



Neutral Citation Number: [2019] EWCA Civ 1152

Case No: C1/2017/3239

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE KERR
[2017] EWHC 3086 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2019

Before:

Lord Justice Lewison
Lord Justice Lindblom
and
Lady Justice Rose

Between:

R. (on the application of Oyston Estates Ltd.) **Appellant**

- and -

Fylde Borough Council **Respondent**

- and -

St Anne's on the Sea Town Council **Interested**
Party

Ms Estelle Dehon (instructed by **direct access**) for the **Appellant**
Mr Jonathan Easton (instructed by **Fylde Borough Council**) for the **Respondent**
The Interested Party did not appear and was not represented.

Hearing date: 11 April 2019

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

Lord Justice Lindblom:

Introduction

1. How should one understand the statutory provisions – in section 61N of the Town and Country Planning Act 1990 – for proceedings to challenge the steps taken by a local planning authority in making a neighbourhood plan? That is the main question in this appeal.
2. In a claim for judicial review issued on 6 July 2017 the appellant, Oyston Estates Ltd., challenged the decision of the respondent, Fylde Borough Council, on 26 May 2017, to make the St Anne’s on the Sea Neighbourhood Development Plan, which had been prepared by the interested party, St Anne’s on the Sea Town Council.
3. Oyston owns a site at Lytham Moss, which it intends to develop for housing. In the neighbourhood plan process it promoted the site for inclusion within the settlement boundary, but without success. Its claim for judicial review sought an order quashing the borough council’s decision to make the plan. In its acknowledgment of service, dated 3 August 2017, the borough council maintained not only that Oyston’s claim was unarguable but also that it was out of time, because it was, in truth, a challenge to the borough council’s consideration of the examiner’s report on 2 March 2017 – which, under section 61N(2), should have been issued by 13 April 2017. On 4 September 2017 Lang J. accepted that the claim “raised arguable grounds which merit full consideration”, but directed that a preliminary hearing be held to determine whether the claim had been made in time. At the preliminary hearing on 9 November 2017 Kerr J. agreed with Lang J. that “the grounds are arguable on their merits” (paragraph 2 of the judgment), but held that the claim had been brought too late and that permission to apply for judicial review must therefore be refused. He granted permission to appeal. The appeal was fought between Oyston and the borough council. The town council has played no part in the proceedings, either in this court or below.

The issues in the appeal

4. There are three grounds of appeal in Oyston’s appellant’s notice, which raise these three questions: first, whether the judge wrongly construed the provisions of section 61N(1), (2) and (3) of the 1990 Act as “exclusionary”, despite this interpretation rendering subsection (1) “almost irrelevant”; second, whether he misunderstood the purpose of section 61N, wrongly concluding that the “exclusionary” interpretation would promote certainty in the production of neighbourhood plans; and third, whether he was wrong to conclude that a “plain” interpretation of section 61N was contrary to “good administration”. Underlying all three of these questions is a single main issue, which is whether the judge’s interpretation of section 61N was correct, and the claim for judicial review too late.
5. At the hearing of the appeal Oyston’s counsel, Ms Estelle Dehon, sought our permission to argue a fourth ground: that permission to apply for judicial review should in any event have been granted because the claim fell within the court’s jurisdiction under section 61N(1) to entertain proceedings for questioning a decision under section 38A(4) and (6) of the Planning and Compulsory Purchase Act 2004 – which require the local planning authority, when it comes under a duty to make a neighbourhood plan, to consider whether the making of the plan would breach, or be otherwise incompatible with, any EU obligation. We permitted Oyston to make a written application to amend its grounds of appeal within seven days of the hearing,

and gave the borough council seven days to respond. The parties complied with this timetable. I shall therefore consider the application to amend, and the relevant arguments on either side, as a separate issue.

The statutory framework for neighbourhood plans

6. Under section 38(3)(c) of the 2004 Act, a “neighbourhood development plan”, once made, becomes part of the development plan. Section 38(6) provides that “[if] regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise”.
7. The provisions for the preparation of a “neighbourhood development plan” are in sections 38A, 38B and 38C (as inserted by the Localism Act 2011). Section 38A(1) states that “[any] qualifying body [defined in subsection (12) as including “a parish council”] is entitled to initiate a process for the purpose of requiring a local planning authority in England to make a neighbourhood development plan”. Section 38A(2) provides that “[a] “neighbourhood development plan” is a plan which sets out policies ... in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan”. Under subsection (3), Schedule 4B to the 1990 Act, which contains provisions relating to the process for the making of “neighbourhood development orders”, including provision for independent examination of orders proposed by “qualifying bodies” – such as a parish council – and for the holding of referendums on such orders, “is to apply in relation to neighbourhood development plans ...”. Subsection (4) provides:

- “(4) A local planning authority to whom a proposal for the making of a neighbourhood development plan has been made –
- (a) must make [that plan] if in each applicable referendum under [Schedule 4B to the 1990 Act] more than half of those voting have voted in favour of the plan, and
 - (b) if paragraph (a) applies, must make the plan as soon as reasonably practical after the referendum is held ...”.

However, subsection (6) states:

- “(6) The authority are not to be subject to the duty under subsection (4)(a) if they consider that the making of the plan would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights (within the meaning of the Human Rights Act 1998).”

Section 38A(9) requires the local planning authority to publish both “(a) their decision to act under subsection (4) or (6)” and “(b) their reasons for making that decision”, and also “(c) such other matters relating to that decision as may be prescribed”.

