

Making a Neighbourhood Plan:
The Examiner's Role and Perspective

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Section 1 – the role of the Examiner

The role of the Examiner is prescribed by Schedule 4B of the Town and Country Planning Act 1990, principally paragraph 8. He/she “must consider” three matters:

- “(a) whether the draft Neighbourhood Development Plan meets the basic conditions (see sub-paragraph (2)),

- (b) whether the draft Plan complies with the provision made by or under sections 38A and 38B, and

- (d) whether the area for any referendum should extend beyond the neighbourhood area to which the draft Plan relates...”

The role of the Examiner is restricted to those matters (paragraph 6) “The Examiner is not to consider any matter that does not fall within sub-paragraph (1) (apart from considering whether the draft order is compatible with the Convention rights)”.

The clearest guidance as to the role of the Examiner is contained in the decision of R
(Crownhall Estates Limited v. Chichester District Council [2016] EWHC 73 (Admin)
especially at paragraph 29:

- (i) *the examination of a Neighbourhood Plan, unlike a development plan document, does not include any requirement to consider whether the plan is “sound” (contrast s.20(5)(b) of PCPA 2004) and so the requirements of soundness in paragraph 182 of the NPPF do not apply. So there is no requirement to consider whether a Neighbourhood Plan has been based upon a strategy to meet “objectively assessed development and infrastructure requirements”, or whether the Plan is “justified” in the sense of representing “the most appropriate strategy, when considered against reasonable alternatives” and based upon “proportionate evidence”.*

Section 2 – A Land Use Plan

Before coming to the basic conditions, consider (b) above.

Section 38A(2) of the Planning and Compulsory Purchase Act 2004 provides:

“A “Neighbourhood Development Plan” is a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan”.

In other words, a Neighbourhood Plan must be a land use plan. This often creates a problem for the promoters of plans. They have many concerns, which often do not relate to land use planning. For example, they want parking controls to be introduced or removed, traffic controls to be introduced or removed, additional school capacity to be provided etc. etc. I rejected a plan in Rugby (Coton Forward) because it contained a number of these “aspirational” policies, and barely a single land use policy.

That is not to say that there cannot be reference in a plan to such aspirations. But as PPG advises, these need to be clearly identified as aspirations and not policies. Some Examiners are happy that these remain within the plan but identified as such (e.g. by separate colouring etc.). My preference, to avoid any confusion, is that they be relegated at least to an Appendix if not to a separate document.

Section 3 – the basic conditions

Paragraph 8(2):

A draft plan 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 plan,*

- (d) *the making of the plan contributes to the achievement of sustainable development,*
- (e) *the making of the plan 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 plan does not breach, and is otherwise compatible with, EU obligations, and*
- (g) *prescribed conditions are met in relation to the plan and prescribed matters have been complied with in connection with the proposal for the plan.*

As to (a)

Crownhall again:

- (iii) *Paragraph 8(2)(a) confers a discretion to determine whether or not it is appropriate that the Neighbourhood Plan should proceed to be made “having regard” to national policy. The more limited requirement of the basic condition in paragraph 8(2)(a) that it be “appropriate to make the plan” “having regard to national policies and advice” issued*

by SSCLG, is not to be confused with the more investigative scrutiny required by PCPA 2004 to determine whether a local plan meets the statutory test of “soundness”.

A word of caution here. Some examinations appear to have focused on whether the Plan had regard to national policies, and less on whether it is “appropriate to make the plan”. This plainly gives a very considerable discretion. There are many considerations in national policy and guidance which could go to this question in any particular case – the protection of the environment, sustainable transport, infrastructure and countless other topics. Further, there is a curiosity as to the role of heritage considerations. Sub-paragraphs (b) and (c) apply to Neighbourhood Development Orders and not to Plans. They introduce the statutory tests relating to listed buildings and conservation areas. But it can hardly be suggested that these are considerations irrelevant to the making of a Plan. Those considerations are, of course, dealt with at length in national policy and guidance.

As to (d), sustainable development, again this clearly gives significant additional discretion to the Examiner. According to the NPPF, sustainable development means the entirety of paragraphs 18-219. Plainly, sustainable development has positive aspects – the provision of housing, jobs, shops etc. – and constraining elements – the protection of the environment, restraint on car use etc.

The Watford examination.

Sub-paragraph (e) “general conformity” can present difficult issues.

