

## 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,

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- (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).



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- 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.

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- 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

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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).

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- 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.

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- *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.



# Thank you for listening

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