8. Section 38C(2) provides that certain provisions of the 1990 Act “are to apply in relation to neighbourhood development plans”. These include “(d) section 61N (legal challenges)”. Section 38C(4) provides that section 61N of the 1990 Act “is to apply in accordance with subsection (2) of this section as if the reference to section 61E(4) or (8) of that Act were a

reference to section 38A(4) or (6) of this Act”. The provisions of section 61E(4) and (8) are in similar terms to those of section 38A(4) and (6).

9. Under paragraph 8 of Schedule 4B, the examiner must consider whether the draft neighbourhood development order meets the “basic conditions” set out in paragraph 8(2), including “(a) [that] having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order”; “(d) [that] the making of the order contributes to the achievement of sustainable development”; “(e) [that] the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority ...”; and “(f) [that] the making of the order does not breach, and is otherwise compatible with, EU obligations”.
10. Paragraph 10(1) requires the examiner to “make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations)”. Under paragraph 10(2) the report must recommend “(a) that the draft order is submitted to a referendum”, or “(b) that modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum”, or “(c) that the proposal for the order is refused”. Paragraph 10(3) provides that the only modifications the examiner may recommend include those he considers need to be made either “(a) ... to secure that the draft order meets the basic conditions mentioned in paragraph 8(2)” or “(b) ... to secure that the draft order is compatible with the Convention rights”. Paragraph 10(4)(a) provides that his report may not recommend that an order (with or without modifications) is submitted to a referendum if he considers that it does not “(a) meet the basic conditions ...”.
11. If the examiner has made a report under paragraph 10, paragraph 12(2) requires the local planning authority “(a) [to] consider each of the recommendations ...”, and “(b) [to] decide what action to take in response to each recommendation”. Under paragraph 12(4), if the authority is satisfied that the draft order “(a) ... meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention rights, and complies with ... sections 61E(2), 61J and 61L”, or “(b) ... would meet those conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner)”, a referendum must be held on the making of the neighbourhood development order. Paragraph 12(11) requires it to “publish in such manner as may be prescribed ... (a) the decisions [it makes] under this paragraph [and] (b) [its] reasons for making those decisions ...”. Paragraph 13(1) provides that if the authority proposes to make a decision differing from that recommended by the examiner and the reason for the difference is “... as a result of new evidence or a new fact or a different view taken by the authority as to a particular fact”, the authority must notify prescribed persons of its proposed decision, and the reason for it, and invite representations. Paragraph 13B provides for the intervention of the Secretary of State in the case of various specified defaults on the part of the authority. Paragraphs 14 and 15 set out provisions for the holding of referendums.
12. Regulation 17A(4) of the Neighbourhood Planning (General) Regulations 2012 (S.I. 2012/637) requires the local planning authority, on or after the prescribed date under paragraph (5), to “decide what action to take in response to each recommendation made by [the examiner’s report]”. Regulation 18(2) requires the authority, “[as] soon as possible” after making a decision on the examiner’s report, to publish that decision and the reasons for it – “the decision statement” – together with the examiner’s report. Regulation 19 requires the authority, “[as] soon as possible” after deciding to make a neighbourhood plan, to publish a

statement setting out that decision and the reasons for making it – again “the decision statement”.

Section 61N

13. Section 61N of the 1990 Act provides for “Legal challenges in relation to neighbourhood development orders”:

“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.”

The neighbourhood plan process

14. Oyston’s site is undeveloped land on the edge of St Anne’s. To its west is a site known as Queensway, which has planning permission for a development of 1,150 dwellings. Together with the Queensway site and other land, it has been included in a Biological Heritage Site. Land to the north and east has been designated a Farmland Conservation Area and will be managed for over-wintering birds, including the Pink-Footed Goose.

15. In July 2013 the borough council designated the St Anne’s on the Sea Neighbourhood Parish Area for the preparation of a neighbourhood plan. Public consultation took place in April and May 2014, and in June and July 2015. The submission draft of the neighbourhood plan was consulted upon in February and March 2016. The examiner, Mr Slater, was appointed in March 2016. The examination hearing took place on 7 June 2016, and the examiner duly submitted a report, dated 10 August 2016.

16. In his conclusions on “Policy GP1: Settlement Boundary” the examiner said he was aware of the “ecological issues affecting Lytham Moss, as the land is used for grazing of overwintering birds ...” and “identified as a Biological Heritage Site as well as being part of a wider network

of linked sites of ecological importance”. But in his view this was “not a reason to exclude it from changes to the settlement boundary”. The “ecological impact on the site and its protected species” would have to be considered “at any application stage”. Given the borough council’s inability to identify a five-year housing supply, “the incorporation [of] the land identified as Countryside outside the Green Belt ... into the settlement boundary would offer the town the flexibility to be able to meet its housing needs over the next 15 years, which are unlikely to diminish, but within the defensible line of the town’s Green Belt”. Therefore, “the settlement boundary should be amended by the removal of the designation of land as “open countryside outside Green Belt” on the Proposals Map”, and should follow the boundary of the Green Belt. That is what the examiner recommended. In the “Summary” at the end of his report he said that “[as] originally submitted the plan ... would not be providing for sustainable development for the whole plan period”, but that “if amended by [his] recommendations, [it] would ... meet all the statutory requirements, including the basic conditions ...”. And his final recommendation was that the plan, “as modified by [his] recommendations, should now proceed to referendum”.

