
LOCAL DEVELOPMENT PLAN: EXAMINATION REPORT

Report by Service Director Regulatory Services

SCOTTISH BORDERS COUNCIL

17 December 2015

1 PURPOSE AND SUMMARY

- 1.1 This report seeks Council agreement on its response to the proposed modifications arising from the Examination Report into the Proposed Local Development Plan, and to take forward the Local Development Plan as amended to formal adoption.**
- 1.2 The Council has now received the Examination Report on the Proposed Local Development Plan following a number of delays. The Examination Report proposes modifications to the Plan, most significantly in relation to renewables policy and the supply of housing land. Whilst officers do not agree with the proposed modifications on these two matters, it is not considered that there is sufficient legal basis for the Council to decline to accept them.
- 1.3 The Council is therefore recommended to accept the Reporter recommendations in full, and to proceed towards formal adoption of the Local Development Plan as set out in paragraphs 3.27 to 3.30.

2 RECOMMENDATIONS

- 2.1 I recommend that the Council:-**
- (a) Agrees its response to the proposed modifications as set out in Appendix B,**
 - (b) Agrees to take forward the Local Development Plan (Appendix C), as amended by the agreed modifications, to formal adoption,**
 - (c) Notes the updates to the Environmental Assessment as set out in Appendix D, and the Habitats Regulation Assessment (Appendix E), the Equalities Impact Assessment (Appendix F), and the Action Programme (Appendix G),**

- (d) Agrees to write to the Government's Chief Planner and the Chief Reporter expressing concern on the approach taken by the Reporter on Renewable Energy policy and Housing Land provision, and on the time taken to deliver the Examination Report.**

3 LOCAL DEVELOPMENT PLAN

Background

- 3.1 The Development Plan for the Scottish Borders will consist of the approved Strategic Development Plan (SDP) and the adopted Local Development Plan (LDP). The SESplan SDP was approved by Scottish Ministers in June 2013. The Council's LDP has now been subject to formal Examination. This report considers the modifications proposed by the Examination Report, and proposes that they should be accepted and included in the LDP to be submitted to Scottish Ministers as part of the formal adoption process.
- 3.2 The Council, following its meeting on 26 January 2012, agreed the Main Issues Report (MIR) as a basis for public consultation for a period of 12 weeks. In parallel, the Environmental Report (ER) was also subject to public consultation under separate legislative process. Following the printing of the documentation, the MIR and ER were subject to advertisement and consultation took place from 2 April to 25 June 2012. As part of the consultation there were a series of nine drop-in exhibitions held across the council area. In addition, the Council notified the neighbours of all new site proposals. Some 278 representations relating to around 1000 issues were received in relation to the MIR. The ER received positive responses from the three consultation authorities (Historic Scotland, Scottish Environment Protection Agency and Scottish Natural Heritage).
- 3.3 The Council, at its meeting on 25 October 2012, considered a report in relation to the consultation responses on the MIR. The Council agreed to the recommended responses to the submitted consultations, but reserved judgement on a small number of issues pending the publication of the SESplan Examination Report and further work on other key studies.
- 3.4 At its meeting on 25 September 2013, the Council agreed the Proposed Local Development Plan. The Plan was subject to public representation from 6 December 2013 to 3 March 2014. The Plan was subject to neighbour notification on all sites within the Plan (some 6500 notifications) and there were presentations at the Area Forums.
- 3.5 At its meeting on 25 September 2014, the Council agreed to take all representations received to formal Examination. The Plan was submitted for Examination on 22 October 2014. The Examination formally started on 26 November 2014. Over the period of the Examination the Reporter issued a series of questions for further information, and held one 1-day hearing on the subject of housing.
- 3.6 Whilst the initial target date for completion of the Examination was 23 July 2015, this was subsequently updated, first to mid-August 2015, then to September 2015, then to mid-October 2015, prior to final receipt on 30 October 2015.
- 3.7 The Examination Report was published by the Directorate for Planning and Environmental Appeals on 4 November 2015. This is significantly beyond the normal expectation that reports should take around 6 months, and

rarely exceed 9 months as set out in Scottish Government in Circular 6/2013.

- 3.8 This delay is unhelpful because the current Local Plan will be over 5 years old in February 2016, and at this point in terms of Scottish Planning Policy, the weight given to it at planning appeals will be reduced in that material weight will be given to a presumption in favour of development that contributes to sustainable development. The report therefore recommends that the Council writes to both the Chief Reporter and the Scottish Government Chief Planner to express its concerns on this matter.

Examination Report

- 3.9 The Examination Report (**Appendix A**) which runs to some 1100 pages is available for view in the Members' Library, and can be viewed on the following link-<http://www.scotborders.gov.uk/ldp>.
- 3.10 **Appendix B** attached to this report sets out the Reporters' proposed modifications (changes highlighted in red), and the officer recommendation, with additional text where appropriate.
- 3.11 The Reporters considered 328 separate issues, and determined that there were no necessary modifications on 178 of these issues. The following briefly sets out the main modifications recommended by the Reporter.

