

**Welcome to Landmark Chambers’  
‘Neighbourhood Plans: The latest law and  
policy’ webinar**

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# Your speakers today are...



**Sasha White QC (Chair)**



**Matthew Reed QC**

**Topic:**  
The examination of  
a Neighbourhood  
Plan



**Kate Olley**

**Topic:**  
The procedure for  
preparing the plan  
and consultation  
requirements  
during the COVID-  
19 pandemic

# Your speakers today are...



**James Neill**

**Topic:**  
Challenging a  
neighbourhood  
plan and when to  
do so



**Andrew Parkinson**

**Topic:**  
Neighbourhood  
Plans: weight in  
development  
control decisions  
and in relation to  
other development  
plans



**Kimberley Ziya**

**Topic:**  
The Approach  
to the Basic  
Conditions  
in Policy and  
Law

# The procedure for preparing the plan and consultation requirements during the COVID-19 pandemic



**Kate Olley**

## Neighbourhood Plans- legal and policy sources

- Town and Country Planning Act 1990 Sch 4B
- Planning and Compulsory Purchase Act 2004 s38
- Neighbourhood Planning (General) Regulations 2012/637 (as amended 2015, 2016, 2017)
- NPPF (12, 13, 29, 37, 125, 136)
- NPPG- NB Coronavirus update
- Legal basis for the Neighbourhood Plan

## The Fundamentals

- A qualifying body
- A clear and defined neighbourhood area
- A neighbourhood forum and a community organisation
- Approval of the forum by the LPA (13 weeks)
- No overlapping areas
- Draft Plan must be consulted on (Reg 14)
- Submission to LPA with a consultation statement (Reg 15)
- Publicised by LPA- opportunity for representations (Reg 16)
- Independent Examination (Sch 4B TCPA, para 6(2))
- Does it meet the statutory requirements, in particular the 'basic conditions'? (Sch 4B, para 8(2))
- Referendum and adoption

## More key points:

- Formulating the Plan- requires an evidence base that should include an SEA and HRA where required
- Plan cannot proceed if there is a risk of significant effects on a European Site- new survey work and assessment may be required
- Existing Local Plan policies, particularly the strategic policies- critically important
- Care needed in site selection process/exercise and conclusions reached
- Specification of period for which to have effect (s38B PCPA)
- Matters expressly excluded- county planning matters
- Clear, unambiguous and precise policies
- Plan should support strategic development needs
- Caution in relation to housing allocations- NB extant Local Plan

# Neighbourhood Planning in the Time of Corona

- NPPG 107
- Referendums (Reg 13 Local Government and Police and Crime Commissioner (Coronavirus) (Postponement and Elections and Referendums) (England and Wales) Regulations)
  - Referendums due between 16 March 2020 and 5 May 2021 postponed to 6 May 2021
- Weight to emerging NPs?
- Examinations- written or oral representations?
- Public consultation
- Publicity
  
- What can still be done?
  - Policy-writing and evidence-gathering (desk based)
  - Online engagement- surveys and questionnaires- or telephone

## The examination of a Neighbourhood Plan



**Matthew Reed QC**

## NP Examination

- Deal with procedures and content of examination process, from appointment to report. Statutory content: Schedule 4B of TCPA as applied by 2004 Act, s. 38A and Neighbourhood Planning (General) Regulations 2012. PPG and RICS NP independent examiner referral service.

### Appointment

- Examination arranged by the LPA, including appointing examiner.
- Examiner only be appointed if NP qualifying body consents (para. 7, Schedule 4B, TCPA) – S/S can appoint (para. 7(5)).
- The examiner must be:
  - Independent of QB and LPA.
  - Not have interest in land affected by NP.
  - Appropriate qualifications and experience.

# Examination

## Submission of plan to examination

- Once Examiner appointed, LPA must send the plan, consultation documents and habitat regulations documents to the examiner (reg 17, 2012 Regs).
- The examiner will then contact authority identifying way proceed with examination, any further documents required, whether exploratory meeting is required, whether hearing necessary, site visits, timetable: RICS guidance
- Exploratory meeting if examiner has concerns – generally rare.

## Examination

- Evidential consideration
- Examiner will generally only consider consultation reps (both pre-submission and post-submission stages), unless further information requested.
- Late representations can be made but whether accepted by the LPA is a matter for discretion. Guidance in RICS: will not be accepted unless exceptional circumstances (e.g. change of circumstances).