17. In October 2016, after the borough council had further consulted Natural England, its ecological consultants, Arcadis Consulting (UK) Ltd., produced an addendum to the screening opinion under the Conservation of Habitats and Species Regulations 2010 (“the Habitats Regulations”), which considered the implications of the change to the settlement boundary for the species in the Ribble and Alt Estuary Special Protection Area and Ramsar site. Arcadis concluded that it was “possible that birds could be displaced to the new Farmland Conservation Areas ... as Queensway is developed” (paragraph 4.1.2); that “whilst likely significant effects cannot be ruled out”, there was “little value in subjecting [the neighbourhood plan] to Appropriate Assessment at this stage”; that “text within the Plan should make it clear that development on this site would only be consented subject to a) monitoring following the Queensway Development which takes into consideration the potential impact of the Queensway Development on the dynamics of the over-wintering bird populations within the wider area and b) project-level HRA being undertaken” (paragraph 4.1.3); and therefore that “if the Plan is amended to include this additional text, ... further HRA at the plan level can be screened out” (paragraph 4.1.4).
18. In a letter dated 30 November 2016 Natural England opposed that approach. They said it was “not acceptable to refer the issue to the project stage as uncertainty has to [be] resolved and in any case proposals leading to a likely significant effect (or where there is uncertainty) cannot progress in a Neighbourhood Plan”. They acknowledged, however, that the site had been considered in the Habitats Regulations assessment for the Queensway development, and it had been concluded that “the mitigation was sufficient to offset this field ...”. They suggested that this be noted in the screening opinion addendum – “to explain that this area has been assessed as part of the Queensway development”.
19. The borough council considered its decision statement at a meeting on 2 March 2017. The officers’ report had been published, and the meeting was open to the public. The report and the borough council’s deliberations on it constituted the consideration of the recommendations in the examiner’s report under paragraph 12 of Schedule 4B to the 1990 Act.
20. The decision statement referred to the screening opinion addendum, and the consultation of Natural England. It said Natural England had “considered that it was unacceptable to refer to any issues and uncertainty at planning application stage and that as the land was considered and calculated into the mitigation calculations for the Queensway residential development site

then any proposal to extend the settlement boundary would need to be Appropriately Assessed at plan stage”; and “in any case as the HRA concludes proposals would lead to a likely effect (or where there is uncertainty) the Plan could not progress in its modified form”. It continued:

“In his report, the Examiner considers that this assessment could be carried out prior to the determination of any future planning application. However, prior to proceeding to Referendum, the LPA must be satisfied that the Plan itself meets the Basic Conditions tests set out in the Regulations. Until the potential implications of including this additional land within the settlement boundary are known, it would not be possible to confirm whether or not there would be any adverse impact on the SPA and so proceeding to Referendum without this information could place the Plan at risk of a potential legal challenge.”

21. The officers’ view, with the benefit of counsel’s advice, was that “[the neighbourhood plan] (with the inclusion of this one modification) did not satisfy the “basic conditions” tests ...”, and that the borough council was therefore “completely within [its] rights not to accept this particular recommendation”. Under the heading “Decision and Reasons”, the decision statement recorded the view of officers that “accepting the [examiner’s] recommendations in full and extending the St Anne’s on [the] Sea settlement boundary to include the land in question would mean that the Plan would not meet the statutory Basic Conditions”. In a table setting out the examiner’s recommended modifications and the borough council’s intended action on each of those modifications, the reason it gave for rejecting the change to the settlement boundary under Policy GP1 was that it “[disagreed] with this modification as [it did] not consider it meets with the basic conditions in that it breaches EU obligations”. Following the officers’ advice, the borough council resolved to publish the decision statement, and that the neighbourhood plan should proceed to a referendum.
22. On 13 March 2017, Oyston made representations to the examination of the draft Fylde Local Plan. In responding to the inspector’s question “Has the requirement for appropriate assessment under [the Habitats Regulations] been met? Is it clear how the HRA screening report has influenced the Plan?”, it referred to the recommendation made by the examiner in the neighbourhood plan process that its site should be included within the settlement boundary (paragraph 1.30), and then said this (in paragraph 1.31):

“1.31 Subsequent correspondence with Fylde Council indicated that they would be updating the Appropriate Assessment in order to review this change. They have failed to do so and have now issued the Decision Notice on the Plan with a view to Referendum in May. This makes the Neighbourhood Plan potentially open to challenge.”
23. The neighbourhood plan went to referendum on 4 May 2017. 90% of those who voted were in favour of the plan being made. The decision statement published by the borough council when it made the plan on 26 May 2017 said the plan “meets the basic conditions and its promotion process is compliant with legal and procedural requirements”.

Oyston’s claim for judicial review

24. Oyston sent a pre-action protocol letter to the borough council on 5 July 2017. The claim for judicial review was issued the next day. This would have been in time, by one day, for a claim under section 61N(1), but it was more than 11 weeks late for a claim under section 61N(2).

25. The claim challenged the borough council's decision to make the neighbourhood plan, on two grounds: first, it had "failed to act lawfully in refusing to follow the independent examiner's recommendation as to modification of the text of the Neighbourhood Plan, and, in particular, failed to comply with the relevant requirements of paragraph 8(2) of Schedule 4B to [the 1990 Act]"; and second, it had "acted [unreasonably] in determining that the modified plan could not progress without an Appropriate Assessment at plan stage, but then failing to carry out that Appropriate Assessment and making the plan without the modification, despite the [examiner's] finding that the unmodified plan would not meet the basic conditions".

The judgment of Kerr J.

