

**Getting a Neighbourhood Development Plan Made
and
Avoiding High Court Challenges**

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IMPORTANCE OF NEIGHBOURHOOD DEVELOPMENT PLANS (NDPs)



- NDPs provide the ability for the local community to directly influence development and the environment in their area
- A NDP is part of the development plan and thus central to the determination of relevant planning applications
- Growing importance as seen from the Housing White Paper last year and the Draft Revised NPPF

STEP 1: DESIGNATION OF A NEIGHBOURHOOD AREA (s.61G of the TCPA 1990)



- NP powers can **only** be exercised in relation to a **Neighbourhood Area** that has been designated in response to an application by the PC to the LPA.
- For a PC that can include all or part of the parish and, provided it does, may extend beyond the parish area. If it includes all of the PC's area and no other, the LPA **must** designate it (Neighbourhood Planning (General) Regulations 2012, reg 5A(1) – “the Regulations”)
- There can only be **one** neighbourhood area for any piece of land and designated areas must **not overlap** each other.
- If the LPA consider that the area is “wholly or predominantly business in nature” they must consider whether they should designate it as a **business area**.
- A PC may choose to establish an **advisory committee or sub-committee** under s.102(4) of the LGA 1972) and **appoint local people** (who need not be parish councillors) to those bodies – they would have voting rights. The terms of reference for a steering group or other body should be published and the **minutes of any meetings made available to the public**.

STEP 2: MOTIVATION & SUPPORT



- A NP involves a great deal of work and relies upon **support from the local community** as well as the LPA.
- The responsibility for preparing the plan **rests with the PC**, as a qualifying body under the legislation.
- Motivation? **Aim** should be to guide development positively and shape the environment rather than block all development.
- LPAs are required to give “***such advice or assistance***” as in all the circumstances they consider appropriate but LPAs are not required to provide funding.
- **Funding** is available from central government (up to £9,000 and possibly additional £8,000).
- Use of **consultants** but also **volunteers** required.

STEP 3: PREPARATION OF THE PLAN



- The **formulation** of the plan is critical and requires an evidence base which the PC must assemble – that will include the SEA and an HRA where required. A NDP cannot proceed if a risk of significant effects on a European site cannot be excluded.
- Some such evidence may already exist (e.g. census data, SHLAA) but other **material may need to be commissioned and produced** – household survey; housing needs assessment; flood risk assessment – if not available for the area.
- **New survey work or assessments** are likely to be required.
- Existing Local Plan policies will be important, particularly where they **are strategic policies**.
- Care should be taken if carrying out **a site selection exercise**.
- **Guidance:** PPG and see guides from Locality – neighbourhoodplanning.org; NPIERS

Guiding Criteria-The Basic Conditions (Schedule 4B of the TCPA 1990, para. 8(2))



- (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 order.

STEP 4: WHAT TO INCLUDE & EXCLUDE (s.38B of the PCPA 2004)



- (1) The plan **must specify the period** for which it is to have effect.
- (2) An NDP may not include provision about development that is “**excluded development**” (s.38B(1) of PCPA 2004, s.61K of the TCPA 1990 as applied by s.38B(6) of PCPA 2004):
 - development normally dealt with by a **county planning authority** e.g. minerals and waste related development
 - development described in **Schedule 1 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended)** which automatically requires an Environmental Impact Assessment
 - development of nationally significant infrastructure projects (as defined in the **Planning Act 2008**)
- (3) A policy should be **clear and unambiguous and concise; precise** and supported by **appropriate evidence**.

What NDPs include (e.g. Joint Henley and Harpsden NDP 2012-2027)



- The Plan should **support the strategic development needs** set out in the Local Plan and plan positively to support local development and not less than (PPG and NPPF [16]).
- The Plan should address the **infrastructure** demands of the identified development.
- Can include **wider community aspirations** than those relating to development and use of land but actions relating to these these should be clearly identifiable.
- **Housing allocations:** this leads to most legal challenges by aggrieved land owners/developers whose land is excluded. The PPG advises that a NDP “*propose allocating alternative sites to those in a Local Plan, but a qualifying body should discuss with the local planning authority why it considers the Local Plan allocations no longer appropriate.*”
- **Employment allocations; town centre** – redevelopment of sites; **open space and environmental matters** – Local Green Space; **community facilities** – renewal and enhancement of these.

Opportunity to be innovative or different



- Because requirement for **general conformity** in with strategic policies and looking at these as a whole, there is room for the NDP to “depart from” / “conflict with” the LP (see e.g. *Kebell Developments Ltd v Leeds City Council* [2018] EWCA Civ 450)
- **Holiday homes exclusion:** *R (oao RLT Built Environment Ltd) v Cornwall Council and St Ives Town Council* [2016] EWHC 2817 (Admin)
 - evidence base to support this
- **Concerns about transport impact** - can include parking provision policy which is more generous than the LP
- **COMING: Design guidance** – Draft Revised NPPF [124]
- **COMING: Change in detailed Green Belt boundary** - Draft Revised NPPF [135]

Housing



- NDP does **not** have to wait for an up-to-date LP.
- Does **not** have to contribute to wider districts housing needs.
- Tensions result particularly as requirement is only that the NDP be in **GENERAL** conformity with the **STRATEGIC** policies of the LP.
- However, PPG was changed and currently advises that where NPs contain policies relevant to housing supply, these policies **should take account of latest and up-to-date evidence of housing need**.
- But now – Draft Revised NPPF [66] & [67] – strategic plans should set out **a housing requirement figure for designated neighbourhood areas** – once adopted will not normally be retested at the neighbourhood plan examination. Where not possible to provide such a requirement figure, the qualifying body may ask the LPA for an **indicative figure**.