## Examination

### How the examination is conducted

- General rule, examination by consideration of written reps under consultation (para. 9, Schedule 4B).
- But, if necessary to ensure adequate examination of issues or to ensure a person a fair chance to put case, must be oral hearing and in public: para. 9(2).
- Questioning of any person giving oral reps – done by examiner except where necessary for adequate examination or a person fair chance to put case (para. 9(6)).
- If hearing, in practice: it will be limited to the specific issues justifying the oral hearing (fair chance or adequate examination).

## Examination

### What the examiner will consider

- Whether NP meets basic conditions: Schedule 4B, 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,
  - (b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the plan,
  - (c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the plan,
  - (d) the making of the plan contributes to the achievement of sustainable development,

## Examination

- (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 order does not breach, and is otherwise compatible with, EU obligations

## Examination

- Basic condition (a): Having regard to national policies and advise in guidance, it is appropriate to make the plan.
- The Examiner's remit does not include a requirement to consider soundness so not consider whether plan 'justified' in sense used in para. 35 of NPPF nor to consider whether a draft policy is supported by "proportionate evidence" or that based on a strategy to meet OANs or that most appropriate strategy considered against reasonable alternatives (*Woodcock Holdings Ltd v SoSCLG* [2015] EWHC 1173).
- Not a requirement to be 'consistent with national policy' like DP test in para. 25 NPPF: *R (oao Maynard) v Chiltern DC* [2015] EWHC 3817; rather, a discretion to determine whether it is appropriate that the plan should proceed having regard to national policy: *BDW Trading Limited v Cheshire West BC* [2014] EWHC 1470).

## Examination

- Basic condition (e): In general conformity with strategic policies contained in development plan;
- not concerned with difference between individual policies but the strategic policies as a whole – note *BDW Trading v Cheshire West* [2014] EWHC 1470, applied *R (oao Maynard) v Chiltern DC* [2015] EWHC 3817;
- though note it is the strategic policies as whole that must be considered, not whole plan: *R (oao Swan Quay LLP) v Swale Borough Council* [2017] EWHC 420.
- Condition (e) is not engaged if there are no strategic policies in the LP: *R (oao Gladman Developments Ltd) v Aylesbury Vale District Council* [2014] EWHC 4323.

## Examination

- Note that the issue under BC (e) is wholly a matter of judgment and there will be elasticity in the assessment allowing some conflict with strategic policies: *Swale* and the plans do not have to match precisely: *R (oao Bewley Homes) v Waverley Borough Council* [2017] EWHC 1776

## Examination

Other principles for considering the examiner's conclusions:

- the Court's recognition of the expertise of specialist planning inspectors and work from the presumption that they would have understood the NPPF applied also to examiners of NPs: *R (oao Lochailort Investments Ltd) v Mendip DC* [2020 EWHC 1146].
- Not to consider any other issues than basic conditions, except compliance with ECHR: para. 8(6), Schedule 4B
- Must consider whether policies relate to development and use of land and not aspirational policies unrelated to use and development of land.

## Examination

### Need for fairness

- *R (oao Legard) v Royal Borough of Kensington & Chelsea* [2018] EWHC 32. Whether apparent bias arising from access granted to one of the neighbourhood forum's members to local authority officers. It was possible for their to be connection. But must be aware of potential bias.
- Guidance is given on this in RICS examiner guidance.

## Examination

### Post consideration/hearing – the Report

- Report recommendations:
  - submit order to referendum or modifications so as to achieve referendum or refused.
  - The examiner may recommend modifications that he/she considered need to be made to secure that the draft NP meets the basic conditions in paragraph 8(2) (Schedule 4B, para. 10(3)(a)); or compliance with convention rights or correcting errors.
  - If Ex.r recommends NP submitted to referendum, must also say whether extend referendum beyond the NP area and say what the area should be (para. 10(5)). Note: should do this if proposals in NP will have a “substantial, direct and demonstrable impact beyond the neighbourhood area” (Paragraph: 059 Reference ID: 41-059-20140306).

