
O P I N I O N

Introduction

1. I am asked to advise Chichester District Council ("**the Council**") in relation to the draft Plaistow and Ifold Parish Neighbourhood Plan ("**the Draft NP**").
2. In particular, I am asked to advise on an open letter written by the examiner of the Draft NP in which she concludes that mitigation measures proposed by the Council as part of a Revised Habitat Regulations Assessment ("**HRA**") for the Draft NP would breach national planning policy guidance. In light of this conclusion, the examiner has advised that the Draft NP should not proceed to a local referendum.
3. I am asked to advise whether the examiner's assessment is correct and, if it is, whether the proposed mitigation can be reformulated so as to comply with the relevant national guidance.
4. In summary, I regret that I have concluded that that the examiner's assessment is correct. I have also concluded that the examiner would be very unlikely to agree that the Council's suggested reformulation of the mitigation would overcome her concerns about compliance with national guidance. As I explain below, I see no realistic prospect of being able to take the Draft NP to a local referendum until a strategic solution is identified *at the District level* for the potential impacts on water resources that need to be mitigated. Unfortunately, the issue cannot be resolved within the narrower parameters of the process relating the Draft NP.
5. I expand on these views below.

Background

6. The examination of the Draft NP started in autumn 2020.

7. In April 2021, as part of its response to another draft neighbourhood plan for a different parish, Natural England advised the Council that proposals for development within the 'Sussex North Water Resource Supply Zone' ("**the WRZ**") would from then on need to be subject to a Habitats Regulations Assessment ("**HRA**"). The Parish of Plaistow and Ifold is within the WRZ. Natural England advised the Council as follows:

“We have advised that any developments in Chichester District which fall within the Sussex North water resource supply zone will need to be tested through an HRA. This is because the Sussex North area is supplied by a water extraction at Hardham, which we have advised cannot with certainty conclude is not having an adverse impact on integrity of the Arun Valley SPA, SAC and Ramsar.

Therefore, in-combination impacts on the Arun Valley SPA, SAC and Ramsar need to be considered. A water neutral approach is a mechanism for avoiding impact if an alternative water supply cannot be secured. We appreciate this is a complex issue and would welcome engagement with your authority on this matter and through the Local Plan review.”

8. After receiving this advice, the Council asked the examiner of the Draft NP to pause the examination process to enable the Council to prepare a Revised HRA for the Draft NP. In a document within the Revised HRA subtitled 'Screening Matrix and Appropriate Assessment Statement', produced in June 2021, the Council concluded that the Draft NP would increase water demand within the WRZ and that measures were therefore required to mitigate the potential impact of this on the Arun Valley SPA, SAC and Ramsar site. The Council wrote *inter alia*:

“The Plaistow and Ifold NP does not currently contain relevant mitigation measures. Subject to Natural England’s comments below mitigation policy will need to be added to the plan to ensure that the increase in water demand from the new homes is offset by reduction in demand elsewhere in the WRZ, through increased water efficiency or other relevant mitigation measures.

[...]

Without mitigation measures to ensure that water demand overall does not increase as a result of the plan (acting in combination with other plans and programmes in the Sussex North WRZ), it is not possible at the present time (June 2021) to conclude that an adverse effect on the integrity of the Arun Valley SPA/SAC/Ramsar site will not occur.”

9. The Council then cited directly the comments made by Natural England on the issue:

“We [*i.e. Natural England*] advise that effective mitigation to ensure that the plan will not increase water demand in the Sussex North WRZ needs to be addressed strategically through the current Local Plan Review and in partnership with neighbouring LPAs within Sussex North. Natural England will continue to work in partnership with your authority and neighbouring authorities to secure a Sussex North water neutrality strategy and associated policy for this complex issue.

Once secured the strategy and policy will be applicable to Neighbourhood Plans within Sussex North.

We have provided your authority with advice on potential mitigation measures to consider for current applications within Sussex North although again we have advised that mitigation should be secured strategically at the Local Plan level. Our advice includes a combination of maximising water efficiency of new builds to achieve a target of 90L per person per day and, in addition, providing water offsetting. Measures include ensuring new builds incorporate rainwater harvesting and greywater recycling as well as water efficient fixtures.

Offsetting includes retrofitting of water efficient fixtures to Council-owned properties or other properties where they have control of the fixtures or can [be] reasonably certain there is control of the fixtures for the likely time required (through to 2030). These must be located within the Sussex North Area and be over and above measures included in Southern Water’s Water Management and Business Plan.

Offsetting needs to be in place until a long term, more sustainable water supply can be secured.”

10. At the end of the document, in light of its own comments and those made by Natural England, the Council concluded that the Draft NP should be amended in these terms:

“Until replaced with a strategic scheme of mitigation or a more sustainable source of water supply, the plan should ensure that developments mitigate water resource impacts through a combination of maximising water efficiency of new builds to achieve a target of 90L per person per day and, in addition, providing water offsetting. Measures include ensuring new builds incorporate rainwater harvesting and greywater recycling as well as water efficient fixtures.”