STEP 5: PUBLICITY & CONSULTATION



- Before submitting its NDP to the LPA, the PC must **publicise** it in a manner that is likely to bring it to the attention of people who live, work or carry on business in the neighbourhood area (Regulation 14(a)). If there are different options considered, there should be engagement on these to narrow and refine options.
- Must also send a **copy to the LPA**.
- Must also consult any **consultation bodies** whose interests the PC considers may be affected by the proposals (Regulation 14(b) and Schd 1 para. 1) – e.g. Natural England, Environment Agency, relevant voluntary bodies, religious groups .
- This stage gives the PC the opportunity to **review the merits of the plan**. The PC will need to consider the representations and decide whether to make changes to the proposed plan.
- Decision-making should therefore be **public, transparent and reasoned**.

STEP 6: SUBMISSION TO THE LPA (TCPA 1990, Sch 4B para 1(2))



- The proposed plan itself and a **map or statement** identifying the area it applies to
- A **consultation statement**– this should explain what main issues and concerns were raised in the representations to the consultation plan and how they were dealt with (Regulation 15(2))
- A **basic conditions compliance statement**
- A full **Strategic Environmental Assessment (SEA)** report in accordance with the Environmental Assessment of Plans and Programmes Regulations 2004, reg 12(2), (3), (or a statement of reasons why a report is not required)
- In accordance with the **Habitats Regulations**, it is also necessary to demonstrate that the neighbourhood plan either alone, or in combination with other plans and programmes, is unlikely to have a significant effect on any European Sites.
- Background evidence. Compliance with HR requirements.
- **Summary** of proposals and **reasons** why the plan should be made in the proposed terms.

STEP 7: SURVIVE OR THRIVE AT EXAMINATION



- The LPA must publicise the submitted plan and allow **at least 6 weeks for representations**. They must also notify any consultation body referred to in the consultation statement.
- THE PC should usually submit any **response** to these representations **within 2 weeks** of that period ending – unless Examiner indicates otherwise
- The LPA **has to submit the plan for independent examination** where it considers that the legal requirements are met, the publicity and consultation requirements in the Regulations are complied with and the draft plan complies with ss38A and 38B of the PCPA 2004 (re. the meaning of, and provisions that can be made by, an NDP)
- The plan has to be independently examined – the **general rule is that this will be done in writing** but a hearing will be held if the Examiner considers it is necessary to ensure adequate examination of an issue or that a person has a fair chance to put their case.

The independent examiner decides:

- If an **exploratory meeting** is necessary
- If the qualifying body **needs to respond to consultation responses**
- If **clarification** is needed on documents or evidence submitted
- If the examination can be undertaken **using written submissions alone**
- What the **likely timetable** for the examination will be
- Whether to undertake any **site** visit(s)

Examiner's Remit
(TCPA 1990 Schd 4B, para. 8(6) as applied to NPs by
s.38C of the PCPA 2004)



- The Examiner can **only** consider the specified matters i.e.
 - (1) Whether the draft plan meets the **basic conditions**
 - (2) Whether it complies with **ss. 38A and 38B of the PCPA 2004**
 - (3) Whether the area for any referendum should be **extended beyond any neighbourhood area**

STEP 8: ENSURE THAT THE LPA'S RESPONSE TO THE EXAMINER'S RECOMMENDATIONS IS LAWFUL



- Successful challenges to NDPs have been more the exception than the norm (for approach see e.g. *R (oao DLA Delivery Ltd.) v Lewes DC* [2017] EWCA Civ 58 and *Crownhall Estates v Chichester DC* [2016] EWHC 73 (Admin))
- In *Maynard v Chiltern DC* [2015] EWHC 3817 (Admin) the claimant owned and occupied a property which included a nightclub and wished to develop the site for housing
- The Draft NDP listed it as a community facility
- The developer made representations asking for this designation to be removed
- The Examiner agreed but the LPA chose not to accept that recommendation, taking the view that it was based on a misunderstanding of development plan policy and breached the basic conditions **in not being in general conformity** with policies in the the local authority's development plan

Maynard v Chiltern DC [2015] EWHC 3817 (Admin)

The Judgment



- The developer had argued that the nature and availability of the service provided did not represent a valuable facility for the local community, which was the representation which the examiner accepted.
- Therefore, the local authority's decision to reject the examiner's recommendation on the basis that he had misinterpreted the policy in the development plan as excluding privately owned, or privately run facilities was itself a material legal misdirection (paras. 48-50).
- The authority had not considered the developer's argument
- Paragraph 8(2)(e) of Sch. 4B only required the local authority to consider whether the draft NDP as a whole was in general conformity with the adopted development plan as a whole. It was not concerned with whether there was a tension between one policy of the NDP and one element of the local plan.

STEP 9: GET THE PLAN THROUGH THE REFERENDUM AND HOLD YOUR BREATH!



- If the Plan is considered to comply with the basic conditions and all requirements para. 8 of Schd 4B it must be put to a referendum (and two if it relates to a business area). It only requires the support of a simple majority, whatever the turnout.
- The Plan can be made and any legal challenge has to be made within 6 weeks of that.
- If you have complied with the above principles, the risks of a successful challenge should be very slim. If however you “push the boundaries” in terms of what is supported by the evidence, the problems could arise as in *R (oao Stonegate Homes Ltd v Horesham DC* [2016] EWHC 2512 (Admin)

STEP 10: WHAT HAPPENS THEN



- Get ready to ensure that the LPA properly takes the plan's provisions into account when determining planning applications