

Caution: examinations in progress - the operation of neighbourhood plan examinations in England

Article

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caution: examinations in progress –

the operation of neighbourhood development plan examinations

Gavin Parker, Kat Salter and Hannah Hickman look at what experience to date tells us about how the examination stage in the neighbourhood plan production process is being undertaken, and the issues and associated questions emerging from that experience

The production of Neighbourhood Development Plans (NDPs) was seen as a tool to localise responsibility for development as part of a rethink about how local communities engage with planning. It is also one element of a shift towards drawing non-state actors into plan-making and creating markets for planning services – including examination roles, as discussed here. These parallel aims may be characterised as seeking a pluralisation and marketisation of planning practice (as well as an effort to ‘declutter’ and deregulate planning).

These ‘new’ plans have been described as offering a ‘potentially radical change to the way planning in England works’,¹ and one sceptic has reported that ‘decision-making in neighbourhood plan areas has made me sit up and take notice.’²

Much has been written about neighbourhood planning and its emerging outcomes, and early voices have raised some important questions about the inclusivity and practicalities of neighbourhood planning, both in this journal and in the wider academic press.³ This keen interest in neighbourhood planning from across sectors not only highlights legitimate concerns about its design and operation, but also reflects a broader, if qualified, recognition

that planning practice does need to embrace participation and co-management more meaningfully and wholeheartedly. In this light it may be said that neighbourhood planning holds some potential or represents some step forwards in this aspect of planning practice, as well as presenting a number of difficulties.

Given the position of neighbourhood planning as a formal element of the new planning system in England, and given concurrent processes of public sector reform, any aspect of neighbourhood planning presents itself as a legitimate area for scrutiny and discussion. We contend that a review of neighbourhood planning stages and features is necessary – both as a means to improve the design and operation of neighbourhood planning now, and also to learn and work towards a more legible, deliverable and co-produced planning process for the future.

We highlight here just one of the regulatory stages for neighbourhood plans – the *examination* which takes place following submission of a draft neighbourhood plan to the relevant local authority (and prior to the neighbourhood referendum). We reflect on *what* the purpose of examination is and

how it is being performed. Alongside this we highlight a number of related issues and associated questions given that neighbourhood planning is becoming established as a mainstream part of planning practice. In the conclusion we discuss how the Government has been responding to some of these issues recently, notably through tweaks to support and through legislative/regulatory reform, as well as other elements that still require attention by researchers or policy-makers.

Caution: 'examinations in progress'

Very little has been written about the neighbourhood plan examination process, or the examiners themselves, although there have been brief mentions in several press articles and other pieces covering related neighbourhood planning topics.⁴ Such pieces have begun to question how the examination stage has been set up and operated and to focus on its outcomes, based on recent practice. In our view the issues arising from experience thus far fall into four areas:

- the *outcomes* of examinations;
- the *guidance* and requirements of the NDP examination;
- the cadre of *examiners* and their experience and training; and
- the *approach* taken towards examination.

We discuss each of these in turn below.

The examination process and its outcomes

Since the first Neighbourhood Development Plan was examined in December 2012 (the Upper Eden Neighbourhood Development Plan) there have been 270 subsequent examinations of plans up to October 2016.⁵ Five have failed at examination and a large proportion have been modified significantly.⁶

While the outcome of the examination is formally non-binding, one consultant noted that there are three possible outcomes to NDP examinations: 'yes', 'no', and 'yes, but modify'. However, in practice other outcomes are emerging. These include: local planning authorities taking the decision not to send the plan to examination for fear of failure;⁷ the plan being withdrawn from the examination process as the examiner had been minded to fail the plan; and neighbourhood planning groups not proceeding with the referendum as they feel unable to agree with the proposed modifications (as highlighted in the Swanwick case – see below).

A review of the 203 plans that passed referendum by the end of July 2016 showed that approximately 85% accepted all proposed modifications, with only one disagreeing with the overarching recommendations and seeking to make the plan despite the examiner stating that it should not proceed to referendum. In cases where the local planning authority does not accept all the proposed

modifications, this usually centres on a disagreement over the proposed deletion of a policy, or the form of wording proposed for a modified policy.⁶ Furthermore, additional modifications have also been proposed by some local authorities in order to 'strengthen' the plan – which also calls into question the community-led process and how the support framework has operated.