Significant policy modifications are-

- Renewables (including wind energy) (Policy ED9) (covered across 18 issues) where the reporter has made modifications to fit his interpretation of national policy, and seeks the preparation of Supplementary Guidance
- Housing land (Policy HD4) where the reporter has largely accepted the council position, but seeks the preparation of Supplementary Guidance to bring forward sites for a further 916 houses.

Other policy modifications are-

- Town centres (Policy ED3), where the reporter has introduced commercial centres into the policy framework
- Housing in the countryside (Policy HD2) where the reporter has removed the policy reference to section 75 occupancy restrictions
- Developer contributions (Policy IS2) where the reporter has made amendments to put the emphasis on the use of conditions rather than section 75 agreements
- Other minor policy modifications are in respect of carbon dioxide emissions (Policy PMD2); carbon rich soils (Policy ED10) (in relation to wind energy); minerals (Policy ED12) ; affordable housing (Policy HD1); water environment (Policy EP15); transport infrastructure (Policy IS4); flooding (Policy IS8); waste (Policy IS10); exclusion

zones (Policy IS12); contaminated land (Policy IS13) and radio telecommunications (policy IS15).

Significant site modifications are-

- Introduction of new housing sites at Stagehall, Stow and Dolphinton
- Introduction of new housing and mixed use sites at Rosetta Road caravan site in Peebles
- Increase in housing capacity at Newtown St Boswells Mart site
- Deletion of sites at Netherbarns and the Birks in Galashiels
- Deletion of 2 sites at Earlston (sites at Mill Road and Earlston Mill); Innerleithen (gas works); Bonchester Bridge (caravan site); Newcastleton (west) (in line with SEPA recommendations)
- Deletion of Philiphaugh Mill, Selkirk (a SEPA recommendation despite being within the protected area of the Selkirk flood scheme)
- Reduction in site housing capacity at Broomilees Road, Darnick
- Deletion of Houndwood cemetery (as put forward by Council)
- Removal of areas covered by TPOs from housing zoning at Dingleton Hospital, Melrose
- Introduction of 2 new key green spaces at Violet Bank and High School playing fields, Peebles.

Discussion on Reporter Recommended Modifications

3.12 As noted above, there are significant changes in respect of two policy areas. Each are of concern, however these concerns need to be considered in the legal context whereby there are very limited avenues available to the Council to depart from the reporter recommendations. It should also be noted that where the Reporter does not propose modification there is no opportunity for the Council to make further change at this stage.

The Legal Context

3.13 The recommended modifications contained in Examination Reports are largely binding on planning authorities. In addition, planning authorities have the ability, in terms of the 1997 Act, to make such (minor) modifications to the LDP, as appear to them to be required for it to properly reflect the Report and its modifications.

3.14 Planning authorities may only depart from the recommendations in specific defined circumstances. These are set out in sections 19(10) and 19(11) of the 1997 Act and Regulation 2 of the Town and Country Planning (Grounds for declining to follow recommendations) (Scotland) Regulations 2009. The only circumstance where authorities may depart from a recommendation is where that recommendation:

- (a) Would have the effect of making the LDP inconsistent with the National Planning Framework, or with any SDP or national park plan for the same area;
- (b) Is incompatible with Part IV of the Conservation (Natural Habitats etc) Regulations 1994;
- (c) Would not be acceptable having regard to an environmental assessment carried out by the planning authority on the plan following receipt of the Examination Report;
- (d) is based on conclusions that could not reasonably have been reached based on the evidence considered at the Examination.

3.15 The Chief Legal Officer has been consulted. Her view is that the grounds upon which departure from recommendations is lawful are very restricted, and therefore the Authority requires to exercise caution. If the authority does not accept a recommendation it would almost inevitably face challenge from the house building and/or renewables industry (depending on the area of departure). This, in turn, would not only result in uncertainty, but equally significantly, could put the whole plan in abeyance for potentially well in excess of a year, until the legal challenge is finally resolved. On the latter point, in the event that the Local Development Plan is unable to be relied upon due to legal challenge then, the current Local Plan would have to continue to be used in the interim, and given it will be over 5 years old in February of 2016, this would allow reporters at appeal to potentially give it less weight as noted in para 3.8 above.

3.16 On balance therefore, the view of officers is that the Council should accept the Reporter recommendations.

Renewables Policy, including Wind Energy

3.17 Policy ED9 and its introductory text have been largely rewritten by the Reporter to conform to his view of Scottish Planning Policy. The result is a generic style policy which does not properly take into account the Council's substantial experience and knowledge in relation to this subject area, set within the context of the Scottish Borders. In addition, it consequently removes interpretation of criteria from the policy which would be helpful to applicants. These significant modifications are proposed by the Reporter without the benefit of a hearing session during the Examination.