Crownhall again:

(ii) where it is engaged, the basic condition in paragraph 8(2)(e) of Schedule 4B to the TCPA 1990 only requires that the draft Neighbourhood Plan as a whole be “in general conformity” with the strategic policies of the adopted development plan (insofar as it exists) as a whole. Thus, there is no need to consider whether there is a conflict or tension between one policy of a Neighbourhood Plan and one element of the local plan.

What are “strategic policies”?

Plenty of room for debate and judgment here. PPG (ID 41-076) suggests the following useful considerations:

- *whether the policy sets out an overarching direction or objective*
- *whether the policy seeks to shape the broad characteristics of development*

- *the scale at which the policy is intended to operate*
- *whether the policy sets a framework for decisions on how competing priorities should be balanced*
- *whether the policy sets a standard or other requirement that is essential to achieving the wider vision and aspirations in the Local Plan*
- *in the case of site allocations, whether bringing the site forward is central to achieving the vision and aspirations of the Local Plan*
- *whether the Local Plan identifies the policy as being strategic.*

As to (f) EU obligations, in practice this will relate to SEA. This can be a difficult area for promoters. There is often a conflict between the “soft” requirements of sustainability appraisal (SA) and the very precise and more rigorous requirements of SEA, not least in the realm of the consideration of alternatives. There are several cases where the focus has been more on SA than SEA. These are matters which should have been resolved early in the plan process, on the basis of advice given by consultants to the qualifying body and/or the advice

of the local planning authority. Examiners may be reluctant to reject a plan – though this has happened on occasions – at the relatively late stage of the examination.

The Slaugham example.

As to (g) “prescribed conditions”, only one further basic condition has been prescribed, as follows:

The making of the Neighbourhood Development Plan is not likely to have a significant effect on a European site...or a European off-shore marine site...(either alone or in combination with other plans or projects).

In practical terms, this denotes principally attention to the Habitats Regulations.

Section 4 – housing

Back to Crownhall:

- (v) *Those policies in the NPPF (and hence the principles laid down in Hunston and Gallagher on the interpretation of those policies) do not apply to the preparation by a qualifying body of a Neighbourhood Plan. Although a Neighbourhood Plan may include policies on the use of land for housing and on locations for housing development, and may*

address local needs within its area, the qualifying body is not responsible for preparing strategic policies in its Neighbourhood Plan to meet objectively assessed development needs across a local plan area. Moreover, where the examination of a Neighbourhood Plan precedes the adoption of a local plan, there is no requirement to consider whether it has been based upon a strategy to meet objectively assessed housing needs.

A word of caution here, in particular in relation to the last sentence. The requirement for conformity relates, of course, to the adopted local plan and not the emerging local plan. However, there are two main reasons why it may often be necessary to have close regard to the content of any emerging local plan.

First, it is likely that the evidence base for the adopted local plan will be significantly out of date, particularly in relation to the requirements for housing, jobs etc. Failure to have regard to new evidence may not be compliant with basic conditions (a) and (d).

Second, section 38(5) of the 2004 Act requires that any conflicts between development plans must be resolved in favour of the later plan to be adopted/made. This latter point, in particular, is dealt with by the following revision to PPG:

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, including housing supply policies. 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. Neighbourhood Plans should consider providing indicative delivery timetables, and allocating reserve sites to ensure that emerging evidence of housing need is addressed. This can help minimise potential conflicts and ensure that policies in the Neighbourhood Plan are not overridden by a new Local Plan.

Section 5 – the Examination procedure

This is prescribed by paragraph 9 of Schedule 4B. The general rule is that the Examination is to be conducted by written representations. A hearing must be held if either the Examiner considers that necessary to ensure adequate examination of an issue, or to ensure that a person has a fair chance to put a case. The hearing is to be held in public. The conduct of the Examination is under the control of the Examiner including the asking of questions. This is generally to be done by the Examiner, subject to the two qualifications referred to above.

Concerns are often expressed that hearings are not conducted. In my view, any significant Neighbourhood Plan really requires a hearing, especially where the plan is for an urban area or where an urban or built-up area is proposed to expand into adjoining countryside. After all, these provisions do spring from the localism agenda.

Dealing with questions/cross-examination should be easy. It is important for the Examiner to gain the confidence of all parties appearing. A relaxed atmosphere should be created. Once this is done, and perhaps after initial hostilities have subsided, it should proceed smoothly.

Section 6 – some tips

- One spokesman
- Counsel ? for legal issues only?
- Ensure clarity and conciseness in the original representations, and in any presentation at the hearing.

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