'Overall, the process has given rise to considerable unease among neighbourhoods and among at least some examiners'

This snapshot highlights that while few NDPs have failed at examination, many others have had some quite significant 'flaws' or have been 'contested' by the examiner, the local planning authority, or both. Overall, the process has given rise to considerable unease among neighbourhoods and among at least some examiners.

To start with the positive view: given that only a handful have failed the process, it appears, on this simplistic level, that the examination stage should be straightforward. Those that have failed at examination have been found not to have had regard to national policy, not to have followed due process with regards to the Strategic Environmental Assessment requirements, and/or to have had insufficient evidence to substantiate the policies and strategy (including the delivery of sustainable development) – i.e. some of the 'basic conditions' clearly set down as prerequisites for an NDP had not been met (see below).

But what does this set of outcomes really tell us? Perhaps it is a ringing endorsement for the content of the plans – that they largely do exactly what was envisaged? Perhaps the content of NDPs themselves is not sufficiently challenging or innovative and therefore easy to endorse? Despite some exceptions, might it be argued that the basic conditions are easy to meet, with examinations reduced simply to a compliance test? These hypotheses raise further questions about how meaningful these plans are in content terms – do they add value to the system?

More significantly still is the idea that the 'light touch' approach urged by the Government, and the lower testing threshold, may not actually mean that the plans will stand up to the rigours of implementation – i.e. when the local planning authority seeks to apply the policies when determining planning applications and, increasingly, when the development industry tests them in its

own ways (either through the planning or legal systems). For example, despite being assessed at examination, the housing policies in the Haddenham Neighbourhood Plan⁸ and the Henfield Neighbourhood Plan⁹ have been quashed in the High Court due to inadequacies and inaccuracies in the evidence base and the plan preparation process.

In short, there are several variables here: the tests, the plan ambition, and the behaviour of examiners being just three. There is a feeling that the process is unclear for participants and examiners and that there may be inconsistencies emerging. This leads us into questioning how the requirements and guidance for examination are constructed, before pursuing the debate over the examiners and the approaches taken.

The guidance and requirements of the neighbourhood planning examination

In the spirit of the wider aims of the Government to (attempt to) ease back on regulatory 'burdens' in the wider planning system, the 'light touch' approach reflects how the legal requirements related to NDP examinations are less onerous (see Town and Country Planning Act 1990, as amended via the Localism Act 2011 and the Neighbourhood Planning Regulations 2013/2015). The appointed NDP examiner is charged with focusing on whether the proposed plan meets a set of 'basic conditions' – namely:

- *Having regard to national policies and advice* contained in guidance issued by the Secretary of State, it is appropriate to make the Neighbourhood Plan.
- It is in *general conformity* with strategic policies contained in the development plan for the area.
- It contributes towards *sustainable development*.
- It does not breach and is otherwise *compatible with EU obligations* (including not having an effect on a European designated site, such as a Special Protection Area, or a European marine site, such as a Marine Conservation Zone).

One organisation offering examination services highlights the importance of a 'proportionate' response and explains:

*'It is absolutely essential that your examiner recognises that the bar for meeting the 'basic conditions', and certain other legal matters, is quite different to the rigour of meeting the local plan soundness requirements.'*¹⁰

It is clear, therefore, that NDP examinations were not conceived of as mini Local Plan examinations but as something quite different.

The basic conditions are open to considerable interpretation, and some neighbourhood planning groups have struggled to comprehend how these tests are judged – this resonates with the feeling

that a certain level of professional planning knowledge is needed to engage meaningfully in the process. This can alienate some communities, particularly those who may be more ambivalent about giving the time to neighbourhood planning. Examiners must also consider a set of process issues; i.e. the draft NDP should not deal with excluded development; it covers only one neighbourhood area and is the only plan; there is a stated time period for the plan; and it contains only land use planning policies.

