpa statement confirming compliance would be no bar to a legal challenge on the basis that this conclusion was wrong in law.

30. Provision for legal challenges is made in section 61N of the TCPA 1990, as applied to NPs by section 38C(d), (4) and (7) of the PCPA 2004. 26.That section provides that a legal challenge: -

i) to a decision by a local planning authority under paragraph 12 of Schedule 4B of TCPA 1990; or

ii) questioning anything relating to a referendum under Schedule 4B; or

iii) questioning a decision by a local planning authority under section 38A(4) or (6) relating to the making of a neighbourhood plan,

may only be brought by a claim for judicial review filed within 6 weeks from the date on which the relevant decision is published or declared.

31. If the requirements under regulations 14 and 15 fall within basic condition (g) (as discussed under issue (3) below), then a challenge for a breach of those regulations could be based on a decision of the lpa under paragraph 12 of Schedule 4B in respect of its consideration of the Examiner's recommendations. On that basis, such a challenge would fall within section 61N. Under paragraph 12, if the lpa is not satisfied that the draft NP meets any of the basic conditions, they must refuse the proposal.

32. If such a challenge was not considered to fall within section 61N because it was not considered that the requirements under regulations 14 and 15 fall within the scope of any of the basic conditions, then any challenge would have to be by way of judicial review under Civil Procedure Rules rule 54. Although I am not aware of any legal authority on this issue, I would be surprised if a court would bar a judicial review in principle for

an alleged legal flaw of this nature, even though it was considered to fall outside of the challenges allowed for by section 61N.

33. As it would be a challenge to a decision under the TCPA 1990, the claim form would have to be filed not later than six weeks after the grounds to make the claim first arose. It is arguable whether that would have to be within six weeks of the lpa's decision (for which the six period has of course already expired) or whether it might be made at a later date – for example after the Examiner recommends the NP should proceed to referendum and the lpa agrees.

(3) Is it within the Independent Examiner's remit to determine whether the consultation stages were properly conducted and whether the consultation summary meets the legal requirements set out in the regulations*?*

34. With regard to the duties of an examiner in carrying out the examination in step 4, the examiner is required to consider:

(1) whether the draft neighbourhood plan meets the basis conditions set out in paragraph 8(2) of Schedule 4B (paragraph 8(1)(a)); and

(ii) whether it complies with section 38A and 38B of the PCPA 2004 (paragraph 8(1)(b)-(e) of Schedule 4B).

35. Basic condition (g) (paragraph 8(2)(g) of Schedule 4B to the TCPA 1990 as applied by section 38C(5) of the PCPA 2004) provides:

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

36. Most examiners do not refer to complying with regulations 14 and 15 as covered by the basic conditions. That may be because they are treating this consideration as falling under regulation 8(1)(e), which provides that an examiner must consider "such other matters as may be prescribed".

37. "Prescribed matters" means matters prescribed by regulations under the TCPA 1990, which includes the 2012 Regulations (see section 336(1) of the TCPA 1990).

38. The legislation is not entirely clear. However, in my view, the requirement to comply with regulations 14 and 15 falls within basic condition (g). This specifically refers to prescribed matters in connection with the proposal for the NP. I consider that would include those two regulations. The difficulty with this interpretation, however, is that this is not entirely consistent with regulation 15. That regulation requires the submission of a consultation statement in addition to a statement explaining how the proposed NP meets the requirements of paragraph 8 of Schedule 4B.

39. My view is that the inconsistency of interpreting basic condition (g) as covering the procedural matters within regulations 14 and 15 is outweighed by the clear wording within paragraph 8(2)(g). However, I acknowledge that this may be arguable and may explain the informal view of the examiner referred to in my initial instructions who considered that the procedural requirements were for the lpa to consider and not for an examiner.

40. Notwithstanding, many Examiners, as a matter of practice, clearly take the view that they are required to consider whether the consultation requirements under regulations 14 and 15 have been met. For example, the Examiner for the Loxwood NP, Sussex stated in her report:

15. I am required under The Localism Act 2011 to check the consultation process that has led to the production of the plan. The requirements are set out in Regulation 14 in The Neighbourhood Planning (General) Regulations 2012.