11. However, in an open letter dated 8 July 2021, the examiner of the Draft NP concluded that she was unable to recommend that the mitigation measures outlined above could be included in the Draft NP “as this would be introducing an additional local technical standard relating to the performance of new dwellings”. She considered that this would be in breach of national planning policy guidance and advice as set out in the chapter of the UK Government’s Planning Practice Guidance (“PPG”) entitled ‘Housing: Optional technical standards’, which cross-refers to a Written Ministerial Statement of 25 March 2015. As a result, the Draft NP would not, in the examiner’s judgment, meet one of the statutory basic conditions for a neighbourhood plan and should therefore be withdrawn. The examiner confirmed that she had considered whether the Draft NP could be modified to comply with national planning policy guidance, but had concluded that this was not possible.

12. I am now asked to advise the Council whether the examiner was correct to take this approach.

The law

13. Before a draft neighbourhood plan may proceed to a local referendum, the examiner must consider whether the draft plan meets a list of statutory “basic conditions”, as set out in paragraph 8(2) of the Schedule 4B to the Town and Country Planning Act, and as applied to neighbourhood plans by section 38A of the Planning and Compulsory Purchase Act 2004.

14. The first basic condition is that “having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the [neighbourhood plan]”: para. 8(2)(a).

Relevant guidance

15. For present purposes, the most relevant extracts of the PPG chapter entitled ‘Housing: Optional technical standards’ are as follows (*emphasis added*):

“What are the new optional technical housing standards?”

The government has created a new approach for the setting of technical standards for new housing. This rationalises the many differing existing standards into a simpler, streamlined system which will reduce burdens and help bring forward much needed new homes. The government set out its policy on the application of these standards in decision taking and plan making in a written ministerial statement, which also withdraws the Code for Sustainable Homes aside from legacy cases.

Paragraph: 001 [...]

What optional technical housing standards can local planning authorities set?

Local planning authorities have the option to set additional technical requirements exceeding the minimum standards required by Building Regulations *in respect of access and water*, and an optional nationally described space standard. Local planning authorities will need to gather evidence to determine whether there is a need for additional standards in their area, and justify setting appropriate policies in their Local Plans.

[...]

Paragraph: 002 [...]

Water efficiency standards

Can local planning authorities require a tighter water efficiency standard in new dwellings?

[...] Early engagement between local planning authorities and water companies can help ensure the necessary water infrastructure is put in place to support new development.
[...] *The local planning authority may also consider whether a tighter water efficiency requirement for new homes is justified to help manage demand.*

Paragraph: 013 [...]

What standard should be applied to new homes?

All new homes already have to meet the mandatory national standard set out in the Building Regulations (of 125 litres/person/day). *Where there is a clear local need, local planning authorities can set out Local Plan policies requiring new dwellings to meet the tighter Building Regulations optional requirement of 110 litres/person/day.*

Paragraph: 014 [...]

16. The Written Ministerial Statement referenced in this section of the PPG was given in March 2015. The statement dealt with various planning issues, but for present purposes, the section entitled 'Plan-making' is most relevant:

"From the date the Deregulation Bill 2015 is given Royal Assent [which in the event was 26 March 2015], local planning authorities and qualifying bodies preparing neighbourhood plans should not set in their emerging Local Plans, neighbourhood plans, or supplementary planning documents, any additional local technical standards or requirements relating to the construction, internal layout or performance of new dwellings.

[...]

Local planning authorities *and qualifying bodies preparing neighbourhood plans* should consider their existing plan policies on technical housing standards or requirements and update them as appropriate, for example through a partial Local Plan review, or a full neighbourhood plan replacement in due course. [...]

The optional new national technical standards should only be required through any new Local Plan policies if they address a clearly evidenced need, and where their impact on viability has been considered, in accordance with the National Planning Policy Framework and Planning Guidance. *Neighbourhood plans should not be used to apply the new national technical standards.*"

Discussion

17. Against this background, I am asked to consider three questions.

(1) Does the approach proposed in the Revised HRA constitute an additional local technical standard identified in the Ministerial Statement of March 2015? Does that then mean that including its recommendations would mean that the NP did not meet the basic conditions?

18. I am confident that including a requirement or target in the Draft NP that new builds should achieve a water efficiency rate of 90L per person per day would be to impose an additional local technical standard, contrary to the PPG and to the Written Ministerial Statement of May 2015.

19. As the PPG confirms, the Building Regulations impose a water efficiency standard of 125L per person per day for new homes, but they include an option for local planning authorities to impose a more onerous standard of 110L per person per day in their Local Plan policies, "if there is a clear need". It follows that, if the Draft NP were to impose a requirement or target of 90L per person per day, it would be problematic on at least three counts:

- (1) It would be imposing an even more onerous standard of water efficiency for which no provision is made in the Building Regulations (it is not even an option in the Regulations to impose such a standard).
- (2) It would be contrary to the clear guidance in the PPG (paragraph 14) that, if a more onerous efficiency standard than 125L per person per day is to be imposed, it is to be imposed by the local planning authority in its Local Plan policies, not imposed at a parish or community level in a neighbourhood plan. This restates the instruction previously given in the Written Ministerial Statement that "[n]eighbourhood plans should not be

used to apply the [optional] new national technical standards” (which, in the present context, would mean the option to impose a requirement of 110L per person per day).