The focus on the basic conditions means that examiners are not testing the plan for soundness, its planning merits or other material considerations. This was recently 'clarified' in the case of *R (Crownhall Estates Ltd) v Chichester District Council*:

*'The examination of a neighbourhood plan, unlike a DPD, 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'.'*¹¹

Thus the NDP examination process is not intended to be as robust as the examination of a Local Plan. Strategic issues such as objectively assessed need and the spatial distribution of growth are assessed using the tests of soundness criteria during the Local Plan process instead.

A classic policy hierarchy approach was envisaged, with NDPs having to be in 'general conformity' with the strategic policies in the adopted Local Development Plan and in turn having regard to national policy. In practice, however, NDPs are coming forward in advance of an up-to-date Local Plan, and this raises the question of whether the process is sufficiently robust in these situations. If the plan is not examined in a sufficiently rigorous manner it could be susceptible to challenge, as well as having a limited shelf-life as policies in the Local Plan would then take precedence (as the latest plan to be adopted).

This hardly motivates communities to expedite neighbourhood planning activity, as this scenario may imperil their early plan-making endeavours. In other related circumstances the NDP may be susceptible to legal challenge, and recent case law has sought to clarify the relative weight and scope of NDPs in areas with an emerging Local Plan.¹²



Neighbourhood planning community event - a number of issues have been raised by the experience of the examination stage of neighbourhood planning to date

NDP examiners – their appointment, experience and training

An independent examiner is appointed not by the Planning Inspectorate, as is the case with Local Plans, but by the local planning authority, in agreement with the neighbourhood qualifying body. While the appointment decision rests with them, the examiner should be selected through open competition with a recruitment exercise. The legislation states that the examiner must be 'appropriately qualified' and meet a number of basic requirements; i.e. that the examiner:

- is *independent* of the qualifying body and the authority;
- does not have an *interest in any land* that may be affected by the draft order; and
- has *appropriate qualifications and experience*.

The intention underpinning the appointment process was to open up the 'market' for NDP examinations. Yet this has prompted some to question whether this approach will lead to those perceived as less 'strict' being appointed, i.e. whether the market test will not relate to the examiner's professional judgement or the appropriateness of their decisions, but will be based more on their previous record of passing plans and their average number of

proposed modifications. Those circumstances may lead to a reluctance on the part of examiners to fail plans, as this may directly impact upon their appointment for future examinations.¹³

Ann Skippers noted after the Slaughtam NDP was not passed for referendum that there was a danger of the appointment process becoming akin to a beauty contest: 'there seems to be a tendency to only appoint examiners who have a track record in passing [neighbourhood] plans'.¹⁴ The danger of a conflict of interest is fairly obvious and appears compounded by the pressure to apply only a 'light touch'.¹⁵

In early 2013 a number of professional bodies, led by the Royal Institution of Chartered Surveyors and with encouragement from the Department for Communities and Local Government, established the Neighbourhood Planning Independent Referral Service (NPIERS).¹⁶ Examiners were recruited onto the panel following a formal application process. The initial list of NPIERS examiners was 42 by the spring of 2013. This number was trimmed back and by 2016 the examiners populating the NPIERS list stood at around 30 people, drawn from across the legal profession (planning lawyers), chartered surveyors and others, but with chartered planners forming the dominant group.

Beyond NPIERS, the last 12 months has witnessed a growing number of individuals and organisations offering NDP examinations as part of their portfolio of planning services. Indeed, local authorities are not limited to choosing from the NPIERS panel, and legislation provides for local authorities to enlist the help of a person from another local authority to conduct an examination, or an employee of the Secretary of State may undertake examinations (most likely an appointee from the Planning Inspectorate). Allowing this range from which local authorities and neighbourhoods can select – according to price, as well the necessary credentials and experience – makes the marketisation of plan examinations and of examiners possible. While no empirical evidence has yet been collated to substantiate that this is happening, a brief review of publicly available fee schedules shows a range of fees emerging.