41. The Examiner for the St Ives NP stated:

I am required to check the consultation process that has led to the production of the plan, as set out in the regulations in the Neighbourhood Planning (General) Regulations 2012. The Town Council has submitted a document entitled the St. Ives Plan Consultation Statement. This document describes how and when the various elements of the consultation were undertaken.

42. Any argument to the contrary to an Examiner may therefore not be well received. To try and force this point may be counter productive and will not in any event prevent any potential challenger to the NP contending that regulations 14 and 15 have been breached.

(4) BNPC are considering withdrawing the current submitted plan from examination and re-submitting a slightly amended plan (mainly to update where planning consent has now been given, and in light of the change in affordable housing contributions on small sites) together with updated supporting evidence (including for example a clarified consultation summary, information on the conduct of meetings, and potentially the legal opinion sought on these matters) – without re-running the pre-submission consultation.

Alternatively BNPC may still decide the best course of action is to simply continue with the examination (with another Examiner being appointed). In either scenario, would the District Council be required in the interests of transparency to put the previous (now withdrawn) Independent Examiner's letters and the Council's response in the public domain (i.e. on the webpage dealing with the examination updates ttps://www.dorsetforyou.gov.uk/article/421806/Buckland-Newton-Neighbourhood-Plan), and bring it to the attention of the new (yet to be appointed) Independent Examiner?

43. The position that has been reached in the examination of the NP is unfortunate. It also results in a degree of uncertainty which is in no one's interest, other than someone trying to defeat the NP proposals. As indicated above, there is also a degree of uncertainty in the applicable legal provisions. Many of the relevant issues that arise have yet to be the

subject of any determinative judicial pronouncement and so any advice will involve a degree of uncertainty.

44. I can see force in the decision to withdraw the submitted plan and update and amend it. However, in my view much uncertainty could be avoided if the pre-consultation exercise was run again. I appreciate that local people may find that confusing. I further appreciate that there would be cost and delay implications of this.

45. The alternative being considered, of continuing the Examination with a new examiner, involves the risks of:

(i) The new examiner taking the same stance as the previous Examiner;
(ii) Whether the new Examiner does or does not take the same approach, there is a risk of a legal challenge at the stage when the lpa makes its decision on the new Examiner's recommendations.

46. In my view, it is likely that the first Examiner's letters will be placed in the public domain. The process should be open and transparent. Further, even if the lpa did not make them public in this way, a party could make a Freedom of Information Act request and obtain the information. I doubt that the lpa would consider that it would be able or appropriate to withhold that information.

47. With regard to the new Examiner, that is perhaps slightly less clear. There is an argument that the new Examiner should look at the matter afresh and should not take into account the previous Examiner's views. However, my experience is that this used to be the approach adopted in planning decisions and plan making. However, it seems more commonplace now that a new Inspector/Examiner is provided with all the background information including any previous views of a colleague.

48. We could argue that this should not occur. However, in some ways, it may be better that it is placed before the new Examiner. This would enable a

fresh evaluation of the point (if the regulation 14 process is not re-run) and it may discourage someone thinking of making a challenge on that basis, if it has been properly considered by the new Examiner.

49. The previous Examiner did not, with respect, appear to have appreciated the full position or the PC's explanation of what actually took place and the lack of any difficulties that might have arisen from it. Her approach to the regulations 14 and 15 point seems very restrictive and technical, which is not the approach usually adopted by the courts to such matters. Even on that basis, it was only one of three matters that led her to advising that it was better to withdraw the submission NP.

SUMMARY AND OVERALL ASSESSMENT

50. I am surprised by the forcefulness of the Examiner's suggestion of withdrawing the NP. However, I recognise that this was based on other reasons than just the supplementary consultation issue. In my view, this technical approach does not appear to be justified.

51. I do not consider that the carrying out of supplementary consultation is necessarily unlawful. The wording of regulation 14 does not expressly preclude this. However, I recognise that it could be argued that it is implicit in the wording and so there is an element of risk on this aspect.