26. Before the judge it was accepted that the thrust of Oyston's challenge went to the decision taken by the borough council on 2 March 2017. But it was submitted that this was not fatal to the claim being entertained by the court. Oyston had sought to rely on the decision of Patterson J. in *R. (on the application of Stonegate Homes Ltd.) v Horsham District Council* [2017] Env. L.R. 8, but the judge found no help there – because the timing of the claim in that case had not been contentious (paragraph 28 of Kerr J.'s judgment). In his view the purpose of the time limits in section 61N was "to promote early certainty and avoid disruption of development projects and plans and prejudice to good administration" (paragraph 31). The rights of challenge are, he said, "compartmentalised and segmented" into several stages (paragraphs 40 to 42), the timing provisions "meticulous and precise" (paragraph 43). This precision "should not be undermined by a lax approach when interpreting and applying them" (paragraph 44). The "parties involved in this important process of localised and democratic decision making are entitled to know, once the six weeks is up, that the stage in the process that could within that six week period have been challenged, is no longer susceptible to challenge" (paragraph 45). A challenge to the making of an order after a referendum should not be entertained by the court if it was, in truth, an attack on the local planning authority's consideration of the examiner's report and its decision to hold the referendum. Legal flaws in the report might be relied on to challenge a decision to hold a referendum under section 61N(3) (paragraphs 46 to 49). Though framed as a challenge to the making of the neighbourhood plan on 26 May 2017, Oyston's claim went to the legality of the borough council's decision in March 2017. It was not in dispute that the six-week period for a challenge to that decision began to run on 3 March 2017, ending in mid-April 2017. But the claim had not been brought until 5 July 2017 (paragraphs 51 and 52).

27. The judge rejected the submission that the language of section 61N(2) and (3) is "permissive" of "a challenge to a decision taken at an earlier stage of the process than the final outcome, without falling foul of a prematurity argument, leaving [a claimant] free, if it prefers, to await the referendum and if the result is positive, to challenge the resultant order". That interpretation offended "good administration" in at least three ways (paragraph 53). First, it was inconsistent with "the carefully calibrated [decision-making] process and the step by step rights of challenge built into the provisions". Second, despite those arrangements, it would allow a claimant to choose when to bring a challenge. And third, it would encourage a claimant to await the outcome of a referendum that was, on his case, a "nullity". This, said the judge, would "promote uncertainty ..." (paragraph 54).

The proper interpretation of section 61N of the 1990 Act

28. Ms Dehon’s submissions on the three grounds of appeal in the appellant’s notice largely replicated her argument in the court below. She contended for a “permissive” interpretation of the provisions of section 61N(1), (2) and (3), which would enable a claimant to choose at which stage of the process to bring a challenge, but would require him, having opted to challenge at a particular stage, to make his challenge by a claim for judicial review within the relevant six-week period.
29. I cannot accept that argument. In my opinion the judge’s understanding of the provisions was essentially correct. And that conclusion, if it is right, must be fatal to all three of the originally pleaded grounds of appeal.
30. The basic question here, as Mr Jonathan Easton submitted for the borough council, is one of statutory interpretation. We must establish what the language of section 61N means, finding Parliament’s intention in the words of the provisions themselves. I see no reason to depart here from a conventional approach to that exercise: a straightforward literal construction of the statutory words, in their statutory context. Unless there is some compelling reason to conclude otherwise, one should take it that the words used by Parliament mean what they say (see the speech of Lord Reid in *Pinner v Everett* [1969] 1 W.L.R. 1266, at p.1273).
31. From the language Parliament has used in section 61N five points seem clear. First, the section is a bespoke and complete scheme for legal challenges to specified decisions and actions taken in the course of a neighbourhood plan process: in subsection (2), a local planning authority’s “consideration” of an examiner’s recommendations under paragraph 12 of Schedule 4B to the 1990 Act or the Secretary of State’s intervention under paragraph 13B; in subsection (3), “anything relating to a referendum” under paragraph 14 or paragraph 15; and in subsection (1), the local planning authority’s “decision” to act under section 61E(4) or (8) of the 1990 Act, or section 38A(4) or (6) of the 2004 Act. Section 61N is differently drafted from other statutory provisions for challenging the validity of development plans, such as section 287 of the 1990 Act (“Proceedings for questioning validity of development plans and certain schemes and orders”) and section 113 of the 2004 Act (“Validity of strategies, plans and documents”) – which does not apply to neighbourhood plans (see the judgment of Richards L.J. in *R. (on the application of Larkfleet Homes Ltd.) v Rutland County Council* [2015] P.T.S.R. 1369, at paragraphs 9 to 23; and the note, at paragraph 2-4598.3 in the *Encyclopedia of Planning Law and Practice*). It is self-contained, and comprehensive. It relates to, and relies upon, no other plan process. It leaves no gaps to be filled by claims for judicial review outside the statutory scheme itself, no alternative or additional statutory procedure, and no alternative time limits (see the judgment of Mr John Howell Q.C., sitting as a deputy judge of the High Court, in *R. (on the application of Hoare) v Vale of White Horse District Council* [2018] P.T.S.R. 210, at paragraphs 183 to 185).
32. Secondly, section 61N does not provide for a single stage of the neighbourhood plan process to be the point at which it is possible to bring a claim before the court. It does not rule out as premature any challenge started before the process has fully run its course, when the plan is finally made. It does not require, or indeed permit, every claim to await that moment (cf. the judgment of Simon Brown L.J., as he then was, in *R. v Cornwall County Council, ex p. Huntingdon* [1994] 1 All E.R. 694, at pp.700 to 701, and the judgment of Cranston J. in *R. (on the application of Hillingdon London Borough Council) v Secretary of State for Transport* [2017] 1 W.L.R. 2166, at paragraph 44). It distinguishes three sequential stages in the plan

process. The three stages, the corresponding provisions for challenge, and the associated time limits are precisely identified.