## Examination

- The report must give reasons for each of its recommendations and contain a summary of its main findings (Schedule 4B, para.10(6)).
- The reasons - *South Buckinghamshire District Council v Porter (No.2)* [2004] 1 WLR 1953 (in particular at [36]) or not?
- *Gladman Developments Limited v Aylesbury Vale District Council* [2014] EWHC 4223 (Admin) at [94] – yes. [95]
- But Holgate J: given the limited ambit of the task of the examiner some modification of the *South Bucks* principles may be necessary: *R (oao Crownhall Estates) v Chichester DC* [2016] EWHC 73.

## Examination

- *R (oao Bewley Homes) v Waverley Borough Council* [2017] 2 P & CR 19: given para. 10(6) – not against *Porter* wholly (though some universal – eg all reasons must be intelligible. Examiner not light appeal inspector – functions different: inquisitorial against adversarial.
- *R (oao Lochailort Investments Ltd) v Mendip DC* [2020] EWHC 1146 and *R (oao Wilbur Developments Ltd) v Hart District Council* [2020] EWHC 227 - both agreed a modified form of *Porter* reasons, following *Crownhall*.
- Note, Large percentage of NPs are decided positively – because of the apparently lighter touch, in spite of considerable significance.

# Examination

## Re-examination

- If the LPA propose to make a recommendation different from the examiner and the reason because of change of circumstances or different view as to a particular fact, and may refer to independent examiner, though they must reconsult: para. 13, Sch. 4B.
- Generally occur where change of policy or different approach and following discussions between the LPA and the qualifying body.

## The Approach to the Basic Conditions in Policy and Law



**Kimberley Ziya**

## What are the basic conditions?

- Para 8(2), Sch. 4B, TCPA 1990
- It is appropriate to make the NP, having regard to:
  - a) national policies and guidance;**
  - b) any listed buildings
  - c) any conservation areas
  - d) the achievement of sustainable development
  - e) general conformity with the strategic policies in the local plan**
  - f) EU obligations
  - g) prescribed conditions met/prescribed matters complied with

## Case law on the basic conditions

- BDW Trading v Cheshire West [2014] EWHC 1470
  - Limited role of examination of NP = have BCs been met?
  - 8(2)(e) – only requires consideration of whether plan *as a whole* is in general conformity with LP *as a whole*
  - Don't have to consider wider ramifications on delivery of housing
  - Whether plan is *appropriate having regard to* national policy not equal to LP needing to be “consistent with national policy”
  - Don't have to consider whether NP “justified” in para 182 NPPF (now para 35(b)) sense

## Case law on the basic conditions

- Woodcock Holdings Ltd v SSCLG [2015] EWHC 1173, [56]-[62]
  - No requirement to consider whether plan is “sound”
  - No need to consider whether the NP is based on a “strategy” to meet OANs or consider reasonable alternatives
- DLA Delivery Ltd v Lewes DC [2017] PTSR 949, [22]-[26]
  - If there are relevant strategic policies in LP → must be in general conform.
  - But don't have to wait for the adoption of a LP/strategic policies
- Lochailort Investments Ltd v Mendip DC [2020] EWHC 1146, [95]-[98]

## Policy on the basic conditions

- NPPF: 13, 29, 37
- PPG – Neighbourhood Planning (updated 13/05/20) – paras 065-079
  - Basic conditions statement: 066, 068
  - LPA should provide “constructive comments” on emerging NP: 067
  - Content of draft NP will determine which aspects of national policy are relevant: 070
  - BCs (b) and (c) apply to draft neighbourhood Development Orders or Community Right to Build Orders: 071
  - “sufficient and proportionate evidence” on how the draft NP guides development to sustainable solutions: 072

## Policy on the basic conditions

- PPG continued
  - Test for “general conformity”: 074
  - “strategic policies”: see paras 20-21 NPPF and PPG 076
  - Relevant EU obligations = SEA, EIA, Habitats: 078

# Neighbourhood Plans: weight in development control decisions and in relation to other development plans



**Andrew Parkinson**

## Weight to be attached to a made NP – General

- A “neighbourhood development plan” is part of the statutory development plan for the area it covers: section 38(3)(c) of the PCPA 2004. It has the same legal status as a local plan: PPG at para. 006.
- Presumption in favour of the development plan unless material considerations indicate otherwise: section 38(6) of the PCPA 2004.
- NPPF, para. 12: *“Where a planning application conflicts with an up to date development plan (including any neighbourhood plans that form part of the development plan) permission should not normally be granted”*.
- 2012 NPPF, para. 198: *“where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted”*
- Woodcock Holdings v SSLCG [2015] EWHC 1173 (Admin) para. 198 neither (a) gave enhanced status to neighbourhood plans or (b) modifies the application of section 38(6) of the PCPA 2004.
- The weight to be given to any breach of a NP is for the decision-maker:
  - Keith Langmead v SSCLG [2017] EWHC 788
  - Cherwell District Council v SSCLG [2016] EWHC 2925 (Admin)