52. However, even if that is the case in my view it still has to be considered whether any party has been prejudiced by the supplementary consultation. From the information before me, such prejudice is not obvious. Nor is there any obvious harm to the NP making process as a whole.

53. As I understand the position, the submitted NP incorporated the changes that were the subject of the supplementary consultation. The NP was then

publicised by the lpa in accordance with regulation 16. That gave the opportunity for people to comment on it.

54. On that basis, I find it difficult to identify any difficulty that arises from the process adopted by the PC. Indeed, they were attempting to give opportunity for further public involvement rather than curtailing or prejudicing it. Only a single response was received which supported the proposed changes. It does seem a disproportionate response in my view to suggest that this supplementary consultation therefore vitiates the consultation process and the submission NP cannot therefore be lawfully examined. On the facts as I understand them, I find such a conclusion to be difficult to justify.

55. However, I recognise, and it is in my experience, that it can be prudent for any body promoting a plan to avoid any unnecessary risks and uncertainty, where it is practicable to do so. Additional time, cost and effort spent now may in the longer term outweigh that which otherwise have been needed. That, I would assume, was the basis of Mr Cardnell's advice in his email to Mr Baker of 22 September 2016.

56. As Mr Cardnell indicates, there is the opportunity for the PC to get the NP up-to-date. The optimal approach might in my opinion be to go back to the pre-submission stage on that slightly amended plan and ensure compliance with regulation 14 and 15. That also would avoid any argument about what stage you can lawfully go back to when a NP proposal is withdrawn. It might be contended that if a submitted plan is withdrawn then you should go back to the regulation 14 stage at least, to allow the matter to be looked at afresh and be consulted on under regulation 14 on that basis.

57. Mr Cardnell's advice was on the basis of the Examiner's concerns in respect of public consultation. In my view in order for the PC to evaluate properly the risk of not taking the lpa's advice it would be helpful for the

lpa to explain why they have departed from their decision in their letter of 25 January 2016. There ought to be a clear justification for this change in position. In particular, it would be helpful to know whether Mr Cardnell considers that there has been any harm or prejudice arising from the supplementary consultation.

58. I entirely understand that Mr Cardnell was taking a cautious/pragmatic approach, which he no doubt considered was in the PC's best interests. I also recognise the advantages of re-running the regulation 14 consultation, as indicated above. However, it has to be born in mind this could lead to significant delay as indicated above. Government policy encourages the making of neighbourhood plans and no doubt wishes this to be done without unnecessary delays.

59. In my view, therefore, simply referring to the Examiner's concerns does not provide the answer in the circumstances of this case. There is no bar on supplementary consultation and many Examinations have commended qualifying bodies for carrying out consultation beyond the minimum required by the 2012 Regulations.

60. Further, it is generally recognised that the legislation allows a more flexible approach to NPs than to the preparation of local plans. This reflects the fact that NPs are community based and promoted and this is itself reflected in the legislation and the interpretation by the Courts of it so far.

61. If the PC, in light of my advice, still prefer not to adopt the approach suggested by Mr Cardnell, then the best option would be to have the NP as submitted placed before the new Examiner. It would be simpler just to rely upon the version of the NP already submitted. However, if the "minor amendments" are considered necessary, it would have to be re-submitted.

62. I consider that if this is to be done it should be assumed that it would be on the basis that the concerns of the previous Examiner will be made public and placed before the new Examiner. The issue should be dealt with directly and openly as it would be beneficial in the longer term to have the matter addressed as early as possible so the risks of proceeding can be addressed. However, it will need to be confirmed with the lpa that if the new Examiner is to be provided with the previous Examiner's comments, the PC is permitted to provide a rebuttal to these which is provided at the same time. In my view, fairness would require that the PC is given the opportunity to respond to the previous Examiner's concerns.

63. I trust that this addresses satisfactorily the matters raised in my Instructions. If any matter requires clarification or further explanation, my instructing planning consultant should of course not hesitate to contact me.

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