33. Thirdly, the three subsections in section 61N are not expressed in merely permissive terms, but both permissively and restrictively. All three are formulated in the same way. Each is permissive in presenting the opportunity for a legal challenge, which the court “may entertain”. Each, however, stipulates two conditions for the bringing of a claim, both of which must be satisfied if the court is to entertain the challenge: the requirement that the proceedings are brought by a claim for judicial review, and the further requirement that the claim form is filed before the end of a finite six-week period, which starts and ends on particular dates, and cannot be varied. The court has no discretion to extend time, as it normally can under CPR r.3.1(2)(a) when a claim for judicial review is made under CPR Part 54. The time limits here are statutorily fixed.
34. Fourthly, there is another feature of these provisions that limits the opportunity for challenge. They do not say that a court may entertain proceedings for questioning the decision or action in question merely “if” the specified conditions on the mode of challenge and its timing are complied with. They state that this may be done “only if” the claim is brought at the specified stage of the process, and within the relevant time limit. It cannot also be brought at some other stage. Section 61N does not provide an opportunity for a challenge to be brought by a claim for judicial review at the point when the claimant opts to issue proceedings, selecting which time limit is to apply. It provides that opportunity, but only within six weeks from the specified date. It does not provide a second or third opportunity after that – whether within the next six-week timeframe, or the next but one, or outside any at all. It permits the challenges for which it does provide, but not those for which it does not.
35. And fifthly, to construe section 61N as if claimants were free to choose when to bring a challenge to the decision or action to which each subsection relates, whether within the relevant six-week period or outside it, would be to undo the express time limits for the bringing of claims. It would upset the carefully constructed arrangements for challenges to be brought only within a specific time from a specific decision or action. To read this qualification into section 61N would be to add words Parliament did not insert, and negate the effect of the words it did. The time limits in subsections (2) and (3) would be otiose if a challenge of any kind could be begun within six weeks of the plan being made. There would have been no point in providing those time limits if the only one that was effective was in subsection (1).
36. Those five points support the judge’s interpretation of section 61N, and are enough, I think, to dispose of Oyston’s first ground of appeal.
37. They also, in my view, reflect the basic intent of the section. The differential time limits, each relating to a particular stage of the plan process, are plainly intended to achieve two things: first, to enable claims to be brought straight away when the grievance in question arises; and second, to prevent them being put off to a later stage of the process, or its end – thus avoiding the cost, disruption and uncertainty of challenges that could and should have been made sooner.
38. Both purposes are important. As this case shows, a neighbourhood plan process can take several years to arrive at its conclusion, and will involve a substantial investment of time and resources for the local planning authority, the town or parish council preparing the plan, the

local community, and those who take part in it – landowners, developers and objectors. In this case the process began in April 2013 and ended when the plan was made more than four years later. The concluding steps in the process, from the examination hearing in early June 2016 to the making of the plan in late May 2017 took almost a year.

39. The provisions of section 61N are designed to avoid a waste of time and resources in the final stages of the process, when the draft neighbourhood plan is sufficiently mature and the local planning authority has made a decision or taken action that has to be published. 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. In the same way, subsection (3) enables, and also requires, a party aggrieved by “anything relating to a referendum” to bring its case before the court within six weeks of the result being declared. In both cases the opportunity is given, and the obligation imposed, to begin a challenge at the appropriate stage in the process: under subsection (2), before the referendum is held; under subsection (3), before the plan is actually made. Subsections (2) and (3) are thus conducive to legal certainty in the neighbourhood plan process, as well as to efficiency and fairness. They make it possible for legal issues arising towards the end of the plan process to be raised and resolved before the making of the plan. As the judge said, this is consistent with good administration. The interpretation of section 61N urged on us by Ms Dehon would work against good administration and legal certainty – giving claimants licence to put off the time when the court can decide legal issues within the reach of subsections (2) and (3). The importance of a regime for challenging planning decisions being “certain and predictable” was emphasized by the House of Lords in *R. (on the application of Burkett) v Hammersmith London Borough Council* [2002] UKHL 23, though in a quite different context from the statutory regime with which we are concerned here (see the familiar passage at paragraphs 45 and 46 in the speech of Lord Steyn).
40. This case illustrates the possible consequences of construing section 61N as Ms Dehon submitted. It seems to have been conceded before Kerr J. that the grounds of Oyston’s claim crystallized on 2 March 2017, when the borough council decided that the neighbourhood plan should proceed to a referendum – and not only when the plan was eventually made on 26 May 2017. Even though Oyston was obviously aggrieved by the decision taken on 2 March 2017, and on Ms Dehon’s suggested interpretation of section 61N could have issued a claim for judicial review under section 61N(2), it did not launch its challenge until after the referendum had been held and the neighbourhood plan made. Arguments that could have been ventilated before the court, and dealt with, were held back until the plan had become part of the development plan under section 38(3) of the 2004 Act, with a statutory presumption in its favour in planning decision-making under section 38(6) (see the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at pp.1450, and 1458 to 1460).
41. I cannot accept Ms Dehon’s submission that, on the judge’s interpretation, section 61N is likely to generate unnecessary claims for judicial review in cases where the claimant ought instead to take part in the final stages of the plan process before embarking on legal proceedings. On the contrary, the judge’s interpretation accords with the aim – in the interests of everyone involved – that proceedings of the kind provided for in section 61N(2) and (3) do not have to wait for the end of the process, but can and will be begun before the plan is made. Understood in this way, section 61N does not encourage precipitate claims for judicial review or discourage participation in the plan process. It has the merit of protecting the process

against tardy challenges – ensuring that the lawfulness of the plan can be effectively tested at the appropriate time.