## Weight to be attached to made NP – no 5YHLS (1)

- Where no 5YHLS, paragraph 11(d) of the NPPF engaged for housing applications (see fn. 7). Planning permission should be granted unless:
  - (i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
  - (ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
- Breach of NP policies may be taken into account and given weight under the “tilted balance”: Gladman Developments Ltd v SSHCLG [2020] EWHC 518 (Admin).
- Weight for the decision-maker. Factors to take into account include: (i) Nature and extent of housing shortfall (ii) Reasons for and prospect of shortfall being reduced (iii) Whether the overall spatial distribution strategy remains sound: Crane v SSCLG [2015] EWHC 425 (Admin) and Barwood Strategic Land II LLP v SSCLG [2017] EWCA Civ 893.
- Breach of NP policies may also result in harm to the “social dimension” of sustainable development: Crane and Keith Langmead.

## Weight to be attached to made NP – no 5YHLS (2)

- NPPF, para. 14: The adverse impact of allowing development that conflicts with a NP is likely to significantly and demonstrably outweigh the benefits, provided all of the following applies:
  - a) the neighbourhood plan became part of the development plan two years or less before the date on which the decision is made;
  - b) the neighbourhood plan contains policies and allocations to meet its identified housing requirement;
  - c) the local planning authority has at least a three year supply of deliverable housing sites (against its five year housing supply requirement, including the appropriate buffer as set out in paragraph 73); and
  - d) the local planning authority's housing delivery was at least 45% of that required over the previous three years.

## Weight to be attached to made NP – no 5YHLS (3)

- Criteria (a): applies where a NP is updated through a material modification to the plan, within two years of the decision, provided all the other criteria continue to be met: PPG, para. 099.
- Criteria (b): (i) ‘policies and allocations’ in the plan should meet the identified housing requirement in full; (ii) policy on a windfall allowance alone would not be sufficient; (iii) reliance on policies and allocations within other development plan documents insufficient: see PPG, para. 097.
- Dymock Road appeal (APP/W1850/W/19/3225309): NP “supported” allocations in Local Plan, and included additional policies in relation to density. Inspector found paragraph 14 not engaged:
- *“It is the CS through the application of Policy LB1 that apportions a minimum of 800 dwellings to Ledbury and Policy LB2 directs 625 dwellings to the Viaduct site. The LNP lends its support to these Policies but does not allocate land for development. Instead, it includes Policies which guide how the quantum of housing should be developed to provide balanced communities at an appropriate density. I am not persuaded therefore that Paragraph 14 is engaged in this instance.”*

## Conflict between made NP and adopted Local Plan

- Section 38(5) of the PCPA 2004: Conflict between a policy in a NP and a policy in a local plan or spatial development strategy, must be resolved in favour of the policy which is contained in the last document to become part of the development plan.
- See also PPG 044.
- Reflected in paragraph 30 of the NPPF: *“Once a neighbourhood plan has been brought into force, the policies it contains take precedence over existing non-strategic policies in a local plan covering the neighbourhood area, where they are in conflict; unless they are superseded by strategic or non-strategic policies that are adopted subsequently.”*

## Weight to be attached to emerging NPS

- Emerging NPs are likely to be a material consideration in many cases: PPG, para. 007.
- Weight to be attached to NPs to be judged in accordance with Para. 48 of the NPPF. Local planning authorities may give weight to relevant policies in emerging plans according to: a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given); b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)
- All three factors relevant and must be considered in each case: Woodcock Holdings at para. 141.
- PPG: “*more weight*” should be given post-publication of the referendum: para. 007.
- See Appeal Decision in March 2020 – Eye – (ref: APP/W3520/W/18/3215534) where emerging NP was decisive in refusing a non-allocated site for housing.