3.18 It should be noted that Circular 6/2013 gives clear guidance to Reporters that they are not tasked with making the plan as good as it can be, but only with modifying those parts that are clearly inappropriate or insufficient.

3.19 Notwithstanding the above concerns, it is noted that the Reporter recommendations also include the need to produce Supplementary Guidance (as did the Council's Proposed Plan) which, once in place, will have the same status in legal terms as the adopted LDP. This will enable the Council to develop the Reporter's generic policy approach taking local circumstances more properly into account, and, importantly, to provide map guidance on landscape capacities for onshore wind energy.

3.20 The report recommends that the Council writes to both the Chief Reporter and the Scottish Government Chief Planner to express its concerns on this matter.

Housing Policy

3.21 The key recommendation in respect of housing policy is that the Council should prepare Supplementary Guidance (SG) within one year of the adoption of the LDP to identify land for 916 houses. The process for the preparation of the SG would need to include a call for sites against strict criteria relating to site delivery within the short term; a draft SG for public consultation; and, a finalised SG that would require to be submitted to the Scottish Government for scrutiny. Once adopted the SG would form a constituent part of the adopted Local Development Plan.

3.22 The main reason for this additional requirement is that the Reporter, against council advice, has introduced a 2014 housing land audit baseline into the assessment of housing land supply against housing land requirement.

3.23 By incorporating a baseline beyond the date of the preparation of the Proposed Plan the Reporter has created an artificial shortfall of land. This is largely due to the fact that development has not kept pace with the housing requirement set by the SESplan Supplementary Guidance on housing. Therefore, requirement which has not been met rolls forward into the remaining requirement.

3.24 The Council prepared its Proposed LDP on the basis of the 2012 audit, and this led to 630 additional house sites being brought into the Plan. This was then subject to public representation. The Council does not consider it appropriate to amend key foundations of the Plan at Examination as this has the effect of disenfranchising the general public from key decisions that may have a direct impact upon them. This view is in line with Government advice that seeks to front load the planning process so that consultation is meaningful to the public.

3.25 The report recommends that the Council writes to both the Chief Reporter and the Scottish Government Chief Planner to express its concerns on this matter.

3.26 The remaining recommended modifications are set out in **Appendix B**, along with any additional commentary. The full revised LDP, including the modifications is set out in **Appendix C**, and is attached as a supplementary report.

Next Steps

3.27 The Council are required to publish the modifications and the revised LDP by placing a public notice; making the copies of the modifications and revised LDP available for public inspection at the planning office, in all public libraries and on the internet; and, to notify all who made representations on the Proposed Plan.

3.28 The Council are to send to Scottish Ministers the modifications made; a statement on and explanation of any recommended modifications not made; the Proposed Plan for adoption; the Report of Examination; the advertisement of its intention to adopt; and an environmental assessment on the Proposed Plan as modified. 28 days following submission the Council may adopt the Plan unless otherwise directed by Scottish Ministers.

3.29 The following documents have been updated in line with the Reporters' proposed modifications and are available to view in the Members' Library- Updated Environmental Assessment (**Appendix D**), Updated Habitats Regulation Assessment (**Appendix E**), Equalities Impact Assessment (**Appendix F**), Updated Action Programme (**Appendix G**).

3.30 Once the LDP is adopted the Council will be required to send two copies to Scottish Ministers; publish it, including electronically; place copies in public libraries; notify people who made representations on the Proposed Plan of its publication and availability in public libraries; and, advertise its publication in a local newspaper.

4 IMPLICATIONS

4.1 Financial

There will be costs associated with the preparation and printing of the Plan and advertisement as part of the process of adoption, and thereafter once the LDP has been adopted. Budget is in place to cover this.

4.2 Risk and Mitigations

The report in paragraphs 3.13 to 3.16 sets out the legal context for consideration by the Council. There is significant risk of legal challenge and consequent delay to the Plan if the Council declines to accept the Reporter recommendations.

4.3 Equalities

An Equalities Impact Assessment has been carried out on this proposal and it is anticipated that there are no adverse equality implications.

4.4 Acting Sustainably

The LDP has been subject to Strategic Environmental Assessment throughout its preparation.

4.5 Carbon Management

There are no known effects on carbon emissions directly affecting the Council.

4.6 Rural Proofing

The proposals within the LDP have been subject to assessment, including rural impact.

4.7 Changes to Scheme of Administration or Scheme of Delegation

There are no changes to be made to either the Scheme of Administration or the Scheme of Delegation as a result of the proposals in this report.

5 CONSULTATION

- 5.1 The Chief Financial Officer, the Monitoring Officer, the Chief Legal Officer, the Chief Officer Audit and Risk, the Chief Officer HR, Corporate Communications and the Corporate Equalities and Diversity Officer, and the Clerk to the Council have been consulted and any comments received have been incorporated into the final report.

Approved by

Brian Frater

Service Director Regulatory Services Signature

Author(s)

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Background Papers: none

Previous Minute Reference: Scottish Borders Council 25 September 2014

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