To assist local planning authorities with the examination process NPIERS has produced a 'top tips' leaflet¹⁷ covering the appointment process, how to select a potential examiner, and how to prepare for and handle the examination process. The requirements for an examiner are fairly succinct, as above, and while NPIERS provides a list of professional qualifications that are deemed appropriate, it still leaves open the question of what appropriately qualified really means. Professional

While this broadening of the market should help to ensure that demand is met, it does raise concerns about consistency. For example, unlike the examination of Local Plans there is no standardised training available for NDP examiners.¹⁸ They hail from different organisational and professional backgrounds, and a lack of benchmarking could result in disparate approaches – including varying interpretations of guidance and case law shaped by their own professional and personal experiences. With no one organisation vetting the appointment or training of examiners and little guidance on relevant qualifications and experiences, it would appear that an inconsistency of approach is almost inevitable.

At least one organisation offering NDP examination services highlights its efforts to 'continually' monitor to ensure consistency but makes no mention of training. Another makes an oblique reference to in-house training but does mention the importance of peer support – something that has been reported as largely absent for members of the NPIERS panel. Such peer learning is an important part of training and ongoing review (and has been recognised by the Department for Communities and Local Government as important for qualifying bodies). There is perhaps a paradoxical outcome to the marketisation of examinations: such work may increasingly go to a few 'trusted' examiners with a bank of experience, in effect restricting new entrants to the market.

The approach taken to the NDP examination

The last aspect of examination that we consider here is how examinations have been conducted and how examiners have applied the guidance and steer from government. There is very limited guidance on how the NDP should be examined, and the actual process may be convened as a hearing or as a written representation. The main steer provided by Planning Practice Guidance is the general rule that 'the examination of a draft neighbourhood plan or Order will not include a public hearing. Rather the examiner should reach a view by considering written representations.'¹⁹ The hearing is also estimated to add more time and expense for local authorities and may explain why the hearing option has had quite limited take-up.

Research by Parker and Salter²⁰ illustrated that of the 130 plans that had passed referendum by January 2016, 60 were 'extensively' modified by the examiner; in 63 cases the examiner recommended the *deletion* of some policies (ranging from one policy up to 24), and in five the number of policies *increased*.²¹ There has been a somewhat varied – and some might be tempted to say inconsistent – approach by examiners which broadly fits into two types. In the first the examiner takes the time to propose modifications to policies in order to ensure that they meet the basic conditions. In the second the examiner is more likely to recommend the

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qualifications provide certain regulatory reassurances on wider competency and training, but do all of these professional qualifications confer or guarantee the equivalent experience for competent neighbourhood planning examination?

Anecdotally, those with experience of neighbourhood planning appear to consider development management experience an important prerequisite for an effective examination. The NPIERS approach has been to develop a competency-led recruitment process:

*'The initial assessment and reassessment process is primarily competency based. It requires examiners to demonstrate the skills and abilities needed to perform specific tasks or functions.'*¹⁶

deletion of the policy. This variation may be down to how the individual examiner views their role and the scope that they consider appropriate to allow for modification of policies.

Examiners also vary in the amount of detail they provide in their reports and the clarity on proposed modifications. For example, from a review of NDP examination reports published from January to July 2016, the majority of examiners review all policies and explain whether they consider that each meets the basic conditions – not all do so. Furthermore, some examiners only offer broad suggestions on how a policy could be re-worded, whereas others provide more detailed advice and guidance.

We also know rather little about the response of the local planning authority to the examination process. The local planning authority has to publish a decision statement and explain what action it has taken in response to the examiner's recommendations and the modifications they have made. However, not all appear to do so, or at least it is challenging to find these responses online.

As previously discussed, the majority of local planning authorities do take on board the examiner's recommendations. While this may reflect that they are in full agreement with the examiner, there may be other reasons driving this approach. For example, it may be viewed as a way to reduce the chances of their subsequent decisions being challenged (reflecting their risk-averse nature), or it may reflect a view that they have appointed, and paid for, an independent person to examine the plan and it is unwise to depart from the advice given.

This can lead to concerns over community ownership of the plan, as the 'post-examination' plan may be substantially different from the plan submitted for examination and may not necessarily represent the intention of the community.²² For example, Swanwick Parish Council actively campaigned for a 'no' vote at referendum as they disagreed with the post-examination modifications made to their Plan.²³ The extent of the proposed modifications also raises a broader concern and questions over the point at which the plan becomes a 'new plan' and whether there are implications in terms of impact on EU obligations – for example, is analysis undertaken to assess whether further Strategic Environmental Assessment/Human Rights Act work is required?