## Weight to be attached to NP in relation to other plans:

- NPs can be developed before or at the same time as a local plan: Court of Appeal in DLA Delivery v Lewes DC [2017] EWCA Civ 58 and PPG at para. 007.
- There must be general conformity with the local plan in force at the time, and the NP will need to take into account the evidential basis of the Local Plan on issues like housing need – relevant to question of whether the NP contributes to the achievement of sustainable development. The qualifying body will need to engage with the LPA: PPG at para. 007.
- Need to minimise conflicts in light of section 38(5) PCPA 2004.
- Nevertheless, increasing trend of NP examiners and LP Inspectors reaching contrary findings in short succession: Lochailort Investments Ltd v Mendip District Council [2020] EWHC 1146 and Wilbur Development v Hart District Council [2020] EWHC 227 (Admin)

# Challenging a neighbourhood plan and when to do so



**James Neill**

# The three targets for legal challenge in the NP process under section 61N TCPA

- **Stage 1:** LPA's consideration of an examiner's recommendations (or exercise of intervention powers by S of S)
- **Stage 2:** "Anything relating to a referendum"
- **Stage 3:** LPA's making of the plan after the referendum

"61N. –

- (1) A court may entertain proceedings for questioning a decision to act under [section 38A(4) or (6) of the 2004 Act] only if –
  - (a) the proceedings are brought by a claim for judicial review, and
  - (b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day on which the decision is published.
- (2) A court may entertain proceedings for questioning a decision under paragraph 12 of Schedule 4B (consideration by local planning authority of recommendations made by examiner etc) or paragraph 13B of that Schedule (intervention powers of Secretary of State) only if –
  - (a) the proceedings are brought by a claim for judicial review, and
  - (b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day on which the decision is published.
- (3) A court may entertain proceedings for questioning anything relating to a referendum under paragraph 14 or 15 of Schedule 4B only if –
  - (a) the proceedings are brought by a claim for judicial review, and
  - (b) the claim form is filed before the end of the period of 6 weeks beginning with the day after the day on which the result of the referendum is declared."

## At what stage should a challenge be brought?

- Claimants are not free to choose to wait until the plan is made: sections 61N(1), (2) and (3) are not entirely “permissive”: Oyston Estates Ltd v Fylde BC [2019] EWCv Civ 1152. **So if a challenge is in truth challenging a Stage 1 or 2 decision, claimants cannot choose to wait and then challenge Stage 3 (the making of the plan):**

*“Subsection (2) enables, and also requires, a party aggrieved by the authority’s consideration of the examiner’s report and wants to test its lawfulness before the court, to bring a challenge promptly at that stage – within six weeks of the publication of the authority’s decision, before the plan is put to a referendum and then proceeds beyond that.”* (at [39])
- Process is via judicial review, **6 weeks to bring a claim** but NB no discretion to extend time (unlike “normal” JR): Oyston at [33]
- However, if a claim is brought to a Stage 1 Decision, Claimants should seek an undertaking or interim relief stopping Stage 2 and 3: see eg Hoare v The Vale of White Horse District Council [2017] EWHC 1711 (Admin)
- Fairly residual role of section 61N(1), mainly if the plan “would breach, or would otherwise, be incompatible with any EU obligation”: see section 38(A)(6) which requires that to be expressly considered at Stage 3, and eg Stonegate Homes Ltd v Horsham District Council [2017] Env LR 8.

## Oyston Estates: the facts

- Consultation on submission draft: May/April 2016
- Examiner's report recommending modification: 10 August 2016
- LPA sought screening opinion, which was negative subject to project specific HRA
- LPA considered the examiner's recommendation and resolved to publish decision statement: 2 March 2017
- Referendum: 4 May 2017
- Final decision statement making the plan: 26 May 2017
- JR filed: 5 July 2017
- **HELD:** out of time to challenge the Stage 1 decision taken on 2 March 2017

## What arguments can be raised in a legal challenge to a NP?

- See Lang J's summary Lochailort at [88] – [94]: standard public law grounds - i.e. misdirection in law, irrationality, failure to have regard to material considerations, procedural impropriety.
- Not a review of planning merits: exercise of planning judgment and weight are matters for the decision maker (including whether plan is in “general conformity” with the strategic policies of the adopted development plan): DLA Delivery at [23]
- Scrutiny of an examiner's report similar to that of appeal decision – should be read “without excessive legalism or exegetical sophistication” (c.f. Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263)

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.**

# Thank you for listening

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