42. Subsection (1) provides a route to challenge the final step in the process – the local planning authority’s decision to make the plan after it has passed through the referendum stage. Ms Dehon argued that the judge’s interpretation of section 61N must be wrong because it leaves subsection (1) “almost irrelevant”. I disagree, for three reasons.
43. First, the argument is misplaced. The fact that a statutory provision, construed in a particular way, has only limited scope does not necessarily mean that the construction is wrong. Secondly, the ambit of subsection (1) would of course have been greater if section 61N had been drafted to permit any challenge to a neighbourhood plan to be begun only at the end of the process, once the plan had been made, rather than providing for claims to be brought at the two stages before that. However, the section was not drafted in that way. If subsection (1) is relatively limited in scope, this is merely the consequence of subsections (2) and (3) providing as they do for challenges to prior steps in the process, so that any unlawfulness in those steps can be tackled before it infects the neighbourhood plan itself, and thus the development plan as a whole. Section 61N acts against that mischief. But thirdly, subsection (1) is far from being redundant. It permits challenges to the local planning authority’s decision to make a neighbourhood plan that are not precluded by subsections (2) and (3). There will be situations where such a challenge is appropriate. Mr Easton pointed, for example, to a claim based on alleged unlawfulness in the authority’s decision that the making of the plan would not “breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights” (section 61E(8) of the 1990 Act and section 38A(6) of the 2004 Act). The authority might then depart from the view it had taken on the plan’s compatibility with a particular EU obligation when considering the examiner’s report; or there might have been some relevant change in circumstances, or some new information might come to hand – for example, affecting an assessment under the Habitats Regulations; or there might have been some relevant change in EU law.
44. As Ms Dehon submitted, there will be cases where a claim is issued under section 61N(2) or (3) and, in spite of that, the local planning authority decides to go ahead with the remaining steps in the process, and even to make the plan, while the claim is still before the court. Section 61N does not prevent an authority from doing that.
45. In such a case the authority may take the view that the challenge is unlikely to succeed, and that the balance of risk falls in favour of moving on with the process before the claim is heard. In *R. (on the application of Crownhall Estates Ltd.) v Chichester District Council* [2016] EWHC 73 (Admin), for example, a referendum was held after permission to apply for judicial review had been granted. It is open to a claimant to seek interim relief – such as an order restraining the authority from taking further steps in the process before the court’s decision is given – or to apply for permission to amend its claim, or, if necessary, to bring a further claim before the court (see the relevant analysis in the judgment in *Hoare*, at paragraphs 181 to 189). In *R. (on the application of Gladman Developments Ltd.) v Aylesbury District Council and Winslow Town Council* [2014] EWHC 4323 (Admin) the claimant applied for an interim injunction to prevent a referendum being held, which the court refused. But there will be cases where an authority facing a claim under section 61N(2) decides not to proceed to a referendum, or further than that, until the claim has been heard – so the neighbourhood plan is not made while doubts over its lawfulness remain. In such a case the authority may be prepared to give an undertaking not to make the plan until the proceedings have been

concluded – as, for example, in *R. (on the application of Bewley Homes Plc) v Waverley Borough Council* [2017] EWHC 1776 (Admin). If in the end the challenge succeeds, the court will be able to grant an appropriate remedy, drawn from the range of relief available to it in a claim for judicial review, or, under section 31(2A) of the Senior Courts Act 1981, it may conclude that it must withhold relief because “the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred” (see the judgment of Holgate J. in *R. (on the application of Maynard v Chiltern District Council* [2015] EWHC 3817 (Admin), and the discussion on relief at paragraphs 72 to 134; and the judgment in *Hoare*, at paragraphs 177 to 190).

46. All of this is inherent in a statutory regime that provides for proceedings to be pursued before a neighbourhood plan is made. It would be so whichever interpretation of section 61N is correct. Even if the interpretation contended for by Ms Dehon were right, a local planning authority would still be able to go on with a neighbourhood plan process after a claimant had chosen to make a claim under section 61N(2) or (3).
47. It follows, in my view, that the second and third grounds of appeal must also fail. Not only was the judge’s interpretation of section 61N correct; he also grasped the statutory purpose behind it. Nor was his interpretation hostile to good administration.

The fourth ground of appeal

48. Oyston’s fourth ground of appeal, which emerged only at the hearing of the appeal, was presented to us in the alternative to the original three. It does not depend on the interpretation of section 61N rejected by the judge. It contends that the High Court has jurisdiction to hear Oyston’s claim “because that section allows a court to entertain proceedings for questioning a decision under section 38A(4) and (6) of the 2004 Act, which require the local planning authority to consider afresh, at the time it is under the duty to make a neighbourhood plan, whether the making of the plan would breach, or would otherwise be incompatible with, any EU obligation”.
49. Oyston applies under CPR r.52.17 for permission to amend its notice of appeal to include this further ground. Ms Dehon submitted that the new ground is “a pure point of law”, which this court can admit without causing any real difficulty to the borough council (see the judgment of this court in *Pittalis v Grant* [1989] Q.B. 605, at p.611C-F). The application is opposed by the borough council. Mr Easton pointed to the presumption against the introduction, without warning, of new grounds of appeal that should have been identified much earlier (see the judgment of May L.J. in *Jones v MBNA International Bank* [2000] EWCA Civ 514, at paragraph 52).
50. Ms Dehon’s argument is essentially this. Section 38A(6) of the 2004 Act requires the local planning authority, once the neighbourhood plan has successfully passed the referendum stage, to consider whether or not the making of the plan would breach or be incompatible with any EU obligations or Convention rights and hence whether or not it has come under the duty in section 38A(4) to make the plan. This requirement is additional to its consideration of a similar question, earlier in the neighbourhood plan process, under paragraph 12(4) of Schedule 4B to the 1990 Act. The authority must undertake a “different and fresh consideration” of the point at the final stage of the process. If it does not do that, the plan, once made, will be vulnerable to a claim under section 61N(1) – even where a challenge could have been brought for a