Conclusion

The way that the examination element of neighbourhood planning has been set up reflects the intent of the Government to treat NDPs differently and to ensure that communities are not deterred from what has been seen by some as a rather burdensome process, despite efforts to ease that process. The light-touch approach for neighbourhood planning in part reflects the fact that the plans are developed by 'non-specialists' and are

part of a broader hierarchy of planning policy which should provide checks and balances.

Since 2014 the Government has been responding to some of the issues noted above. Tweaks to neighbourhood planning support arrangements and to legislative and regulatory reform include intervention powers in the Housing and Planning Act 2016 (for example enabling the Secretary of State to direct a local planning authority to make arrangements for a referendum and to direct the local planning authority to act in a way not in accordance with the recommendations of the examiner). Furthermore, there are a number of emerging provisions in the Neighbourhood Planning Bill intended to strengthen and expedite the process, including giving NDPs that have passed referendum immediate legal effect.

There is now growing evidence that, in order to pass the ultimate tests presented by the development industry, the way that examinations are undertaken could be falling short. This concern has developed in the light of the rising number of legal challenges and decisions from the Secretary of State. It is discernible that there is a trend from a flexible process to a tighter one influenced by the legal-challenge-led approach of some developers and local planning authorities.

Recent judgements also cast doubt on communities' ability (or propensity) to produce robust policy – despite plans meeting the basic conditions. This begs the question about the role of NDPs. It seems to us that communities need to be aware that the plan needs to stand up to scrutiny from the development industry, and that ultimately this may require a stronger test than that required by the regulatory framework. So perhaps a rethink on the examination tests and hurdles is actually the logical conclusion from all this?

Clearly there are elements regarding NDP examination that still require attention by researchers or policy-makers – as indicated above. For us, the main unresolved questions revolve around the robustness of NDPs to challenge, particularly where there is no extant Local Plan or five-year land supply. How examiners are navigating through this environment and what their experiences have been also merit further exploration. This should be done with a view to improving communications with all concerned, ensuring that expectations are clear and that the outcomes are understood. This may involve stiffening the tests required, so that what is a challenging process has the best chance of being truly worthwhile.