(3) In the same vein, it would be contrary to the more general instruction in the Written Ministerial Statement that qualifying bodies preparing neighbourhood plans should not set “additional local technical standards” relating to the “performance of new dwellings” in their neighbourhood plans. A more onerous standard of 90L per person per day would be an “additional” standard when compared to the two alternative standards of 125L and 110L for which provision is made in the Building Regulations and the PPG.

20. I have no hesitation, therefore, in concluding that the mitigation proposed in the Revised HRA in relation to the potential impacts on the Arun Valley SPA, SAC and Ramsar would render the Draft NP in breach of the first statutory “basic condition” for a neighbourhood plan. In other words, it would not be appropriate to “make” (i.e. adopt) the neighbourhood plan if it included a policy requiring such mitigation, as such mitigation would be in breach of national planning policy and advice (and would also be inconsistent with the Building Regulations).

21. With regret, I therefore conclude that the examiner was correct to conclude that the Draft NP could not properly proceed to a local referendum as currently drafted.

(2) Might an alternative approach to the Revised MRA mitigation, requiring water neutrality but not specifying a higher water efficiency standard, avoid the concerns set out in question 1 above?

22. My instructions ask me to consider the following potential alternative formulation of the mitigation that was proposed in the Revised MRA (as compared with the original formulation cited in para. 9 above):

“Until replaced with a strategic scheme of mitigation or a more sustainable source of water supply, the plan should ensure that developments achieve water neutrality. Measures could include maximising water efficiency through measures such as rainwater harvesting, greywater recycling as well as water-efficient fixtures, as well as providing water offsetting.”

23. I am instructed that the aim of this alternative wording would be “to achieve water neutrality without establishing a ‘technical standard’ for the operation of the new development”. My instructions add that “water neutrality may be achieved through a variety of measures, and the balance between water efficiency and water offsetting is not currently fixed”.
24. I regret that I see considerable difficulty with this proposed approach. As I read the relevant extracts of the PPG and the Ministerial Statement cited above, they are seeking to ensure that if a more onerous water efficiency standard than the default 125L/person/day is to be imposed on new homes, there should only be one more onerous option open to local planning authorities (110L/person/day), and this should only be set at the Local Plan level once clear evidence of need for that more onerous standard has been shown. This simplified approach to imposing water efficiency standards is consistent with the overarching purpose of the new optional technical housing standards, as described in the PPG, of introducing “a simpler, streamlined system” to replace the “many differing” standards used in the past (para. 001).
25. It is tempting to think that the examiner’s objection to the mitigation in the Revised MRA could be overcome simply by deleting the reference to the “additional” standard of 90L/person/day and relying instead on a more generic description of potential mitigation. It is true that this would remove a precise “additional” efficiency standard as a matter of form. However, this would not have the effect of reverting to the certainty of the 125L/person/day standard, or even the 110L/person/day alternative. Rather, in place of the 90L standard would be a highly generic standard (“water neutrality”) which would still rely on standard water efficiency techniques such as rainwater harvesting and greywater recycling so as to achieve much greater efficiency than if these techniques were not deployed.
26. In my judgment, the likely practical effect of the Draft NP requiring new housing to provide this mitigation would still be to impose a more onerous standard of water efficiency on that new housing than 125L/person/day. The inability to be precise about how much more onerous than 125L/person/day it would be is inconsistent with the emphasis in the PPG and Ministerial Statement on a “simpler, streamlined system” in which there are only two possible water efficiency standards for new homes (125L or 110L). The fact that this uncertain, but more onerous efficiency standard would be secured through a

neighbourhood plan, rather than a Local Plan, would still be in breach of the PPG and the Ministerial Statement.

27. For these reasons, I regret that I see no real prospect of the examiner concluding that the reformulation of the mitigation is sufficient to overcome her concerns about compliance with national guidance. The examiner would focus on the substance of the matter, not the form. She would be alive to the argument that the reformulated mitigation is, in truth, another attempt to impose more onerous water efficiency standards on new housing through the back door of the Draft NP, contrary to Government policy. She would be very likely to conclude that the Draft NP, as modified, would still fail to meet the first statutory basic condition for a neighbourhood plan.

(3) If the answer to question 2 is yes, what mechanism might the Council use to revisit the approach in the Revised HRA?

28. As my answer to question 2 was 'no', this question falls away, but for completeness, I should confirm that I share the examiner's view that there is no realistic prospect of being able to take the Draft NP to a local referendum until provision is made for a *strategic* scheme of mitigation and/or a more sustainable source of water supply *at the District level*. Put simply, this is not an issue that can be resolved within the narrower parameters of the process relating the Draft NP.
29. I am conscious that this advice might generate further discussion among the Council's officers. I have focused in this opinion on the three questions that were posed in my instructions. Should this opinion give rise to further questions about the Council's strategy in relation to the Draft NP, please do not hesitate to contact me.

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