previous error of the same kind under section 61N(2). The scope for a claim under section 61N(1) is not confined to cases where a change in circumstances has occurred after the referendum has been held, or something previously unknown has come to light, or the authority has changed its mind. Ms Dehon submitted that both grounds in Oyston's claim for judicial review fall within subsection (1). In effect, she argued, they both allege a failure by the borough council to do what was required at the final stage of the process: the first, that it left uncorrected its earlier error in misunderstanding EU obligations bearing on appropriate assessment under Directive 92/43/EEC ("the Habitats Directive") before deciding to "progress and make" the plan without the modification relating to the settlement boundary recommended by the examiner (paragraphs 35 to 42 of the statement of facts and grounds); the second, that it acted unreasonably in not carrying out an appropriate assessment of a modified plan and "making the plan without the modification", despite the examiner's conclusion that the "unmodified" plan would not meet the basic conditions (paragraphs 43 to 45).

51. The counter argument is that the question of the plan's compliance with EU obligations must be fully addressed by the examiner before he can recommend that it proceeds to a referendum (paragraphs 8(2)(f) and 10(4)(a) of Schedule 4B to the 1990 Act). That is the first time the question must be formally considered. The second is when the local planning authority has to grapple with it in considering the examiner's report (paragraph 12(4) of Schedule 4B). At that stage, if there are grounds for challenge that go to the plan's compliance with EU obligations, a claim for judicial review must be made under section 61N(2). Once the plan has passed the referendum, the authority is compelled to make it (under section 38A(4)(a)) unless to do so would be contrary to any EU obligation or any of the Convention rights (under section 38A(6)). There is, submitted Mr Easton, no requirement at that stage to revisit "all potential questions relating to EU law/Convention rights arising at any stage" of the plan process. Such a requirement would be inconsistent with a statutory framework in which the local planning authority's duties are laid down, stage by stage, with the corresponding "stepped" opportunities for challenge in section 61N.
52. That this new ground of appeal has come before the court so late is unfortunate. It could have been pleaded in the appellant's notice, and there is no good reason why it was not. It is, however, a matter of law – a further question of statutory construction, of the same provisions as are contentious in the other three grounds. It has not been accompanied by any application to amend the grounds of the claim itself. But it might be decisive in Oyston's application for permission to apply for judicial review. It is not a question on which there is any previous authority. It has been argued fully, though concisely, in further written submissions on either side, within the time we allowed. Beyond the obvious disadvantage of delay, it has, I think, led to no real detriment or prejudice to the borough council, which has now had a fair opportunity to meet it and can be adequately protected in costs. In my view, therefore, we should permit the necessary amendment to the appellant's notice.
53. If that is our decision, I would dismiss the appeal on the new ground. I acknowledge that Ms Dehon's argument here does not require us to accept her submissions on the first three grounds. It does not deny the concept of discrete provisions for challenge at each of the three stages of the plan process identified in section 61N, or the requirement to bring a claim at the appropriate stage and only then. But in my view it is wrong.
54. It is clear that the local planning authority is not relieved of an active role in the process once the neighbourhood plan has successfully passed the referendum stage. The duty at that stage to "make" the plan, under section 38A(4)(a), is not unqualified. Parliament has deliberately

provided for a particular exception to that duty – under section 38A(6). This is a distinct but integral part of the statutory framework.

55. The language of section 38A(6) is broad. The provision extends to “any” EU obligation and to “any” Convention right. It is not confined to, nor does it exclude, EU obligations and Convention rights previously considered in the course of the process. It implies that the local planning authority must have in mind all relevant obligations and rights, and must be alert to any conflict of the neighbourhood plan with them, regardless of when that conflict arose (see, for example, the judgment of Patterson J. in *Stonegate Homes Ltd.*, in particular at paragraphs 53, 70 to 78, 83, 90, 100, and 107 to 110). There is no qualification stating that the breach must have arisen after the examiner has submitted his report, or after the authority’s consideration of the report, or after the referendum. But the approach must be realistic and not unduly elaborate, given that this is the very last stage of the plan process and the third occasion when compliance is formally considered. How the authority goes about ensuring that the neighbourhood plan, if now made, will not be invalidated by any clash between making the plan and EU obligations and Convention rights will depend on the circumstances – most obviously, the content of the plan itself, and the EU obligations and Convention rights in play.
56. The outcome of the local planning authority’s consideration of that particular question at the final stage of the process may expose the plan it makes to a challenge under section 61N(1). If there would be a breach of any EU obligation or Convention right in the making of the neighbourhood plan it would otherwise be under a statutory duty to make, the authority must remove that breach. Whether that specific breach is the result of an oversight or legal error before the referendum or after it, a failure to rectify it before the plan is made will afford a ground for challenge under section 61(N)(1). If the claimant’s true grievance is that section 38A(6) has been offended – because “the making of the plan would breach, or would otherwise be incompatible with, any EU obligation ...” – the claim will be properly brought under section 61N(1).
57. In this case the grounds of the claim for judicial review do not fall within the scope for challenge under section 61N(1). They do not, in truth, allege an error by the borough council under section 38A(6) of the 2004 Act – an error in its performance of the task it had to perform at this, the ultimate stage of the neighbourhood plan process, which was to consider whether “the making of the plan” it would now be under a duty to make “would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights ...”. The challenge here is not of that kind. The contentions made in both grounds of Oyston’s claim for judicial review go to the question of whether, at an earlier stage of the process, when deciding under paragraph 12 of Schedule 4B to the 1990 Act not to accept the examiner’s recommended modification involving a change to the settlement boundary, the borough council had failed to act lawfully, on a correct understanding of EU obligations relating to appropriate assessment under the Habitats Directive as they related to that modification.
58. Oyston’s argument in the first ground of the claim is that Arcadis’ conclusion “that the Examiner’s proposed modification would not breach EU law if the Neighbourhood Plan were amended to require an Appropriate Assessment to be carried out when any application for planning permission were made for development of the Inclusion Land” was “in line with EU law ...” (paragraph 37 of the statement of facts and grounds); that if the borough council was “to reject the conclusion of the Appropriate Assessment ... , [it] was required to adopt a lawful and correct understanding of EU law, the requirements of an Appropriate Assessment and the requirements of the basic conditions in paragraph 8 [of Schedule 4B]”; that “[in] the light of