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Notes

- 1 Liz Beth, quoted in L. Edgar: 'Specialists debate current state of neighbourhood planning'. *The Planner*, 17 Nov. 2015. www.theplanner.co.uk/news/specialists-debate-current-state-of-neighbourhood-planning
- 2 A. Bembenek: 'Neighbourhood planning – the one to watch?'. Planning Matters blog, 12 Nov. 2014. <http://nlplanning.com/blog/neighbourhood-planning-the-one-to-watch/>
- 3 A useful online neighbourhood planning bibliography was set up some time ago by Michael Edwards and Matthew Wargent, at <http://bit.ly/1liqals>
- 4 See D. Scharf: 'Neighbourhood Development Plans, the referendum and after'. *Town & Country Planning*, 2015, Vol. 84, Apr., 183-4; A. Skippers: 'Behind the examination'. *The Planner*, 6 Feb. 2015. www.theplanner.co.uk/opinion/behind-the-examination; W. Agbonlahor: 'Are examiners setting a higher bar for neighbourhood plan examinations?'. *Planning*, 2 Sept. 2016. www.planningresource.co.uk/article/1407594/examiners-setting-higher-bar-neighbourhood-plan-examinations; and G. Parker and K. Salter: 'Five years of neighbourhood planning – a review of take-up and distribution', *Town & Country Planning*, 2016, Vol. 85, May, 181-8
- 5 Based on Department for Communities and Local Government data, as of 26 July 2016 – see <http://mycommunity.org.uk/resources/key-neighbourhood-planning-data/>
- 6 See G. Parker and K. Salter: 'Five years of neighbourhood planning – a review of take-up and distribution' (see note 4)
- 7 See, for example, S. Sell: 'Herefordshire Council recommends neighbourhood plan does not progress to examination'. *Planning*, 6 Apr. 2016. www.planningresource.co.uk/article/1390240/herfordshire-council-recommends-neighbourhood-plan-does-not-progress-examination
- 8 See C. Marrs: 'Why a legal challenge led to the quashing of a Buckinghamshire neighbourhood plan's housing policies'. *Planning*, 24 Mar. 2016. www.planningresource.co.uk/article/1388733/why-legal-challenge-led-quashing-buckinghamshire-neighbourhood-plans-housing-policies
- 9 See M. Donnelly: 'High Court quashes neighbourhood plan over 'inadequate' evidence base'. *Planning*, 14 Oct. 2016. www.planningresource.co.uk/article/1412280/high-court-quashes-neighbourhood-plan-inadequate-evidence-base
- 10 Intelligent Plans and Examinations (IPE) Ltd's 'Neighbourhood Plan Examinations' webpage, at www.intelligentplans.co.uk/services/neighbourhood-plan-examinations
- 11 *R (Crownhall Estates Ltd) v Chichester District Council* [2016] EWHC 73 (Admin)
- 12 For example, in the Earls Barton case, which the Secretary of State recovered, the absence of a five-year land supply in the district meant that the NDP policies could not be seen as the last word on the amount and type of development in the locality. In the case of Ringmer, a decision also recovered, this issue centred on how the NDP appeared to squeeze housing numbers downwards – a proposal for a greater number of units on a site than intended by the NDP was allowed as result
- 13 See, for example, A. Skippers: 'Behind the examination' (see note 4)
- 14 Ann Skippers, cited in S. Wicks: 'Selection of neighbourhood plan examiners threatens integrity of process'. *The Planner*, 11 Nov. 2014. www.theplanner.co.uk/news/selection-of-neighbourhood-plan-examiners-threatens-integrity-of-process-says-examiner
- 15 DLA Delivery Ltd had argued that the ability of a local authority to choose its examiner, appointing on a competitive basis, could lead to the appearance of bias, given the strong motivations for Neighbourhood Plan bodies to choose an examiner with a track record in approving plans. DLA Delivery's case was quashed at the High Court and is pending appeal. An early challenge in Tattenhall attempted to raise the question of examiner appointment
- 16 See the Neighbourhood Planning Independent Examiner Referral Service (NPIERS) website, at www.rics.org/uk/join/member-accreditations-list/dispute-resolution-service/drs-products/neighbourhood-planning-independent-examiner-referral-service-npiers/
- 17 *Top Tips for Local Planning Authorities – Independent Examination of a Neighbourhood Plan or a Neighbourhood Development Order (Including a Community Right to Build Order)*. Neighbourhood Planning Independent Referral Service, 2016. www.pas.gov.uk/documents/332612/1099329/Top+Tips+for+Local+Planning+Authorities/50bcba67-5cb3-4a08-81fa-5eb3d39fd424
- 18 For example, NPIERS offers training on an 'ad hoc' basis. Other individual organisations meet their own training needs
- 19 'How is a neighbourhood plan or Order examined?'. Planning Practice Guidance. Paragraph 056. Reference ID: 41-056-20140306. Updated 6 Mar. 2014. http://planningguidance.communities.gov.uk/blog/guidance/neighbourhood-planning/the-independent-examination/#paragraph_056
- 20 See G. Parker and K. Salter: 'Five years of neighbourhood planning – a review of take-up and distribution' (see note 4)
- 21 Parker and Salter – in G. Parker and K. Salter: 'Five years of neighbourhood planning – a review of take-up and distribution' (see note 4) – indicate that the number of policies in an NDP can vary widely, from as few as two up to 114
- 22 See G. Parker, T. Lynn and M. Wargent: 'Sticking to the script? The co-production of Neighbourhood Planning in England'. *Town Planning Review*, 2015, Vol. 86 (5), 519-36. See also the Swanwick NDP outcome revealed in late October 2016 – see 'Residents reject Derbyshire neighbourhood plan'. Webpage. Planning Portal, 27 Oct. 2016. www.planningportal.co.uk/news/article/434/residents_reject_derbyshire_neighbourhood_plan
- 23 J. Gardiner: 'Why a neighbourhood plan became the first to fail at referendum'. *Planning*, 4 Nov. 2016. www.planningresource.co.uk/article/1414259/why-neighbourhood-plan-became-first-fail-referendum