[the decision in *Abbotskerswell Parish Council v Teignbridge District Council* [2014] EWHC 4166 (Admin)], and given the accepted lack of compliance [of] the unmodified plan with [the] basic conditions 8(2)(a) and 8(2)(c) [sic], [its] decision to progress and make the plan without the modification was not lawful” (paragraph 38); that its attempt “to justify its position that the modification would breach the basic condition ... in paragraph 8(2)(f) by reference to Natural England’s consultation response” was mistaken because “Natural England’s response was itself erroneous” (paragraphs 39 and 40); and that, instead of taking the steps recommended by Natural England, it “adopted a course which, in light of the uncontroverted findings of the Examiner, breached basic conditions 8(2)(a) and 8(2)(c) [sic]” (paragraph 41).

59. The argument in the second ground is that “[instead] of ... conducting a further Appropriate Assessment, in light of Natural England’s [consultation] response, the [borough council] chose to progress and make the unmodified plan”, which “was not a path rationally open to [it], in light of the Examiner’s uncontroverted finding, apparently accepted by the [borough council], and the unmodified plan breached basic conditions 8(2)(a) and 8(2)(c) [sic]” (paragraph 44).
60. These complaints are squarely within the scope for challenge under section 61N(2), and outside that for which section 61N(1) provides. In substance, they do not assert that in making the neighbourhood plan after it had gained the requisite level of support in the referendum, the borough council acted on a misunderstanding or misapplication of the provisions of section 38A(4)(a) and (6) of the 2004 Act. Rather, they allege that the borough council’s decision, at the earlier juncture in the plan process when it was considering the recommendations in the examiner’s report, not to proceed with a particular modification to the plan was a decision taken on a false understanding of the legislative regime for appropriate assessment, and irrationally. They contend that the borough council ought at that previous stage of the process to have modified the plan in accordance with the examiner’s recommendation, and that, having not done so, it proceeded with a plan that failed to satisfy basic condition (a) – and possibly basic condition (d) – in paragraph 8(2) of Schedule 4B. The burden of the complaint is not that, without the change to the settlement boundary recommended by the examiner, the neighbourhood plan that did in fact go to a referendum failed to satisfy basic condition (f) because it was itself in breach of, or otherwise incompatible with, EU obligations (cf., for example, *Stonegate Homes Ltd.*, where the thrust of the claim was that the neighbourhood plan in question breached and was incompatible with EU obligations, in particular the requirement for a proper assessment of reasonable alternatives in the regime for strategic environmental assessment under Directive 2001/42/EC).
61. Oyston’s real grievance in these proceedings, therefore, is not that the neighbourhood plan that was made by the borough council on 26 May 2017 – or the “making of” that plan on that day – was itself in breach of, or incompatible with, any EU obligation. On the contrary, it is that a neighbourhood plan that was not in fact made, but – says Oyston – ought to have been made, would also have complied with those obligations, because if the plan had been modified in accordance with the examiner’s recommendation that modified plan would not have offended the arrangements for appropriate assessment in the Habitats Directive and the Habitats Regulations.
62. Even if that argument were correct, it would not be a proper basis for a claim under section 61N(1) in this case. Section 38A(4)(a) requires the local planning authority to make the neighbourhood plan approved in the referendum. This plan is the plan that has proceeded to the referendum after the authority’s decision, and has secured the requisite level of support. The duty in section 38A(6) is disapplied if the making of that plan would breach EU

obligations or Convention rights. However, Oyston does not assert that the making of that plan – the plan as actually made – would breach any EU obligation. It asserts, in effect, that the borough council was wrong to reject the examiner’s recommended modification to change the settlement boundary, and that the making of the plan it would have made if it had accepted his recommendation would also not have breached any EU obligations.

63. In reality, therefore, as appears to have been conceded in the court below, the real target of the claim for judicial review in this case is not what the borough council did when, subject to section 38A(6), the duty under section 38A(4)(a) arose to make the neighbourhood plan in the form it was in by that stage of the process. Oyston’s argument does not truly lie within the territory of section 38A(6) at all. Rather, it is to the effect that making a different plan, which the borough council had earlier rejected, would also have complied with EU obligations. This may or may not be right, but it does not avail Oyston of a claim under section 61N(1). A challenge under that provision must attack the local planning authority’s decision to make the plan that was actually made at the final stage of the statutory process. The fact that making another neighbourhood plan might have complied with EU obligations and Convention rights does not mean that making the one that was actually made did not. The challenge here is not to any alleged unlawfulness in the action taken under section 38A(4)(a) and (6), which would have been within the proper scope of a claim under section 61N(1) – but to an alleged unlawfulness at an earlier stage, for which a challenge lay, and only lay, under section 61N(2), within the relevant six-week time limit under that provision.

64. It follows, in my view, that the fourth ground of appeal must also fail.

Conclusion

65. For the reasons I have given, I would dismiss the appeal.

Lady Justice Rose

66. I agree.

Lord Justice Lewison

67. I also agree.